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Federalism, Lochner, and the Individual Mandate

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**FEDERALISM, *LOCHNER*, AND THE INDIVIDUAL
MANDATE**

PETER J. SMITH*

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INTRODUCTION

In February 2011, several members of the South Dakota House of Representatives introduced legislation to require all residents over the age of twenty-one to purchase a firearm. Representative Hal Wick, one of the bill’s sponsors, explained that he did not actually want the legislature to adopt the proposal; instead, the proposal was a form of public protest, meant to draw attention to what he perceived as the unconstitutionality of the provision in the federal Patient Protection and Affordable Care Act (“ACA” or “the Act”) that requires individuals to obtain health insurance.¹ He stated, “Do I or the other cosponsors believe that the State of South Dakota can require citizens to buy firearms? Of course not. But at the same time, we do not believe the federal government can order every citizen to buy health insurance.”²

Many people presumably viewed the South Dakota proposal as a crude political stunt, part of a somewhat corrosive public discourse about the ACA. It may well have been, but it also was quite revealing in ways that its sponsors perhaps did not intend. The attacks on the ACA have proceeded not only in the political arena but also in the courts. The legal challenges assert that Congress lacks authority pursuant to the Commerce Clause and the Necessary and Proper Clause to compel individuals to purchase health insurance.³ These

* Professor, George Washington University Law School. This paper benefited from thoughtful comments from Brian Galle, Chip Lupu, Jeff Powell, Ted Ruger, Robert Tuttle, and participants at a workshop at George Washington University Law School.

¹ Nick Wing, *South Dakota Legislators Propose Individual Mandate to Require Gun Ownership*, HUFFINGTON POST (Feb. 1, 2011), http://www.huffingtonpost.com/2011/02/01/south-dakota-individual-mandate-guns_n_816772.html.

² *Id.*

³ *See, e.g., Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, No. 3:10-cv-

claims derive principally from the Supreme Court's decisions in *United States v. Lopez*⁴ and *United States v. Morrison*,⁵ which held that Congress lacks power under the Commerce Clause to regulate non-economic local activity on the theory that, in the aggregate, such activity has a substantial effect on interstate commerce.⁶ The plaintiffs challenging the individual mandate, as the controversial provision has come to be known,⁷ have contended, essentially, that the Court's focus on economic activity implies an additional limit: that Congress lacks power to regulate inactivity, which, they argue, by definition is not economic activity. Accordingly, they claim that the individual mandate is unconstitutional.

The challenges to the individual mandate, in other words, have been litigated as cases about federalism, and the courts that have invalidated the individual mandate have done so on those grounds. Ken Cuccinelli, the Attorney General of Virginia and a leading figure in the legal challenges to the individual mandate, explained that the individual mandate "is unconstitutional because it uses an unprecedented and incorrect interpretation of the Commerce Clause of the U.S. Constitution (Article I, Section 8)."⁸ He stressed that his legal challenge to the Act "is not just about buying insurance. It is about the limits of the power of the federal government and its relationship to citizens."⁹ Similarly, Randy Barnett, who has been a vocal critic of the individual mandate, explained that the "answer" to the question of the provision's constitutionality "lies in the commerce clause of the Constitution."¹⁰ And the courts that have ruled that the individual mandate is unconstitutional have framed the question as one of the "[c]onstitutional role of the federal government."¹¹

91-RV/EMT, slip op. at 13 (N.D. Fla. Jan. 31, 2011).

⁴ 514 U.S. 549 (1995).

⁵ 529 U.S. 598 (2000).

⁶ *Id.* at 617; *Lopez*, 514 U.S. at 567.

⁷ The provision is titled the "Requirement to Maintain Minimum Essential Coverage" and is sometimes called the "minimum coverage requirement" or the "minimum essential coverage requirement." 26 U.S.C.A. § 5000A (West 2011). Because it is most commonly called the individual mandate – particularly by those contesting its constitutionality – I will use that term here for clarity's sake.

⁸ Ken Cuccinelli, *Accomplishments*, <http://cuccinelli.com/index.php/accomplishments> (last visited February 11, 2011).

⁹ *Id.*

¹⁰ Randy E. Barnett, *Is Health-Care Reform Constitutional?*, WASHINGTON POST (Mar. 21, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/19/AR2010031901470.html>.

¹¹ Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., No. 3:10-cv-91-RV/EMT, slip op. at 75-76 (N.D. Fla. Jan. 31, 2011); accord Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 778 (E.D. Va. 2010).

So consider again the proposed legislation in South Dakota to require all adult citizens to purchase firearms. If it were a serious proposal, there would be any number of reasons to object to it. But federalism would not be one of them. Whatever one can say about the federalism-based limits on Congress's power under the Commerce Clause, those limits do not apply to the states acting pursuant to their police powers. If there is anything constitutionally problematic about the South Dakota proposal (and it is not clear that there is), it is that it interferes with individual liberty by compelling action that some of the law's subjects might not wish to take. This is, broadly speaking, a *libertarian objection*¹²: It asserts that the government lacks authority to regulate certain personal decisions or actions, because those decisions or actions are for the individual, and only the individual, to make or take. As a doctrinal matter, this objection is based generally on the Fourteenth Amendment's protection of individual liberty and specifically on the notion of substantive due process.

The libertarian objection arguably applies with comparable force to the individual mandate in the ACA. If one believes that government has no business, generally speaking, telling us what to do or how to take care of ourselves, then the individual mandate is a problematic provision. But the legal challenges to the Act have been framed, doctrinally at least, in terms of federalism. And yet the libertarian objection has nothing to do with federalism unless one views the concept of federalism – that is, a system for allocating power between the federal government and the states – at such a high level of generality that the concept becomes useless for deciding real cases.¹³

To be sure, the sponsors of the South Dakota bill presumably did not think very carefully about the varying doctrinal frameworks that apply to federal and state legislation when they developed their proposal.¹⁴ But the implication of

¹² Michael Dorf has used this term to describe one of the frequently asserted political arguments against the individual mandate. See Michael C. Dorf, *The Constitutionality of Health Insurance Reform, Part I: The Misguided Libertarian Objection*, FINDLAW (Oct. 21, 2009), <http://writ.news.findlaw.com/dorf/20091021.html>.

¹³ One could argue, for example, that because “the Constitution divides authority between federal and state governments for the protection of individuals,” *New York v. United States*, 505 U.S. 144, 181 (1992), and because “federalism secures to citizens the liberties that derive from the diffusion of sovereign power,” *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting), any federalism-based limitation on Congress's authority ultimately is about protecting individual liberty. See, e.g., *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011). But to say that federalism is ultimately a means to achieve the end of individual liberty tells us very little about what rules to apply in determining the allocation of authority between the federal government and the states.

¹⁴ Nor did they seem to realize that in 1792 Congress enacted a statute that required all able-bodied male citizens to acquire a weapon and ammunition. See Act of May 8, 1792, ch. 23, §§ 1, 4, 1 Stat. 271-273 (1792); Jack Balkin, *The Civic Republican Roots of the Individual Mandate*, BALKANIZATION (Feb. 1, 2011), <http://balkin.blogspot.com/2011/02/civic-republican-roots-of-individual.html> (discussing the

their proposal – that what is ultimately constitutionally problematic about the individual mandate is its interference with individual liberty – is, I believe, at the core of the legal attack on the ACA, even though the challenges have been couched in the language of federalism. Yet if the problem with the individual mandate is that it violates a libertarian ideal, then federalism is an inappropriate constitutional framework in which to consider it.

To anyone familiar with our constitutional history, it is unsurprising that the attacks on the individual mandate have been framed in terms of federalism. After all, the libertarian objection has, to say the least, a somewhat checkered past. The Court has long been chastened by its attempt to read the libertarian objection into the Due Process Clauses, an approach epitomized by the decision in *Lochner v. New York*.¹⁵ But because the objections to the individual mandate, though couched in federalism terms, have very little to do with federalism at all, it is difficult to see them as anything other than *Lochner* under a different guise.

