

The Private Action Requirement

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The crucial issue in the ongoing litigation over the individual health insurance mandate is whether there is a constitutional distinction between the congressional regulation of action and inaction.¹ Critics of the Patient Protection and Affordable Care Act say that Congress lacks the authority under the Commerce Clause to make citizens buy health insurance against their will.² The individual mandate, they contend, is not a regulation or a prohibition of economic activity, which fall within the commerce power.³ Instead, the requirement is a regulation of inactivity (or compelled activity) that is unprecedented under the Commerce Clause and invalid.⁴

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¹ See, e.g., *Thomas More Law Ctr. v. Obama*, No. 10-2388, 2011 WL 2556039, at *14 (6th Cir. June 29, 2011) (“Thomas More argues that the minimum coverage provision exceeds Congress’s power under the Commerce Clause because it regulates inactivity. However, the text of the Commerce Clause does not acknowledge a constitutional distinction between activity and inactivity, and neither does the Supreme Court.”); *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 615 (E.D. Va. 2010) (“While this case raises a host of complex constitutional issues, all seem to distill to the single question of whether or not Congress has the power to regulate – and tax – a citizen’s decision not to participate in interstate commerce.”).

² See U.S. CONST. art. I, § 8, cl. 3; Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119, 242-44 (2010), *amended by* Health Care and Education Reconsideration Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (requiring all citizens, with limited exceptions, to have a certain level of health coverage or pay a penalty); Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 607 (2010) (“Under this theory . . . Congress can mandate individuals do virtually anything at all on the grounds that the failure to engage in economic activity substantially affects interstate commerce. Therefore, it would effectively obliterate, once and for all, the enumerated powers scheme that even the New Deal Court did not abandon.”).

³ See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (stating that even if “activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce”); see also *Gonzales v. Raich*, 545 U.S. 1, 26 (2005) (“Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.”).

⁴ This Essay assumes that self-insurance does not constitute economic activity. That conclusion, however, is far from clear. See, e.g., Patient Protection and Affordable Care Act § 1501(a)(2)(A) (“The requirement regulates activity that is commercial and economic in nature:

This Essay examines the proposed “private action” limitation on the commerce power and concludes that it is unsound.⁵ I use the term private action to describe the rationale advanced by foes of the individual mandate because its closest analogy is the state action doctrine under the Fourteenth Amendment.⁶ In both cases, the argument is that federalism shields some kinds of inaction from congressional control.⁷ The legal challenge to the individual mandate does not suggest that there is fundamental right – applicable to the states and to Congress – to be let alone with respect to health insurance.⁸ As a result, the Supreme Court must identify some convincing states’-rights interest to draw a constitutional line between the regulation of private action and inaction by Congress.⁹

No such justification exists for health care. While the states do face substantial costs if they set up the benefit exchanges that are related to the individual mandate, they can do nothing and force the federal government to bear that burden.¹⁰ In other words, there is no

economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.”).

⁵ My Essay does not discuss the other legal arguments against the individual mandate, most notably the claim that the requirement can be supported by the taxing power. If the Supreme Court concludes that the regulation of inactivity is impermissible under the Commerce Clause, it is probably not going to conclude that the same inaction can be reached via the imposition of taxes or penalties.

⁶ See *United States v. Morrison*, 529 U.S. 598, 621 (2000) (reaffirming “the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action”).

⁷ See *id.* at 620 (stating that limits such as state action “are necessary to prevent the Fourteenth Amendment from obliterating the Framers’ carefully crafted balance of power between the States and the National Government”); see also *The Civil Rights Cases*, 109 U.S. 3, 13 (1883) (stating that the lack of a state action limitation would let “congress take the place of the state legislatures and . . . supersede them”).

⁸ To the extent that anyone is arguing that there is an unenumerated right that bars a state from making its citizens buy health insurance, that argument is without merit. *But cf. Virginia v. Sebelius*, 702 F. Supp. 2d 598, 615 (E.D. Va. 2010) (asserting, without citation, that the individual’s right to choose to participate in health insurance was at issue).

⁹ An unsound syllogism that supports distinguishing acts from omissions goes something like this: (1) the Commerce Clause must be limited; (2) the action/inaction distinction is a limit; and therefore (3) the Commerce Clause cannot reach inaction. The problem with that reasoning is that there are other principled ways of restricting Congress. See *United States v. Lopez*, 514 U.S. 549 (1995) (concluding that there is a relevant difference between economic and non-economic regulation for Commerce Clause purposes).

