

The Affordable Care Act and the Constitution

"The Supreme Court ... (has) agreed to hear a challenge to the 2010 health care overhaul law, President Obama's signature legislative achievement, setting the stage for oral arguments by March and a decision in late June as the 2012 presidential campaign enters its crucial final months."

— *New York Times*, Nov. 14, 2011

The Constitutional Case for the Individual Mandate

By Chris Bryant



The individual mandate provision of the Affordable Care Act (ACA) will, starting in 2014, require that most Americans obtain health insurance or pay a monetary penalty. Jack Painter and other opponents of the ACA claim that this provision exceeds the scope of Congress's power. But in the last three-quarters of a century, the Supreme

Court has on only two occasions invalidated a federal statute on the ground that it went beyond Congress's sweeping authority to regulate interstate commerce. In both cases the Court concluded that Congress lacked power because the matters addressed were in no way economic in nature. Obviously, neither of these cases supplies any precedent for invalidating the ACA. That statute regulates the health insurance industry, which none can doubt is economic in nature, and which pays for what amounts to nearly 18 percent of the U.S. economy.

It bears emphasis that the only genuine controversy concerns whether Congress can enact a health-insurance mandate. There is simply no serious federal constitutional argument that states lack the power to impose such a mandate, which is why Mr. Painter's appeal to the Declaration of Independence generates more heat than light.

Does this power belong solely to state governments? The Constitution grants Congress power "To regulate Commerce . . . among the several States" and "To make all Laws which shall be necessary and proper for carrying into execution" all other powers that the Constitution vests in the federal government. Whatever the outer boundaries of "Commerce" may be, the Supreme Court ruled more than sixty years ago that the business of insurance is "Commerce." I think that should end the matter, and I am not alone in this view. Former Reagan Administration Solicitor General Charles Fried, Sixth Circuit Judge Jeffrey Sutton, and D.C. Circuit Judge Laurence Silberman think so too. Though their integrity may have cost them some fair-weather friends, two years ago all three would have topped any conservative's list of brilliant and honorable lawyers.

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The Individual Mandate Appears to Fail the "Proper" Test

By Jack Painter



Under the Affordable Care Act, starting in 2014, most Americans must purchase health insurance or pay a monetary penalty. The Obama Administration faces a key challenge in arguing for the constitutionality of this "individual mandate": Its theories of Congress's commerce power arguably lack an effective limiting principle, and that has potentially significant constitutional implications.

The Constitution grants Congress power to "regulate Commerce . . . among the several States" and "make all Laws which shall be necessary and proper for carrying into Execution" all powers the Constitution vests in the federal government.

The Supreme Court has said Congress may regulate activities that have a "substantial effect" on interstate commerce. The Administration's basic argument is that the failure to purchase health insurance has such an effect because everyone will eventually need health care, and, in the aggregate, people who fail to purchase health insurance ultimately impose medical costs on others through cost-shifting. Therefore, Congress can mandate the purchase of health insurance.

Under that theory, can the federal government also force people to see their doctors for check ups or preventive care in an effort to reduce medical costs and cost shifting?

Can it force people to buy healthful foods or join a health club on the same basis? Former Solicitor General Charles Fried, who believes the individual mandate is constitutional, says Congress can mandate the purchase of broccoli.

What about telling people they must eat broccoli or exercise? Erwin Chemerinsky, the Dean of the California Irvine School of Law, says "what people choose to eat well might be regarded as a personal liberty" and thus beyond Congressional control. Professor Chris Bryant (see accompanying story) of the UC College of Law wrote an op-ed saying forcing people to exercise "might unconstitutionally infringe upon individual liberty."

They apparently believe those mandates would improperly intrude on personal autonomy. Why don't government mandates concerning personal decisions like whether to go to a

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doctor and how to pay for it also do that?

In response to these types of questions, the Administration has adopted an alternate argument that Congress may do anything essential to a broader scheme to regulate interstate commerce (a test proposed by Justice Scalia in his concurring opinion in *Gonzales v. Raich*). The Administration says this test is met because a requirement in the Affordable Care Act that insurance companies cover pre-existing conditions won't work without the individual mandate. (People will wait until they are sick to buy health insurance.) But this argument also lacks an effective limiting principle because it permits Congress to justify any economic mandate by first adopting a regulatory scheme that won't work without it.

Ultimately, the Administration argues its theories have a limiting principle because health care is different. But that isn't really a constitutional principle. Professor Chemerinsky admits as much when he says “Congress could use its commerce power to require people to buy cars.”

So the Administration can't convincingly identify a limiting principle that protects us against inappropriate government control over our lives. (This is true despite Supreme Court decisions that say Congress cannot use its commerce power to regulate intrastate non-economic activity.)