In Part I, I briefly describe the relevant provisions of the ACA. I then consider, in Part II, the ostensibly federalism-based objections that have been raised against the Act and how the ACA fares under established federalism doctrine. Finally, I turn in Part III to the true nature of the legal objections and what they reveal about the attacks on the Act.

I. A VERY BRIEF OVERVIEW OF THE ACA

The ACA is a complex piece of legislation, but its central elements are straightforward. The Act's principal objective is to make insurance more readily available and affordable, regardless of the insured's health condition. Of most relevance here, the Act seeks to accomplish this goal by prohibiting insurers from denying coverage of pre-existing conditions¹⁶ and from denying eligibility based on health status, medical condition, or disability.¹⁷

Requiring insurance companies to provide coverage to people who are sick, however, can have perverse effects. Under such a scheme, healthy individuals could refrain from buying (and thus paying for) insurance until the moment that they need care, because they would know that they could not be denied

Militia Act).

¹⁵ 198 U.S. 45 (1905).

¹⁶ 42 U.S.C.A. § 300gg-3(a) (West 2011).

¹⁷ *Id.* § 300gg-4(a). The Act contains many other provisions whose constitutionality has not been questioned. For example, the ACA prohibits insurers from establishing "lifetime limits on the dollar value of benefits" or "unreasonable annual limits" on benefits and claims, *id.* § 300gg-11(a)(1)-(2); prohibits the rescission of insurance contracts, *id.* § 300gg-12; requires insurers to provide a simple, straightforward summary of coverage, *id.* § 300gg-15(b); requires insurers to include provisions for preventive care, such as immunizations, breast-cancer screening, and screenings for infants, children, and adolescents, *id.* § 300gg-13; and requires insurers to provide coverage for dependents to a specified age, *id.* § 300gg-14(a).

coverage at that point solely on the basis of their newly pre-existing condition. In other words, the persons most likely to purchase insurance would be those who are most likely to require the most (and most expensive) care. Under such a system, because there would be relatively few healthy insureds to spread the risk, premiums would skyrocket, many individuals would have difficulty affording coverage, and many insurers likely would be driven from the market.

In enacting the ACA, Congress recognized that its direct regulations of the market for insurance – particularly the requirement that insurers extend coverage to people with pre-existing conditions – would be self-defeating if the Act did not also require all individuals to maintain health insurance, even when they are healthy. Accordingly, the ACA includes a requirement that all individuals maintain “minimum essential coverage.”¹⁸ Failure to maintain such coverage gives rise to the obligation to pay a penalty when the individual files his or her tax return.¹⁹ Together, these provisions are commonly known as the “individual mandate” because they require individuals who otherwise lack health insurance to obtain some minimal insurance coverage.²⁰ Under the mandate, individuals cannot, without penalty, simply wait to purchase health insurance until they need health care.

II. FEDERALISM DOCTRINE AND THE INDIVIDUAL MANDATE

Shortly after Congress enacted the ACA, several suits were initiated, some by state Attorneys General, to challenge the constitutionality of the Act. The plaintiffs in those suits have not directly challenged the vast majority of the ACA’s provisions. For example, the plaintiffs and other opponents of the Act have not contended that the Act’s prohibitions on denying coverage on the basis of pre-existing conditions or denying eligibility on the basis of health condition are unconstitutional.²¹ The Supreme Court, after all, has explicitly

¹⁸ 26 U.S.C.A. § 5000A (West 2010).

¹⁹ *Id.* After a brief phase-in period, the penalty will be \$695 per year, or one-twelfth of that amount for every month that the individual fails to maintain minimal essential coverage. *Id.* § 5000A(c). The Act further provides that the amount of the penalty will increase each year after 2016 by a cost-of-living adjustment. *Id.* § 5000A(c)(3)(D).

²⁰ As Jack Balkin has stated, “the term ‘individual mandate’ is misleading” because the mandate does not apply to all individuals but instead only to persons who do not have health insurance through Medicare, Medicaid, the military, or their employers. Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 45 (2010).

²¹ See *Commonwealth v. Sebelius*, 728 F. Supp. 2d 768, 779 (E.D. Va. 2010); John Yoo, *The ‘Individual Mandate’ an Intrusion on Civil Society*, PHILADELPHIA INQUIRER, Mar. 28, 2010, at C01 (arguing against the constitutionality of the individual mandate but acknowledging that the Act’s “requirements that insurance companies take all comers and forgo lifetime benefit caps will pass constitutional muster as a regulation of a nationwide market in goods and services”). The plaintiffs nonetheless seek to have those provisions invalidated on the theory that the allegedly unconstitutional provisions of the Act are not severable from the Act’s other provisions, including those described above.

held that Congress has authority under the Commerce Clause to regulate insurance markets.²² As such, those provisions seem to be a straightforward exercise of Congress's power to regulate interstate commerce. Instead, the plaintiffs have, for the most part, focused their constitutional attack on the individual mandate.²³

The core of the constitutional attack on the individual mandate has been the claim that Congress lacks authority under Article I to compel individuals, simply by virtue of their status as lawful United States residents who earn income above the tax-filing threshold, to acquire and maintain insurance.²⁴ That claim contains two discrete, albeit related, strands. First, opponents of the mandate have made a doctrinal claim that Congress lacks power under the Commerce and Necessary and Proper Clauses to regulate "inactivity."²⁵ This argument derives principally from the Supreme Court's decisions in *United States v. Lopez*,²⁶ which invalidated a statute criminalizing the possession of guns near schools, and *United States v. Morrison*,²⁷ which invalidated a statute authorizing a private right of action for victims of gender-motivated violence. In both cases, the Court reasoned that Congress lacks power under the Commerce Clause to regulate non-economic local activity solely on the theory that, in the aggregate, such activity has a substantial effect on interstate commerce.²⁸ The plaintiffs challenging the individual mandate's constitutionality have contended that the limitation announced in those cases stands for the proposition that Congress at most has authority under the Commerce Clause to regulate only certain forms of economic activity and, *a fortiori*, no authority to regulate inactivity.²⁹ In their view, by requiring people

²² See *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 539 (1944) ("[T]he word 'commerce' as used in the Commerce Clause . . . include[s] a business such as insurance.").

²³ Some of the state plaintiffs have also argued that the ACA's expansion of Medicaid imposes impermissible financial burdens on the states. Those claims are beyond the scope of this essay. For an assessment of those claims, see Mark A. Hall, *Individual Versus State Constitutional Rights Under Health Care Reform*, 42 ARIZ. ST. L.J. 1233 (2011); Abbe R. Gluck, *The Tenth Amendment Question*, N.Y. TIMES (Mar. 28, 2010), <http://roomfordebate.blogs.nytimes.com/2010/03/28/is-the-health-care-law-unconstitutional/>.

²⁴ See, e.g., David B. Rivkin Jr. & Lee A. Casey, *Illegal Health Reform*, THE WASHINGTON POST, August 22, 2009, at A15 ("The federal government does not have the power to regulate Americans simply because they are there."); Yoo, *supra* note 21, at A01 ("[T]he court has never upheld a federal law that punishes Americans for exercising their God-given right to do absolutely nothing.").

²⁵ See, e.g., *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT, slip op. at 13 (N.D. Fla. Jan. 31, 2011).

²⁶ 514 U.S. 549 (1995).

²⁷ 529 U.S. 598 (2000).

²⁸ *Id.* at 617-18; *Lopez*, 514 U.S. at 567.

²⁹ See, e.g., *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 782 (E.D. Va.

to “engage in commercial transactions they would otherwise have avoided,” the mandate by definition regulates inactivity.³⁰ Second, the plaintiffs have pressed a slippery slope argument, contending that if Congress has authority to compel individuals to purchase health insurance, then Congress can compel individuals to do anything.³¹ They argue that such a conclusion would be inconsistent with the notion of limited and enumerated powers.