¹⁰ See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1321(c), 124 Stat. 119 (2010), amended by Health Care and Education Reconsideration Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010). Of course, the states give up significant federal assistance if they refuse to set up the exchanges, see *id.* § 1311(a), but this does not raise a constitutional problem, see *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987) (concluding that Congress has broad discretion under its Spending Clause authority to attach conditions to the receipt of federal funds).

“commandeering” of state officials.¹¹ With respect to individuals, there is no reason to think that private inactivity (or at least health care inactivity) should be privileged from federal regulation.¹² All of the arguments against conscripting citizens into buying insurance to solve the adverse selection problem in health insurance premiums apply with equal force against a similar state rule.¹³ While those objections are compelling from a policy perspective, they do not speak to the federalism issue and hence provide no basis for striking down the individual mandate.

Part I explores how the health insurance requirement could be upheld without engaging the private action argument. Part II rejects that evasive approach and uses the state action doctrine to probe the distinction between acts and omissions with respect to congressional authority before concluding that the individual mandate is valid.

I. APPLYING CONVENTIONAL WISDOM

Opponents of the individual mandate are right to say that Congress has never tried to use its Commerce Clause authority to regulate inaction until now. When the Supreme Court reviews the constitutional challenge to the Patient Protection and Affordable Care Act, though, the Justices may conclude that this fact is irrelevant. I want to canvass that possibility briefly before examining the proposed private action principle.¹⁴

The first point is that no Commerce Clause case says that Congress is limited to regulating action. Under the “substantially affects” test, Congress can legislate on economic issues if a rational basis exists for concluding that an activity, in the aggregate, substantially affects interstate commerce.¹⁵ Although this standard uses the word “activity,” that could be explained as a reference to the presence of an action in each of those decisions, not as a limit on congressional authority.

¹¹ See *Printz v. United States*, 521 U.S. 898 (1997) (articulating the anti-commandeering principle); *New York v. United States*, 505 U.S. 144 (1992) (same). As Part II explains, the anti-commandeering cases basically just apply the state action rule to the Commerce Clause. See *infra* text accompanying notes 25-26.

¹² There is a stronger argument against federal regulation of inactivity that involves education or family law, as those are subjects that the Supreme Court has marked out as traditional domains of the states. See *infra* text accompanying notes 31-33.

¹³ For a skeptical view of how adverse selection works in the context of health care, see Peter Siegelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 YALE L.J. 1223 (2004).

¹⁴ There are viable questions of standing and ripeness in the individual mandate litigation, as that provision does not come into effect until 2014. See Patient Protection and Affordable Care Act § 1501(a). This Essay, though, focuses only on the merits.

¹⁵ See *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

Furthermore, the substantially affects standard is broad enough to support the view that Congress just needs a rational basis to conclude that an activity is involved and that the judiciary must defer to that finding.¹⁶ Either way, the individual mandate could be upheld.

Next, the Supreme Court could hold that requiring citizens to buy health insurance is just the means that Congress chose to exercise its Commerce Clause authority and that this choice is valid so long as it is rational. This is a straightforward application of *M'Culloch v. Maryland*.¹⁷ Of course, the individual mandate could be viewed as an impermissible end rather than as a rational means, or one could say that private inaction does not come within the Necessary and Proper Clause any more than state inaction is covered by Section Five of the Fourteenth Amendment.¹⁸ Nevertheless, under *M'Culloch* Congress could be reasonably deemed the only body that can draw a constitutional line between regulating activity and inactivity.

Finally, Congress does regulate inaction (or mandate action) under its other Article One, Section Eight powers, and that authority could just be extended to commerce. Federal officials can force the unwilling to serve in the army, sit on juries, pay taxes, and fill out census forms.¹⁹ These activities could be distinguished from the purchase of health insurance because they are longstanding practices or basic attributes of citizenship. This begs the question, however, of what standard of review should apply to a contrary congressional decision. There is a rational basis for thinking that health care should be a fundamental right through legislation, and the right to get emergency care without regard to wealth is well established.²⁰ Thus, the Supreme Court would have to say that heightened scrutiny applies to a congressional determination that private inaction can be regulated under the Commerce Clause.

In sum, just because the individual mandate is novel does not mean that it is unconstitutional. An explanation must be developed for holding that private inaction is beyond the reach of the Commerce

¹⁶ This interpretation of “substantially affects” is not as plausible as one that says that inactivity is within the reach of Congress, but the expansion of rational basis to cover the activity as well as its impact is not implausible.