This raises additional questions. If the federal government can force you to buy a product, can it also force you to sell one? Does this apply to services as well? What penalties can the government impose for non-compliance? (Under the Affordable Care Act as originally proposed, people who refused to purchase health insurance or pay a penalty faced jail time.)

In any event, if the federal government has this power, why hasn't it used it in the past 225 years? Why has it always chosen to create incentives for people to buy and sell goods and services instead of just ordering them to do so?

Professor Bryant says disallowing the individual mandate wouldn't protect

individual liberty because Congress can instead impose taxes under its taxing power and provide health care under its spending power. But the fact that Congress can use the taxing power to tax people who choose to enter the stream of commerce doesn't mean it can use the commerce power to force them to enter the stream of commerce. And it is arguably easier politically for Congress to infringe our liberty through targeted economic mandates than broad-based tax increases.

The Administration's constitutional theories are ultimately based on the Necessary and Proper Clause of the Constitution. The key Supreme Court decisions developing the “substantial effects” doctrine appear to rely on the “necessary” part of that Clause, and the “essential to a broader scheme” theory proposed by Justice Scalia does so explicitly.

In *McCullough v. Maryland*, Chief Justice Marshall said a law is “proper” under the Necessary and Proper Clause only if it is consistent with “the letter and spirit of the Constitution.” Do economic mandates like the individual mandate meet that test?

At the very least, the individual mandate is unprecedented. A mandate coerces you because you exist (in contrast to a prohibition or regulation of chosen activity, where you can avoid government coercion by making a choice to forgo certain activities.) Unlike the individual mandate, existing federal mandates (military conscription, jury duty, and census participation) are all essential to the very existence of the federal government and therefore considered fundamental duties of citizenship.

Beyond that, the Obama Administration's broad view of the commerce power puts the burden of protecting individual liberty almost entirely on the Bill of Rights and “unenumerated rights” (like the right to privacy) recognized under the doctrine of “substantive due process.” In effect, the lack of a limiting principle creates a sea of federal power with islands of individual liberty

rights (and a small island representing relatively minor instances of intrastate non-economic activity not subject to the commerce power).

This has three significant implications for the “proper” test. First, it means the limitations on state and federal power are effectively the same, and, therefore, the federal government has virtually the same powers as the states. That is clearly inconsistent with our federal structure and with long-standing Supreme Court precedent stating that only the states have a general “police power.”

Second, it means our personal liberty is at risk because existing individual liberty rights don't provide sufficient protection against the possible intrusions on personal autonomy noted above. In particular, the unenumerated right to liberty recognized in *Lawrence v. Texas* at best protects only conduct that is not harmful to others, such as certain private sexual conduct. There is a real risk the courts will conclude that our failure to eat broccoli or exercise indirectly harms others by raising their health care costs and therefore is not a protected right.

Finally, it means the scope of federal power is at odds with the concept of self-ownership that underlies the theory of natural rights in the Declaration of Independence - the idea that we own ourselves and, therefore, have the right to be left alone as long as we honor the equal right of others to be left alone. If the federal government can force us to purchase health insurance from a private company for the rest of our lives and, by logical extension, force us to join a health club or buy a car, and perhaps force us to eat broccoli or exercise, we have strayed far from the vision of liberty at our founding. (This is true even if the states can use their police powers to impose mandates, since there are practical limits on their use of those powers that don't apply at the federal level, including the ability of people to vote with their feet.)

Given this, is the individual mandate consistent with the letter and spirit of the Constitution and therefore “proper” under the Necessary and Proper Clause? ➤

In the 1990s, the Supreme Court held that certain federal mandates are an unconstitutional commandeering of the state legislatures in violation of the Tenth Amendment and therefore not "proper" under the Necessary and Proper Clause.

The unanswered question is whether the Tenth Amendment recognizes not just state sovereignty, but also the popular sovereignty of the people, and whether the individual mandate constitutes an unconstitutional commandeering of the people.

In the recent case of *Bond v. United States* (2011) all nine Justices agreed that states are not the sole intended beneficiaries of federalism under the Tenth Amendment, and Justice Kennedy stated, "federalism protects the liberty of the individual from arbitrary power."

This suggests to me that individuals, like states, cannot be commandeered to carry out federal regulatory programs and that the individual mandate is therefore unconstitutional. ■

Painter is a corporate lawyer in private practice. He founded Liberty Alliance Cincinnati and is on the board of the Ohio Liberty Council. His full analysis of this issue is at www.LibertyAllianceCincinnati.org/individualmandate



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