Under existing federalism doctrine, these claims are quite weak. Other scholars have offered careful and thorough assessments of the plaintiffs’ claims about the limits of Congress’s affirmative authority under Article I.³² For present purposes, it suffices to note that the federalism challenge founders for several reasons. First, even assuming that Congress lacks power under the

2010) (concluding that in order to be subject to regulation under the Commerce Clause, an individual must engage in “some type of self-initiated activity”); David B. Rivkin, Jr., Lee A. Casey & Jack M. Balkin, *A Healthy Debate: The Constitutionality of an Individual Mandate*, 158 U. PA. L. REV. PENNUMBRA 93, 98-99 (2009) .

³⁰ Randy Barnett, Nathaniel Stewart & Todd Gaziano, *Executive Summary: Why the Personal Mandate to Buy Health Insurance is Unprecedented and Unconstitutional*, THE HERITAGE FOUNDATION (Dec. 9, 2009), <http://www.heritage.org/Research/Reports/2009/12/Executive-Summary-Why-the-Personal-Mandate-Buy-Health-Insurance-Is-Unprecedented-Unconstitutional>; Barnett, *supra* note 10, at B02; Ilya Somin, *The Problem with Broad Definitions*, N.Y. TIMES (Dec. 13, 2010), <http://www.nytimes.com/roomfordebate/2010/12/13/a-fatal-blow-to-obamas-health-care-law/the-problem-with-broad-definitions> (“Far from engaging in ‘economic activity,’ people who decide not to purchase health insurance are actually refraining from doing so.”).

³¹ See, e.g., Rivkin, Casey & Balkin, *supra* note 29, at 101 (“If Congress can mandate the purchase of health care insurance, it can similarly impose, under the Commerce Clause guise, an infinite array of other mandates, ranging from health club membership to a requirement to consume a given quantity of fruit and vegetables annually.”); Randy E. Barnett, *Obamacare’s Individual Mandate is a Dangerous New Federal Power*, WASHINGTON EXAMINER (Feb. 15, 2011), <http://washingtonexaminer.com/opinion/op-eds/2011/02/obamacares-individual-mandate-dangerous-new-federal-power> [hereinafter Barnett, *A Dangerous New Federal Power*]; Randy E. Barnett & Elizabeth Price Foley, *The Nuts and Bolts of the ObamaCare Ruling*, WALL ST. J., Feb. 2, 2011, at A17; Ilya Somin, *supra* note 30; Yoo, *supra* note 21, at C01 (“If the government can force every American to buy health insurance, why can’t it impose fines for not losing weight, not exercising, or not eating low-fat foods – all in an effort to reduce the nation’s health-care costs?”). In the Florida suit, Judge Vinson concluded that if Congress could compel individuals to purchase health insurance, then Congress also “could require that people buy and consume broccoli at regular intervals.” Florida *ex rel.* Bondi v. U.S. Dep’t of Health & Human Servs., No. 3:10-cv-91-RV/EMT, slip op. at 46 (N.D. Fla. Jan. 31, 2011). Andrew Koppelman has referred to this concern as the “Broccoli Objection.” Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 19 (2011).

³² See, e.g., Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PENN. L. REV. 1825, 1827-29 (2011).

Commerce Clause³³ to regulate inactivity, it is far from clear whether the minimum-essential-coverage provision actually does so. As the government and others have argued, a decision not to purchase or maintain insurance can just as easily be conceptualized³⁴ as a form of activity – in essence, a decision to self-insure or to plan to seek health care without any means to pay for it (and thus often at public expense).³⁵ Decisions about how to fund eventual health-care expenses – whether by purchasing private insurance, securing a job that provides health insurance, planning to take advantage of government-provided health care, or planning to rely on the financial assistance of family members – are economic decisions that, in the aggregate, have a substantial effect on interstate commerce.³⁶

Second, in any event, the Court has never held that Congress lacks power under Article I to regulate “inactivity.”³⁷ To the contrary, the Court has long permitted Congress to invoke those powers to compel individuals to take action that they otherwise might choose not to take. The Court has held, for

³³ The government has also defended the individual mandate as a proper exercise of Congress’s taxing power. There is a very strong argument that an individual mandate is indeed a valid exercise of that authority. See Balkin, *supra* note 20, at 45-46; Rivkin, Casey & Balkin, *supra* note 29, at 102-05; Gillian Metzger & Trevor Morrison, *Health Care Reform, the Tax Power, and the Presumption of Constitutionality*, BALKINIZATION (October 19, 2010), <http://balkin.blogspot.com/2010/10/health-care-reform-tax-power-and.html>. I am principally interested here, however, in the challenges that the opponents of the Act have pressed to Congress’s power under the Commerce and Necessary and Proper Clauses.

³⁴ There is no obvious way to distinguish between regulations of activity and regulations of inactivity. See, e.g., Hall, *supra* note 32, at 6 (“To mandate the purchase of insurance is, grammatically, just as much the regulation of insurance as is a mandate to *sell* insurance, or a *prohibition to buy* insurance Selling and purchasing are two sides of the same transactional coin.”); Koppelman, *supra* note 31, at 8; Charles Fried, *Health Care Law’s Enemies Have No Ally in Constitution*, BOS. GLOBE, May 21, 2010, at 13.

³⁵ See Balkin, *supra* note 20, at 47; Rivkin, Casey & Balkin, *supra* note 29, at 108; Sara Rosenbaum & Jonathan Gruber, *Buying Health Care, the Individual Mandate, and the Constitution*, 363 NEW ENG. J. MED. 401, 402 (2010) (“Far from being passive and noneconomic, the uninsured consume” billions of dollars in uncompensated care, “the costs of which are passed through health care institutions to insured Americans.”).

³⁶ In effect, the individual mandate regulates the future activity of obtaining healthcare – which is essentially inevitable for all of us – by requiring individuals to make arrangements in advance to ensure an ability to pay for it.

³⁷ Hall, *supra* note 32, at 4; see *The Constitutionality of the Affordable Care Act: Hearing on S. 216 Before the Senate Committee on the Judiciary*, 112th Cong. 105 (2011) [hereinafter *Hearing Before the Judiciary*] (testimony of Charles Fried, Beneficial Professor of Law, Harvard Law School), available at <http://judiciary.senate.gov/pdf/11-02-02%20Fried%20Testimony.pdf>; Erwin Chemerinsky, *Health Care Reform is Constitutional*, POLITICO (October 23, 2009), <http://www.politico.com/news/stories/1009/28620.html>; Michael C. Dorf, *Judge Hudson’s Misguided Focus on “Activity,”* DORF ON LAW (December 14, 2010), <http://www.dorfonlaw.org/2010/12/judge-hudsons-misguided-focus-on.html>.

example, that Congress has power under Article I to compel citizens to register for the draft,³⁸ and no one seriously contends that Congress lacks authority to require individuals to report for jury duty³⁹ or to respond to the census.⁴⁰

To be sure, the congressional authority to compel draft registration, jury service, or a response to the census derives from grants of authority in Article I other than the Commerce Clause.⁴¹ The opponents of the individual mandate have argued, again relying on *Lopez* and *Morrison*, that the Commerce Clause is somehow different.⁴² But there are several problems with this argument. The Court in *Lopez* and *Morrison* did indeed focus on Congress's authority to regulate economic "activity," but as Mark Hall has noted, it did so "only

³⁸ See *Rostker v. Goldberg*, 453 U.S. 57, 83 (1984) (upholding against constitutional challenge Congress's decision to require registration only of men and not women); *Arver v. United States*, 245 U.S. 366, 377 (1918) (relying on Congress's power "to raise and support armies"). The relevant statutory provision is at 50 U.S.C. app. § 453 (2006).

³⁹ 28 U.S.C. § 1866(g) (2006).

⁴⁰ 13 U.S.C. § 221(a)-(b) (2006).