¹⁷ 17 U.S. (4 Wheat.) 316 (1819); see also *United States v. Comstock*, No. 08-1224, slip op. at 6 (U.S. May 17, 2010) (explaining that, under the Necessary and Proper Clause, “we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power”).

¹⁸ See U.S. CONST. art. I, § 8, cl. 18; *id.* at amend. XIV, § 5.

¹⁹ See, e.g., *Selective Draft Law Cases*, 245 U.S. 366 (1918) (upholding the constitutionality of military conscription).

²⁰ See *Emergency Medical Treatment and Active Labor Act*, 42 U.S.C. § 1395dd (2010) (requiring hospitals that participate in Medicare and provide emergency care to accept anyone who needs treatment).

Clause.²¹ Since no personal right can supply that logic, the search for an answer turns to the only general concept that distinguishes action from inaction for congressional power: the state action doctrine.

II. STATE ACTION AND FEDERALISM

While some constitutional provisions do prohibit Congress from regulating specific kinds of inaction, the state action requirement of the Fourteenth Amendment is the obvious point of comparison for assessing the validity of the individual mandate.²² The state action doctrine limits federal power to protect federalism, which is what the proposed private action rule must be trying to do since states are free to make citizens buy insurance.²³ With respect to the health care choices of individuals, though, no federalism interest is involved the way that there is for education or family law.²⁴ Thus, the distinction between acts and omissions simply does not work in the context of a challenge to the individual mandate.

State action is made up of two different strands. The first involves congressional regulation of state governments and officials. In our federal system, there must be a limit to what Congress can order the states to do. The Court crystallized this idea in its anti-

²¹ Of course, the reason could just be political. I have written at length about “preemptive opinions” by the Supreme Court, which are decisions that reach out to decide unnecessary constitutional issues in an extraordinarily broad fashion to inflict partisan damage on a popular movement. See GERARD N. MAGLIOCCA, *THE TRAGEDY OF WILLIAM JENNINGS BRYAN: CONSTITUTIONAL LAW AND THE POLITICS OF BACKLASH* 71-72 (2011) (exploring this phenomenon). The individual mandate may receive this kind of treatment from the Justices, but that cannot be assessed yet.

²² See U.S. CONST. amend. III (prohibiting the quartering of troops in private homes during peacetime); *id.* at amend. V (barring self-incrimination and the confiscation of private property without just compensation); *cf. id.* at amend. XIII (barring compulsory labor). The problem with stringing these examples together into something more is that there are just as many instances where Congress can draft citizens or their property. See *supra* text accompanying note 19.

²³ Randy Barnett argues that the individual mandate violates the popular sovereignty protected by the Tenth Amendment. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); Barnett, *supra* note 2, at 629 (“[I]f imposing mandates on state legislatures and executives intrudes improperly into state sovereignty, might mandating the people improperly infringe on popular sovereignty?”).

One way of understanding Professor Barnett’s claim is that the limit on congressional regulation of private inaction is an unincorporated fundamental right, which would allow states to regulate in this area. An unincorporated right that is unenumerated, though, makes sense only if there is a federalism basis for having one rule for the federal government and another for the states.

²⁴ See *United States v. Morrison*, 529 U.S. 598, 615-16 (2000) (rejecting a broad reading of the Commerce Clause because it might “be applied equally as well to family law and other areas of traditional state regulation”); see also *United States v. Lopez*, 514 U.S. 549, 565-66 (1995) (expressing concern about the potential congressional micromanagement of schools).

commandeering cases, which hold that state legislatures and executive officials cannot be conscripted into service to administer a federal program.²⁵ Anti-commandeering is basically just the extension of the state action rule to the Commerce Clause, but that aspect of the doctrine is not relevant to the individual mandate.²⁶

The other thread of state action is directed at private conduct that Congress cannot regulate. With the enactment of the 1964 Civil Rights Act, this limitation on federal power was greatly diminished.²⁷ Indeed, the argument that private inaction is the new place to take a stand against the expansion of congressional authority concedes that the Commerce Clause can be extended over almost all private action. Put another way, there are hardly any substantive topics where the regulation of individuals presents a federalism limit that can be enforced by courts.²⁸

The most serious flaw in the argument against the individual mandate is that there is nothing special about private inaction from a states'-rights perspective. Arguments about the flaws of the individual mandate cannot be bootstrapped into a constitutional limit that applies only to Congress.²⁹ The regulation of private inaction in certain sensitive areas might present a constitutional problem.³⁰ One way

²⁵ See *Printz v. United States*, 521 U.S. 898 (1997) (addressing executive officials); *New York v. United States*, 505 U.S. 144 (1992) (dealing with state legislatures).

