

## Just How Broad is the Tax Power?

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Erik M. Jensen, *The Individual Mandate and the Taxing Power*, Case Research Paper Series In Legal Studies, Working Paper 2010-33 (September 2010), available at [SSRN](#).

Even though it is Congress's first enumerated power, appearing in the Constitution ahead of the power to regulate interstate commerce, the tax power doesn't get much attention in court cases, law journals, or newspaper articles. It is, however, the Constitution's hidden giant. The Constitution doesn't express many limits on the scope of the tax power, other than the requirement that taxing (and spending) must be "for the General Welfare." And the Supreme Court has interpreted Congress's tax power broadly, finding taxes constitutional even when they have regulatory effects that Congress could not have achieved directly under the Commerce Clause.

Constitutional scholars have been debating whether the individual mandate of the health care act, which inserts into the tax code a penalty that applies to certain people who fail to purchase private insurance, exceeds Congress's power under the Commerce Clause. Suits against the federal government in Virginia and Florida by the attorneys general of 20 states claim that the health care law—in particular the individual mandate—is unconstitutional because it exceeds Congress's constitutionally enumerated powers.

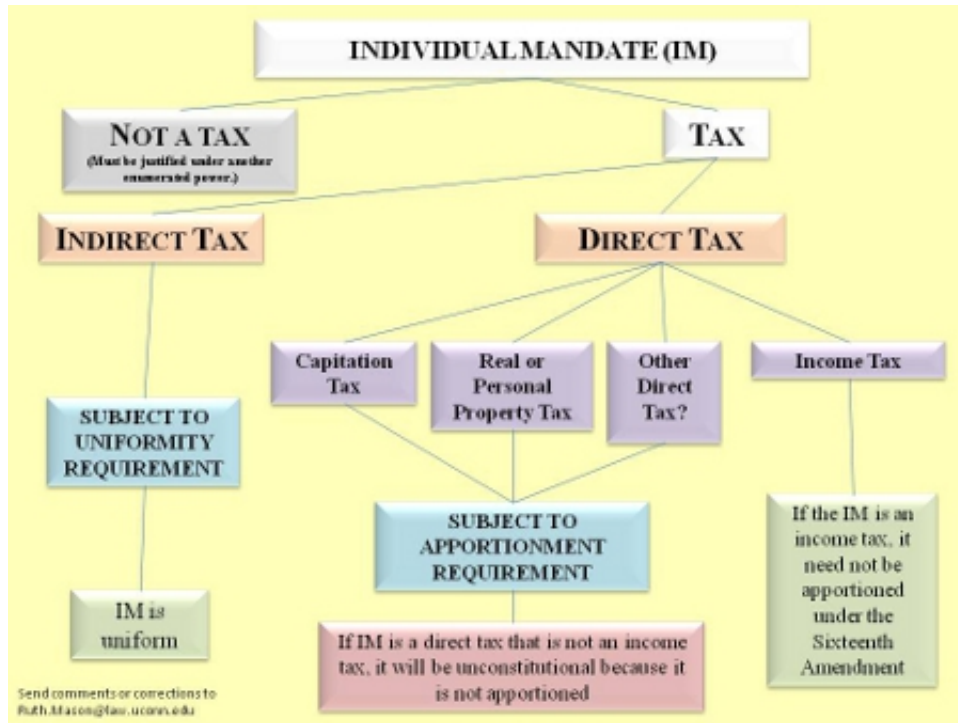
The federal government has responded that Congress was within its power under the Commerce Clause to enact health care reform, and that even if the act exceeds the scope of the Commerce Clause, the individual mandate nevertheless represents constitutional exercise of Congress's taxing power. Likewise, in an amicus brief in the Virginia case, constitutional law professors Jack Balkin, Gillian Metzger, and Trevor Morrison argue that the individual mandate is an indirect tax that falls within the tax power.

The [constitutional law professors' brief](#) should be read in conjunction with tax power expert [Erik Jensen's recent paper](#) on the same topic. Although Jensen offers no opinion on the constitutionality of the individual mandate under the Commerce Clause, he is considerably more skeptical of its validity under the tax power. First, Jensen doubts whether the individual mandate is a tax, in part because Congress did not label it a tax. He notes that placement of monetary penalties in the Internal Revenue Code does not automatically convert them to taxes. After all, he points out, the Internal Revenue Code provides penalties for the failure to pay taxes, but these penalties do not themselves constitute taxes.

Jensen's gives a methodical and straightforward explanation of the relevant tax power precedent and how it applies to the question of the constitutionality of the individual mandate. A short review piece like this one cannot hope to summarize all the arguments Jensen makes in his over 40page article, so the purpose of this review is to recommend that readers interested in this issue should read both his article and the briefs and other documents filed so far in Virginia and Florida cases, which can be downloaded from Brad Joondeph's [ACA Litigation Blog](#). For another argument that the tax power cannot be used to justify the individual mandate, readers can look to a [working paper by Randy Barnett](#).

Jensen's article is useful for understanding how the tax power works. Jensen explains that if the mandate is a tax, then it would be subject to one of two constitutional restrictions on taxation, namely, uniformity (if it is an indirect tax) or apportionment (if it is a direct tax). If the mandate is an indirect tax, it will have no trouble satisfying the uniformity requirement, which requires the tax rules to be the same in New York as they are in Montana. But if the mandate is a direct tax that is not an income tax, it would be unconstitutional because it would fail the apportionment requirement,

under which the amount collected from each state has to be proportional to its population. Jensen warns that if the individual mandate is a direct tax that is not an income tax, it will be unconstitutional for failure of apportionment, even if Congress has the power to enact healthcare reform under the Commerce Clause. This line of analysis, which applies to any tax, can be represented graphically as follows:



For a chart with more details, click [here](#).

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