⁴¹ The power to compel registration for the draft derives from Article I, section 8, clauses 12 and 13, which empower Congress to "raise and support Armies" and to "provide and maintain a Navy." The power to compel individuals to report for jury service derives from Article I, section 8, clause 9, which empowers Congress to "constitute Tribunals inferior to the Supreme Court" (and Article III, clause 3, which provides that the "Trial of all Crimes, except in cases of impeachment, shall be by Jury"). The power to compel individuals to respond to requests for information from the census derives from Article I, section 2, clause 3, which requires an "actual Enumeration" every ten years "in such Manner as [Congress] shall by Law direct."

⁴² Some have merely noted this difference, as though its implication for congressional power were self-evident. See, e.g., Yoo, *supra* note 21. Others have tried to offer a principled basis for treating the draft, jury service, and the census differently. Randy Barnett, for example, has argued that mandates to register for military service, serve on a jury, or report to the census are different because "[e]ach of these duties is necessary for the operation of the government itself" and "each has traditionally been recognized as inherent in being a citizen of the United States." Barnett, *A Dangerous New Federal Power*, *supra* note 31; see also Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J. L. & LIBERTY 581, 630 (2011) [hereinafter Barnett, *Commandeering the People*]; Randy Barnett, *A Noxious Commandment*, N.Y. TIMES (Dec. 13, 2010), <http://www.nytimes.com/roomfordebate/2010/12/13/a-fatal-blow-to-obamas-health-care-law/an-unconstitutional-commandment>. But deciding which civic obligations are inherent in the nature of citizenship is a normative question, and it simply assumes the conclusion to assert that the obligation to maintain health insurance to ensure broad coverage and diverse risk pools is not one that is inherent in the notion of citizenship. Cf. Balkin, *supra* note 14 (arguing that the point of the individual mandate is "civic republican in nature" because it "requires citizens to make . . . [a] public-spirited sacrifice on behalf of other Americans who cannot afford health insurance").

because activity was what Congress actually regulated” in the statutes at issue in those cases.⁴³

Whatever one can say about the coherence of the view that Congress has authority to regulate only economic activity on the theory that in the aggregate it substantially affects interstate commerce,⁴⁴ the Court did not purport in *Lopez* or *Morrison* to announce an additional limitation based on how active or passive the object of the regulation is. The Court subsequently made clear that when the challenged statute (or the statute of which the challenged provision is a part) “directly regulates economic, commercial activity, [the] opinion in *Morrison* casts no doubt on its constitutionality.”⁴⁵ The ACA indisputably regulates the national market for health insurance, and thus the limitation that the Court imposed in *Lopez* and *Morrison* – whatever its precise scope – is inapposite.

In addition, the Court arguably has acknowledged Congress’s power under the Commerce Clause to regulate inactivity. In determining the scope of Congress’s authority under the Commerce Clause, the Court has rejected the “mechanical application of legal formulas”⁴⁶ – such as those that would arbitrarily distinguish between activity and inactivity – in favor of a “practical conception” of interstate commerce that “does not ignore actual experience.”⁴⁷ The Court has explained that a regulated matter, “whatever its nature,” may be reached by Congress if it exerts a substantial economic effect on interstate commerce.⁴⁸ Indeed, the Court made clear in *Gibbons v. Ogden*, the Court’s very first decision construing the scope of the Commerce Clause, that Congress’s power under the Commerce Clause is the plenary power “to prescribe the rule by which commerce is to be governed.”⁴⁹

This functional conception of the commerce power logically extends to at least some forms of inactivity. In *Wickard v. Filburn*, for example, the Court

⁴³ Hall, *supra* note 32, at 4; *see also* *Hearing Before the Judiciary*, *supra* note 37, at 5; Dorf, *supra* note 37.

⁴⁴ Compare Barnett, *Commandeering the People*, *supra* note 42, at 600 (arguing that the economic/non-economic distinction “is useful because the regulation of intrastate economic activity is far more likely to be closely related to interstate commerce than is the vast array of intrastate non-economic activity”), with *United States v. Morrison*, 529 U.S. 598, 656-57 (2000) (Breyer, J., dissenting) (“The ‘economic/non-economic’ distinction is not easy to apply More important, why should we give critical constitutional importance to the economic, or non-economic, nature of an interstate-commerce-affecting *cause*?”).

⁴⁵ *Gonzales v. Raich*, 545 U.S. 1, 27 (2005).

⁴⁶ *Wickard v. Filburn*, 317 U.S. 111, 123-24 (1942).

⁴⁷ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41-42 (1937).

⁴⁸ *Wickard*, 317 U.S. at 125.

⁴⁹ *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824); *see also* *Hearing Before the Judiciary*, *supra* note 37, at 2 (“Neither the Constitution nor the great Chief Justice [Marshall in *Gibbons v. Ogden*] said anything about limiting such rules [by which commerce is to be governed] to those that prohibit or limit commerce.”).

held that Congress could validly “restrict . . . the extent . . . to which one may *forestall* resort to the market by producing [wheat] to meet his own needs,” even if the regulation “forc[ed] some farmers into the market to buy what they could provide for themselves”⁵⁰ and thus to engage in commercial transactions that they otherwise would have elected to avoid. Furthermore, as Michael Dorf and others have mentioned, the Court has made clear that Congress has authority to ban secondary boycotts, even though the refusal to purchase goods or services from the target of the boycott is literally a form of inactivity.⁵¹

If indeed Congress has power under the Commerce Clause to regulate inactivity, the case for the individual mandate as a valid exercise of that power is irresistible. The Court has repeatedly made clear that Congress has authority under the Commerce Clause to regulate local, individual decisions with an economic character when those decisions, in the aggregate, have a substantial effect on interstate commerce.⁵² The decisions of millions of Americans whether to purchase health insurance or pay for health care out of pocket – that

⁵⁰ *Wickard*, 317 U.S. at 127, 129 (emphasis added).

⁵¹ See Dorf, *supra* note 37; Carlton Lawson, *Inactivity and the Commerce Clause*, PRAWFSBLAWG (Jan. 12, 2011, 2:28 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/01/inactivity-and-the-commerce-clause.html>; see also *United Auto., Aircraft & Agric. Implement Workers of Am. v. Wisconsin Emp’t Relations Bd.*, 351 U.S. 266, 271 (1956). The Court has also upheld Congress’s power to require restaurants and hotels to serve persons regardless of the color of their skin, even when those places of public accommodation preferred not to serve some customers. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 251 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964); Chemerinsky, *supra* note 37. Randy Barnett, Nathaniel Stewart, and Todd Gaziano have responded by arguing that the Civil Rights Act of 1964 barred racial discrimination only “by those who freely chose to operate a commercial enterprise.” Barnett, Stewart & Gaziano, *supra* note 30, at 10. But every person, at some point in his or her life, needs health care; we cannot choose to opt out of illness. At a minimum, there is an overwhelming possibility that we will all need health care at some point. As a result, we all participate, either passively or actively, in the market for health care and, thus, for health insurance. Some opponents of the mandate have acknowledged that Congress can compel individuals who have taken some action in commerce to take (or refrain from taking) other actions. Rivkin, Casey, and Balkin have acknowledged that “[u]nder the teaching of *Heart of Atlanta Motel, Inc. v. United States*, Congress can certainly regulate both the economic transactions which commercial establishments engage in and the refusal to engage in such transactions,” but they have argued that the notion of enumerated powers presumes a “limiting factor” on this authority, and their proposed limit is that Congress cannot compel action that does not “proximately relate” to some other economic action. Rivkin, Casey & Balkin, *supra* note 29, at 112. The limiting principle that they propose, however, not only would be incredibly difficult to administer but would also seem to require the conclusion that federal regulation of employer-provided health insurance is unconstitutional. See *id.* at 116.

⁵² See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 17 (2005); *Heart of Atlanta Motel*, 379 U.S. at 258; *Katzenbach*, 379 U.S. at 302; *Wickard*, 317 U.S. at 125.

is, the decision whether to pay now or later – has an obviously substantial effect on the interstate markets for health care and health insurance.