²⁶ I am troubled by the possibility that the costs of implementing the mandate might exceed the amount of federal assistance a state would receive if it elects to set up the exchanges, but that still involves a voluntary decision by the state. The anti-commandeering cases do not contemplate a Spending Clause challenge. Cf. *Printz*, 521 U.S. at 936 (O'Connor, J., concurring) (noting that Congress can use its power of the purse to induce state officials to carry out federal objectives).

²⁷ See Pub. L. No. 88-352, 78 Stat. 241; *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (upholding the Act as a valid use of Commerce Clause power).

²⁸ Granted, there is value in allowing states to experiment on controversial topics instead of having a single national standard. But this is true for many substantive areas where the Court has rejected the view that federalism restricts the power of Congress to impose a uniform standard. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that Congress can prohibit the use of medical marijuana notwithstanding state law).

²⁹ I agree with the criticism that the individual mandate is not a transparent way of cross-subsidizing health insurance. See Barnett, *supra* note 2, at 632 ("Rather than incur the political cost of imposing a general tax on the public using its tax powers, economic mandates allow Congress and the President to escape accountability for tax increases by compelling citizens to make payments directly to private companies."). The same charge, though, could be made against a state individual mandate.

³⁰ It is worth pointing out that many congressional efforts to compel activity would involve state officials and thus face an anti-commandeering problem. For instance, suppose Congress wanted to lengthen the public school year across the country. That would draft students from work or recreation, but it would also impose regulatory obligations on schools and teachers that would be invalid absent the use of carrots (pursuant to the Spending Clause) to secure consent by the states.

to read *United States v. Lopez*³¹ and *United States v. Morrison*³² is that state law over action and inaction should have more scope in family law and education because they have traditionally been regulated by the states and deal with value choices that vary widely across states.³³ A federal statute that conscripts individuals in these fields (for example, mandatory marriage counseling or a rule that children must read three hours a day) might well be problematic since there would be a federalism basis for striking such a law down.

The individual mandate, though, is not in this category, since there is nothing to indicate that health care is a peculiar domain of state regulation.³⁴ Federal involvement in medical treatment is pervasive and has been ever since Medicare was enacted during the 1960s. Private inaction does not itself provide a justification for rejecting the exercise of congressional power unless a personal right is involved or a substantial states'-rights principle is at stake. The former is absent in this situation, and the latter cannot be derived from the precedents. Thus, I must conclude that the individual mandate should be upheld, even though I think that the decision to impose the requirement was a mistake.

III. CONCLUSION

Whenever a new constitutional claim is advanced, it is easy to get caught up in the politics of the moment. That is why this Essay assessed the individual mandate by looking to the closest neutral principle that distinguishes congressional regulation of action and inaction. A careful review of the state action doctrine reveals that the

³¹ 514 U.S. 549 (1995).

³² 529 U.S. 598 (2000).

³³ There is, of course, a significant federal role in these areas, but the point is that the Court has marked them out as subjects that might deserve some kind of different constitutional status. The same cannot be said for health care.

³⁴ The Eleventh Circuit's conclusion that health care is an area of traditional state regulation cannot withstand scrutiny. See *Florida v. U.S. Dep't of Health & Human Servs.*, Nos. 11-11021, 11-11067, 2011 WL 3519178, at *58-61 (11th Cir. Aug. 12, 2011). The Court relied heavily on the McCarren-Ferguson Act, which was enacted in the 1940s and was intended to preserve state autonomy over insurance regulation. See *id.* at *59 ("The passage of the McCarren-Ferguson Act signaled Congress's recognition of the states' historical role in regulating insurance within their boundaries – and its unwillingness to supplant their vital function as a source of experimentation."). This citation was buttressed by a number of cases stating that "health" or "public health" is part of the states' police power. See *id.* at *60.

Something important is missing from this analysis: Medicare. Congress ousted the states from the regulation of health care for senior citizens in the 1960s. The fact that the Eleventh Circuit did not mention this massive program and its implications for federalism fatally undercuts its conclusion. Health care regulation cannot be a traditional state function when the federal government is the exclusive source of insurance for the segment of the population that consumes most of the medicine.

claim that there should be a comparable private action limit on the Commerce Clause is without merit because it has nothing to do with protecting federalism under the Supreme Court's cases.