Finally, even if there were some doubt whether Congress has authority under the Commerce Clause, standing alone, to compel individuals to obtain health insurance, it is clear that Congress has power to do so under the Necessary and Proper Clause.⁵³ Since *McCulloch v. Maryland*,⁵⁴ the Court has interpreted the Clause to authorize Congress “to enact laws that are ‘convenient, or useful’ or ‘conducive’ to the . . . ‘beneficial exercise’” of Congress’s specific affirmative authority.⁵⁵ More recently, the Court has made clear that “in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”⁵⁶

Under that test, the individual mandate is within Congress’s power under the Necessary and Proper Clause. As discussed above, the ACA’s principal objective is to make health insurance more readily available to a greater number of people, and the principal means for achieving this objective is to impose terms – including pre-existing condition exclusions and bans on discriminatory pricing – on insurance contracts sold by insurance companies in national markets.⁵⁷ The opponents of the individual mandate have conceded that those provisions are within Congress’s authority under the Commerce Clause.⁵⁸ Congress required individuals to acquire and maintain minimum essential insurance coverage because the Act’s concededly valid regulations would not only be ineffective but would also, in light of the adverse-selection problem, be self-defeating without some provision for mandatory participation in the market for health insurance.⁵⁹ Indeed, for these reasons the individual mandate has such a close relationship to Congress’s legitimate ends that it

⁵³ See Hall, *supra* note 32, at 10 (“[U]nder the Necessary and Proper Clause there is no plausible path of reasoning that would produce a coherent basis for rejecting the mandate.”).

⁵⁴ 17 U.S. 316 (1819).

⁵⁵ *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (quoting *McCulloch*, 17 U.S. at 418).

⁵⁶ *Id.*

⁵⁷ See *supra* pp. 1726-27.

⁵⁸ See, e.g., *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 779 (E.D. Va. 2010) (“The Commonwealth does not appear to challenge the aggregate effect of the many moving parts of the ACA on interstate commerce. Its lens is narrowly focused on the enforcement mechanism to which it is hinged, the Minimum Essential Coverage Provision.”).

⁵⁹ See 42 U.S.C. § 18091(a)(2)(I); Balkin, *supra* note 20, at 46; Hall, *supra* note 32, at 11 (“[T]here is no substantial dispute that this fundamental improvement in health insurance products and markets cannot be done effectively without an accompanying mandate to purchase. Otherwise, many people would simply wait to purchase insurance until they needed care.”).

would satisfy even a substantially more restrictive view of the Necessary and Proper Clause.⁶⁰

The Court has made clear in the specific context of regulation under the Commerce Clause, moreover, that the Necessary and Proper Clause confers on Congress broad latitude to reach localized conduct or decisions, regardless of their nature, when doing so is “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”⁶¹ Indeed, Justice Scalia has stressed that how we characterize the local behavior or decision at issue is largely irrelevant under the proper inquiry because “Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.”⁶² The individual mandate is not only “conducive” to achieving Congress’s legitimate objective of making health insurance more readily available but is also essential to the broader regulatory scheme created by the ACA.⁶³ If anything, as Rick Hills has stated, the individual mandate is even more closely related to the ACA’s regulation of the interstate market for health insurance than the provision that the Court upheld in *Wickard v. Filburn*,⁶⁴ prohibiting Mr. Filburn from consuming home-grown wheat, was related to the regulation of the interstate market for wheat.⁶⁵

⁶⁰ The individual mandate would be permissible, for example, under James Madison’s view of the Necessary and Proper Clause. He argued that the Clause allowed Congress to enact legislation providing a “direct and incidental means” to attain the object of a general power – that is, to use any “means *necessary* to the *end*, and *incident* to the *nature*, of the specified powers.” LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 42 (M. St. Clair Clarke & D. A. Hall eds., 1832); *see also Comstock*, 130 S. Ct. at 1970 (Alito, J., concurring) (“The Necessary and Proper Clause . . . requires an appropriate link between a power conferred by the Constitution and the law enacted by Congress.” (citations omitted) (internal quotation marks omitted)); *id.* at 1971-73 (Thomas, J., dissenting) (asserting that Congress’s “objective” must be “legitimate” such that the chosen means “‘carr[ies] into Execution’ one of the Federal Government’s enumerated powers”). Indeed, Charles Fried has argued that it would satisfy even the narrow test that the State of Maryland advanced in *McCulloch v. Maryland*, famously defended by Thomas Jefferson, that necessary and proper enactments must be absolutely essential to executing an enumerated power. *See Hearing Before the Judiciary*, *supra* note 37, at 4.

⁶¹ *Gonzales v. Raich*, 545 U.S. 1, 24 (2005) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

⁶² *Id.* at 37 (Scalia, J., concurring).

⁶³ *See Rivkin*, Casey & Balkin *supra* note 29, at 106-07.

⁶⁴ 317 U.S. 111 (1942).

⁶⁵ *See Rick Hills*, *Federalism & Healthcare: The Dangers and Benefits of Confusing Individual Rights with Federalism*, PRAWFSBLAWG (Dec. 14, 2010, 10:07 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2010/12/federalism-healthcare-the-dangers-benefits-of-confusing-individual-rights-with-federalism.html> (“Suppose that the feds do not forbid Farmer Filburn from consuming home-grown wheat but instead require him to consume wheat that has traveled in interstate commerce. Is it not obvious that the latter

The opponents of the individual mandate do not deny that the mandate is necessary in the sense that, without it, the other regulations in the Act will produce perverse results and be largely self-defeating.⁶⁶ They nevertheless have contended (and two district judges and the Eleventh Circuit have found) that the mandate is not a “proper” means of executing Congress’s authority under the Commerce Clause because a statute compelling individuals to act “cannot be reconciled with a limited government of enumerated powers.”⁶⁷ On this view, it is simply improper, as a matter of first principles, for the federal government to regulate a market by forcing people to participate in it.

As it has been presented, this view trades heavily on the notion of the slippery slope.⁶⁸ As Andy Koppelman has noted, however, this view seems to assume, counter-intuitively, that the Commerce Clause serves as a limitation on Congress’s power under the Necessary and Proper Clause to choose the appropriate means of carrying its commerce authority into effect.⁶⁹ In addition, the specific suggestion that a statute compelling individuals to act cannot be “proper” under the Necessary and Proper Clause is simply wrong under current law. As discussed above, it is uncontroversial that Congress has authority to require individuals to register for the draft, report for jury service, and respond to the census. But the statutes requiring those actions are not direct exercises of the powers, respectively, to raise and support armies, constitute inferior tribunals, or make an actual enumeration. Instead, they are means reasonably adapted to the effectuation of ends within the contemplation of those grants of authority. If Congress has power under the Necessary and

measure is more directly related to the regulation of interstate commerce than the former?”).

⁶⁶ See, e.g., Rivkin, Casey & Balkin, *supra* note 29, at 95.

⁶⁷ Florida *ex rel.* Bondi v. U.S. Dep’t of Health & Human Servs., No. 3:10-cv-91-RV/EMT, slip op. at 63 (N.D. Fla. Jan. 31, 2011). Judge Vinson acknowledged that Congress has authority under the Commerce Clause to regulate the health insurance industry to prevent insurers from excluding or charging higher rates to people with pre-existing conditions. *Id.* at 61-62. But, he reasoned that if

Congress is allowed to define the scope of its power merely by arguing that a provision is “necessary” to avoid the negative consequences that will potentially flow from its own statutory enactments, the Necessary and Proper Clause runs the risk of ceasing to be the “perfectly harmless” part of the Constitution that Hamilton assured us it was.

Id. at 62 (internal quotation marks omitted); see also Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 779 (E.D. Va. 2010) (“If a person’s decision not to purchase health insurance at a particular point in time does not constitute the type of economic activity subject to regulation under the Commerce Clause, then logically an attempt to enforce such provision under the Necessary and Proper Clause is equally offensive to the Constitution.”). The Eleventh Circuit upheld the district court ruling in part, stating that without a “judicially enforceable limiting principle,” upholding the individual mandate would “obliterat[e] the boundaries inherent in the system of enumerated congressional powers.” Florida *ex rel.* Att’y Gen. v. U.S. Dep’t of Health & Human Servs., 648 F.3d 1235, 1329 (11th Cir. 2011).

⁶⁸ See *supra* note 31 and accompanying text.

⁶⁹ Koppelman, *supra* note 31, at 9.

Proper Clause to compel unwilling individuals to act when seeking to accomplish ends within those grants of authority under Article I, it is difficult to see why it would not have power to do so when seeking to accomplish legitimate ends under the Commerce Clause.⁷⁰

III. SITUATING THE LEGAL CHALLENGES TO THE INDIVIDUAL MANDATE

The Act's opponents have pressed their attack by arguing that the individual mandate exceeds Congress's affirmative powers as a matter of federalism doctrine.⁷¹ Yet we have seen that under existing federalism doctrine, the case against the individual mandate is quite weak. More strikingly, the particular limitation that the opponents of the mandate have urged – that Congress lacks power to regulate “inactivity” under the Commerce and Necessary and Proper Clauses – *has virtually nothing to do with federalism*. That is, whether a statute regulates an active or passive matter – to the extent that we can even comfortably distinguish between those two things – tells us nothing about whether the matter ought to be regulated at the national or instead at the state level.

Of course, determining what ought to be within the province of the federal government and what ought to be left only to the states is no easy task; this question has been contested since the founding.⁷² But any federalism question is, at bottom, about locating “the boundary between federal and state authority.”⁷³ To be sure, as the Court has learned over the years, there is no perfect rubric for drawing such boundaries. Some scholars, for example, have called on the Court to view the question in terms of the problem of collective action, the existence of which would provide a justification for federal action;⁷⁴

⁷⁰ See Hall, *supra* note 32, at 22-23 (“[F]ederal powers to compel military service and to appear before Congress are not expressed in the Constitution, but instead have long been supported, in part, as necessary and proper extensions of related war powers and legislative powers [These powers] demonstrate the utter implausibility of arguing that regulation of inactivity is somehow categorically improper, or even suspect, across the full range of federal powers.”).

⁷¹ See *supra* notes 24-31 and accompanying text.

⁷² See *New York v. United States*, 505 U.S. 144, 149 (1992).

⁷³ *Id.* at 159.

⁷⁴ See, e.g., Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 165 (2010); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 555 (1995) (“[W]hen we are trying to decide whether some federal law or program can be justified under the commerce power, we should ask ourselves the question, ‘Is there some reason the federal government must be able to do this, some reason why we cannot leave the matter to the states?’”); Robert L. Stern, *That Commerce Which Concerns More States than One*, 47 HARV. L. REV. 1335, 1340 (1934). There is an ample historical basis for this view; the Constitutional Convention adopted the Committee of Detail’s proposal conferring on Congress the power “to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in

others have more generally urged attention to the respective virtues of centralization and decentralization;⁷⁵ and still others have looked to history to determine the original meaning of the Commerce Clause (and other clauses)⁷⁶ to identify the proper scope of federal power.⁷⁷ This range of approaches suggests that there rarely will be perfect agreement on the particular rules that the Court devises to police the boundaries between state and federal authority. But we can at least expect the lines drawn to establish those boundaries to reflect something about why we have a system of divided authority in the first place. Indeed, experience has tended to show that doctrinal lines drawn to allocate authority between the federal government and the states endure only when they bear some relationship to the reason our system divides authority in the first place.⁷⁸

The distinction between activity and inactivity, however, is not a distinction that anyone genuinely interested in formulating sensible and coherent rules of *federalism* – again, rules about allocating authority between the federal government and the states, and in particular about the limits on federal authority – would naturally propose. Whether a regulated matter is more aptly characterized as passive rather than active bears no relationship at all to the things that matter in determining whether the federal government or instead the states ought to be the presumptive or exclusive regulator. It is one thing to say that Congress presumptively should not have authority over purely local matters; state regulation of such matters not only will often be self-evidently more sensible but is also more likely to reflect and satisfy the preferences of a greater number of people.⁷⁹ It might even make sense, from the standpoint of

which the harmony of the United States may be interrupted by the exercise of individual legislation.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1911) [hereinafter 2 RECORDS] (quoting Resolution VI of the Virginia Plan); see also 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1911) (quoting the text of the adopted resolution).

⁷⁵ See, e.g., Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 321 (1997); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493-500 (1987) (explaining the value of decentralization).

⁷⁶ See, e.g., Gary Lawson, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 274 (1993).

⁷⁷ Not surprisingly, there is no consensus on what the history reveals. Compare Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 104-105 (2001) (advancing a narrow view of the term “commerce”), with Balkin, *supra* note 20, at 1-2 (advancing a broad view of Congress’s commerce power).

⁷⁸ See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (explaining that the Court abandoned previous tests of whether an activity was “production” or whether its effects on interstate commerce were “indirect” because those tests failed to provide a necessary “economic measure of the reach of the power granted to Congress in the Commerce Clause”).

⁷⁹ See McConnell, *supra* note 75, at 1509 (“[R]epresentatives in a smaller unit of government will be closer to the people. . . . Assuming representative bodies of roughly the

the values of the federalism, to say that Congress lacks power to regulate local, non-economic activity even when that activity, in the aggregate, has a substantial effect on interstate commerce. After all, such activity by definition is “noncommercial,”⁸⁰ and there is an obvious textual argument that Congress’s power under the Commerce Clause ought to be limited to commercial matters. But it is another thing altogether to suggest that Congress should not have authority to regulate “inactivity.”

First, as Mark Hall has explained, the “passivity of non-purchasing decisions does not rob them of their inherently economic nature,”⁸¹ which means that they presumptively should be within the scope of the commerce power even under the more restrictive approach in *Lopez* and *Morrison*. Second, the proposed inactivity limitation would be substantially more sweeping than other limitations that the Court has imposed. The Court has made clear that Congress does have authority to regulate even local, non-economic activity when doing so is necessary to effectuate a broader regulation of interstate commerce.⁸² The limitation that the opponents of the mandate have proposed (and that two district judges and the Eleventh Circuit have accepted), in contrast, is categorical, regardless of how essential the regulation of inactivity is to an otherwise valid scheme of regulation.⁸³

Third and most important, as the case of the individual mandate and the ACA makes clear, a rule prohibiting Congress from regulating “inactivity” would in at least some cases deprive Congress of authority to address genuine collective action problems and to resolve problems that seem to call for a national solution. Reasonable minds can disagree about how serious a collective action problem ought to be before Congress should act to address it, but any respectable theory of federalism must at least acknowledge that the

same number, any given representative will have fewer constituents and a smaller district at the state or local level,” and “[e]ach citizen’s influence on his representative, therefore, will be proportionately greater . . .”).

⁸⁰ *United States v. Lopez*, 514 U.S. 549, 566 (1995).

⁸¹ Hall, *supra* note 32, at 9. Professor Hall states that this is especially true “when considering the non-purchase of *insurance*, which is a quintessentially economic product.” *Id.* at 9. To be sure, there is something quite arbitrary and unsatisfying about ascribing the label “economic” to any form of activity because almost any activity can, at a minimum, substitute for the need to purchase a product or a service. *See Gonzales v. Raich*, 545 U.S. 1, 50 (2005) (O’Connor, J., dissenting) (“To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic.”).

⁸² *See Raich*, 545 U.S. at 37 (Scalia, J., dissenting) (agreeing with the majority that “Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce”).

⁸³ *See, e.g., Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT, slip op. at 63 (N.D. Fla. Jan. 31, 2011) (disagreeing that Congress may regulate economic inactivity, even when “absolutely ‘necessary’ and ‘essential’ for the Act to operate as it was intended by Congress”); Rivkin & Casey, *supra* note 24.

argument for federal power is at its apex in cases in which, to use the language that the Constitutional Convention adopted in 1787, “the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.”⁸⁴ The difficulty that persons with pre-existing conditions have in obtaining health insurance is just such a collective action problem.⁸⁵ The distinction between action and inaction, in other words, “is completely unrelated to the question any doctrine of enumerated powers must answer, *viz.*, ‘why should we trust the states more than the feds to impose the challenged regulation?’”⁸⁶

⁸⁴ 2 RECORDS, *supra* note 74, at 21.

⁸⁵ Notwithstanding broad public support for legislation prohibiting insurance companies from discriminating against people who have pre-existing conditions, most states do not currently prohibit such practices. This is because states that seek to do so are likely to attract individuals with such conditions from other states, which will drive up insurance premiums; that in turn might lead healthy individuals – or even insurers, as happened in Kentucky – to leave the state, driving up premiums even further and undermining the goal of expanding coverage. *See generally* Adele M. Kirk, *Riding the Bull: Experience with Individual Market Reform in Washington, Kentucky, and Massachusetts*, 25 J. HEALTH POL., POL’Y & L. 133 (2000). Indeed, only Massachusetts has even approached success in seeking to ban denial of coverage for persons with pre-existing conditions. *Id.* at 162; *see also* Brian Galle, *The Taxing Power, the Affordable Care Act, and the Limits of Constitutional Compromise*, 120 YALE L.J. ONLINE 407, 412 (2011).

⁸⁶ Rick Hills, *What Does it Mean to Have a Theory of Federalism?*, PRAWFSBLAWG, (Dec. 17, 2010), <http://prawfsblawg.blogspot.com/2010/12/what-does-it-mean-to-have-a-theory-of-federalism.html#more>; *see also* Hall, *supra* note 32, at 9 (“The Court’s expressed concern in limiting the commerce power is to avoid overtaking all of [the] states’ police powers. In contrast, *individual* rights are the motivating concern in challenging the insurance mandate, not *states’* rights. . . . [N]othing in existing Commerce Clause jurisprudence expresses special solicitude toward individual liberties *simpliciter*.”). The only theory of federalism to which the distinction between activity and inactivity is arguably relevant is a purely historical one that limits Congress to regulating the precise sorts of things that it could have (or did) regulate in 1789. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 585-89 (1994) (Thomas, J., concurring) (urging a narrow definition of “commerce” based on the original expected application of the term). Under such a test, however, the Court would be confronted with serious problems about the appropriate level of generality for determining Congress’s historical power. In any event, such a test clearly has not been the measure of Congress’s power for at least the last seventy years. Moreover, as Theodore Ruger has pointed out, in 1790 Congress included a mandate to purchase private goods in the very first federal health statute. *See* Act of July 20, 1790, 1 STAT. 131 (1790) (requiring all ships of a certain size to “provide[] . . . a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same” and maintain that chest for the benefit of sailors or to pay for all such advice, medicine, or attendance of physicians, as any of the crew shall stand in need of in case of sickness, . . . without any deduction from the wages of such sick seaman or mariner”).

Randy Barnett nevertheless has argued that courts should interpret the Tenth Amendment, when combined with the Necessary and Proper Clause, to prohibit Congress both from

One could, I suppose, defend the inactivity limitation as a “second-best” approach” for achieving federalism-based goals.⁸⁷ This claim would start from the premise that federalism doctrine has become increasingly (and indefensibly) weighted in favor of congressional authority but acknowledge that it is not feasible or practicable to overrule seventy years of settled understandings about the scope of Congress’s power. Under these assumptions, the second-best strategy for limiting federal authority is to effect incremental compensating adjustments that limit federal authority through doctrinal innovation.⁸⁸ The inactivity limitation is one potential doctrinal innovation.⁸⁹

Undoubtedly, there is often good justification for such second-best strategies,⁹⁰ but if nothing else we expect the limitations imposed as second-best strategies to bear at least *some* relationship to the values that the underlying doctrine – here, federalism – is designed to serve. It may well be that, all things being equal, leaving a good deal of regulatory room for the states will maximize utility, foster innovation, and promote democratic accountability.⁹¹ And it may well be that, either as a doctrinal or normative matter, Congress has too much power. But if we were convinced that current doctrine had not fully succeeded in constraining Congress’s power, we wouldn’t respond by proposing, say, that Congress shall lack authority to legislate on odd-numbered days; such a rule simply would have “nothing to do with the underlying reasons for wanting to have limited but effective federal power in the first place.”⁹²

mandating that the states regulate pursuant to federal directions, *see, e.g.*, *New York v. United States*, 505 U.S. 144 (1992), and from “commandeering the people” by mandating that they engage in particular activities. Barnett, *Commandeering the People*, *supra* note 42, at 621-26. But this argument seems to ignore completely the basic thrust of the Court’s decision in *New York* that Congress lacks power to “commandeer” the states because “the Framers explicitly chose a Constitution that confers upon Congress the *power to regulate individuals*, not States.” *New York*, 505 U.S. at 166 (emphasis added); *see* Rick Hills, *Judge Vinson’s Incoherent Extension of Printz’s Anti-Commandeering Principle from States to Private Persons*, PRAWFSBLAWG (Jan. 31, 2011), <http://prawnsblawg.blogspot.com/prawnsblawg/2011/01/the-foolly-of-extending-printzs-anti-commandeering-principle-from-states-to-private-persons.html>.

⁸⁷ Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY. L. REV. 1733, 1753-54 (2005) (quoting Adrian Vermeule, *Hume’s Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421, 426 (2003)).

⁸⁸ Young, *supra* note 87, at 1755.

⁸⁹ *Id.*

⁹⁰ *See id.* at 1756.

⁹¹ *See, e.g.*, DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 58-106 (1995); McConnell, *supra* note 75, at 1493-1511.

⁹² Andrew Koppelman, *Can’t Think of Another One*, BALKINIZATION (Dec. 14, 2010), <http://balkin.blogspot.com/2010/12/cant-think-of-another-one.html>. Professor Koppelman

All of this leads one to question whether the attacks on the individual mandate really *are* about federalism. The basic objection to the individual mandate, after all, is that the government lacks the power to compel individuals to do things that they do not want to do. This is, at bottom, a *libertarian* objection. And, in fact, if one reads the challenges to the individual mandate closely, one can find the libertarian objection at the core of the attack.⁹³ Randy Barnett, for example, has argued that mandates to take action are much more serious infringements on liberty than are prohibitions on certain forms of conduct.⁹⁴ A federal district judge in Virginia, in concluding that the individual mandate exceeds Congress's Article I powers, stated, "At its core, this dispute is not simply about regulating the business of insurance – or crafting a system of universal health insurance coverage – it's about an individual's right to choose to participate."⁹⁵ And David Rivkin and Lee Casey, the lead attorneys in the Florida suit, have argued that if Congress can force individuals to purchase health insurance, it "would turn everybody into a ward of the state, unable to exercise individual choices."⁹⁶ One need not question the motives of the opponents of the individual mandate⁹⁷ to note that

summarizes the basic logic of the legal attack on the mandate as follows: "(1) There must be some limit on federal power; (2) I can't think of another one; and therefore, (3) the limit must preclude the individual mandate." Koppelman, *supra* note 31, at 18 (quoting a December 14, 2010 e-mail from Professor Steven Lubet to Professor Andrew Koppelman.). For an example of such logic, see Yoo, *supra* note 21, at C01 ("The framers could have granted Congress a limitless police power, as that held by the states, but they didn't – which is why states can force everyone to buy auto insurance or health insurance, where the federal government cannot.").

⁹³ See, e.g., *Hearing Before the Judiciary*, *supra* note 37, at 104 ("But the objection, while serious, is not at all about the scope of Congress's power under the Commerce Clause. It is about an imposition on our personal liberty, a liberty guaranteed by the 5th and 14th Amendments . . ."); Hall, *supra* note 23, at 1235; Koppelman, *supra* note 31, at 22; Aziz Huq, *In Healthcare Ruling, Libertarianism by Judicial Diktat*, NATION (Feb. 9, 2011), <http://www.thenation.com/article/158427/healthcare-ruling-libertarianism-judicial-diktat>.

⁹⁴ Barnett, *A Dangerous New Federal Power*, *supra* note 31 (stating that, "[w]hile your liberty would be restricted" if you were told things you were not permitted to do, mandates "could potentially occupy all your time and consume all your financial resources" and thus "are so much more onerous").

⁹⁵ *Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010); see also Simon Lazarus, *Jurisprudential Shell Game*, NAT'L L. J. (Dec. 20, 2010), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202476355698&slreturn=1&hbxlogin=1>.

⁹⁶ Rivkin, Casey & Balkin, *supra* note 29, at 101. In their complaint, they actually pressed a Fifth Amendment substantive due process argument, which the district court rejected. See *Florida ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1162 (N.D. Fla. 2010).

⁹⁷ See, e.g., Koppelman, *supra* note 31, at 15 (stating that what the opponents "really want is, not to invoke settled law, but to trash it – to replace the constitutional law we now have with something radically different"); see also Hills, *supra* note 65.

their attacks on the provision, in substance even if not in framing, sound in notions of personal liberty rather than state autonomy.

The libertarian objection – and in particular, the objection that the government should lack authority to compel individuals to engage in certain economic transactions – is the same objection on which the Court relied during the *Lochner*⁹⁸ era in invalidating state and federal legislation that interfered with the “freedom of contract.”⁹⁹ During that era, the Court viewed “the right to contract about one’s affairs [as] a part of the liberty of the individual protected” by the Due Process Clauses,¹⁰⁰ and it accordingly viewed with skepticism any regulation that interfered with that form of individual liberty.¹⁰¹ The limitation proposed by the opponents of the individual mandate – that Congress lacks authority to compel individuals to enter commercial transactions – is born of the same impulse.¹⁰²

The slippery slope argument that opponents of the individual mandate have pressed likewise underscores the libertarian nature of the objection. Randy Barnett, for example, has argued that if Congress “can mandate this, then . . . Congress could require every American to buy a new Chevy Impala every year.”¹⁰³ A federal district judge in Florida suggested, perhaps even more ominously, that if the individual mandate were constitutional, Congress would also have power to “require that people buy and consume broccoli.”¹⁰⁴ It is true that, without a limiting principle, the recognition of *any* exercise of congressional authority could, in theory, mean the recognition of unlimited federal authority.¹⁰⁵ But to be viable as a *federalism*-based limiting principle, the principle needs to bear some relationship to the very reasons why we divide authority between the federal government and the states in the first place. The

⁹⁸ *Lochner v. New York*, 198 U.S. 45, 57 (1905).

⁹⁹ The Court in *Lochner* even used the phrase “wards of the State.” *Id.* at 57 (reasoning that the state regulation was invalid in part because bakers “are in no sense wards of the State”).

¹⁰⁰ *Adkins v. Children’s Hospital*, 261 U.S. 525, 545 (1923).

¹⁰¹ *See id.* at 546 (“[F]reedom of contract is . . . the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.”).

¹⁰² *See* Simon Lazarus, *The Health Care Lawsuits: Unraveling a Century of Constitutional Law and the Fabric of Modern American Government*, AM. CONST. SOC’Y FOR L. & POL’Y, Feb. 8, 2011, at 1, 17.

¹⁰³ Barnett, Stewart & Gaziano, *supra* note 30; *accord* Barnett, *supra* note 10 (“Regulating the auto industry or paying ‘cash for clunkers’ is one thing; making everyone buy a Chevy is quite another.”); *see also* Florida *ex rel.* Bondi v U.S. Dep’t of Health & Human Servs., slip op. at 46 (N.D. Fla. Jan. 31, 2011).

¹⁰⁴ Florida *ex rel. Bondi*, No. 3:10-cv-91-RV/EMT, at 46.

¹⁰⁵ *Cf.* United States v. Lopez, 514 U.S. 549, 564 (1995) (“[I]f we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.”).

parade of horrors¹⁰⁶ suggested by opponents of the mandate resonates (if at all) not as a principle of federalism but instead as a means of defending against threats to individual liberty.¹⁰⁷ After all, as Randy Barnett has explained, government mandates to purchase – or to engage in other behavior – are, when viewed from the standpoint of individual liberty, simply “more onerous than either economic regulations or prohibitions.”¹⁰⁸

If indeed such mandates are problematic because they interfere with individual liberty, then there is no obvious reason why they would be any more problematic when imposed by the federal government than they are when imposed by the states. If it would impermissibly interfere with individual liberty to require individuals to purchase a car or broccoli, then state laws requiring individuals to do so would be constitutionally suspect, as well.¹⁰⁹ But they would not be suspect because of anything to do with federalism;¹¹⁰ they would be suspect because they violate some unenumerated right to decide in which economic transactions to engage. Such a right, if it existed, would be protected, not as an implicit limitation on Congress’s power under the Commerce and Necessary and Proper Clauses but as liberty protected by the

¹⁰⁶ I leave it to the reader to decide whether it would be more horrible to be compelled to purchase a Chevy or instead to purchase broccoli.

¹⁰⁷ Perhaps not surprisingly, the Court in *Lochner* advanced a very similar argument in invalidating a law regulating the hours of employment for bakers. In rejecting the state’s argument based on the need to protect bakers’ health, the Court stated,

It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank’s, a lawyer’s or a physician’s clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one’s living, could escape this all-pervading power

Lochner v. New York, 198 U.S. 45, 59 (1905).

¹⁰⁸ Barnett, *supra* note 31.

¹⁰⁹ See Orin Kerr, *Two Variations on “Could the Government Make You Buy a GM Car?”*, VOLOKH CONSPIRACY (December 17, 2010), <http://volokh.com/2010/12/17/two-variations-on-could-the-government-make-you-buy-a-gm-car/>.

¹¹⁰ Hills, *supra* note 86 (“If it is an unduly oppressive burden on liberty for Congress to require consumers to buy health insurance (or a Chrysler car or whatever), then why is it any less of an unduly oppressive burden for the states to do so? If you cannot answer this question, then your action/inaction distinction is unrelated to any theory of federalism.”). Opponents of the mandate have not explained why it is uniquely problematic for the federal government to intrude on individual liberty. One possibility would be that, because the federal government lacks the broad police powers of the states, it also lacks the authority to justify interference with individual liberty by reference to the same objectives that a state could invoke to justify such interference. But this view would be inconsistent at least with the modern trend of viewing individual liberty in negative terms – that is, as an immunity from various forms of governmental interference, regardless of the identity of the interfering government. See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010).

substantive components of the Due Process Clauses of the Fifth and Fourteenth Amendments.

Under current doctrine, of course, there is no such right protected by the Due Process Clauses.¹¹¹ But if there were, the consequence would be not only that the individual mandate arguably is unconstitutional under the Due Process Clause of the Fifth Amendment (if it could not satisfy heightened scrutiny), but also that *state-imposed* mandates to engage in commercial transactions are unconstitutional under the Due Process Clause of the Fourteenth Amendment. If that were the case, then South Dakota would indeed presumptively be constitutionally prohibited from requiring all of its citizens to purchase guns, as the sponsors of the bill have suggested.¹¹² But the fact that its sponsors have proceeded on the assumption that their mock proposal would be unconstitutional only serves to underscore that the challenges to the individual mandate in the ACA are not about federalism at all.

The weakness of a straightforward economic substantive due process claim might help to explain why the opponents of the individual mandate have, for the most part, urged the courts to invalidate the provision on federalism grounds. But in doing so, they have in effect asked the courts to fashion a limitation that sounds in personal liberty but that, paradoxically, applies only to action by the federal government.¹¹³ It is bad enough that such a limitation

¹¹¹ See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905) (upholding, against a substantive due process challenge, a state law that imposed a fine on individuals who refused to submit to a state-mandated smallpox vaccination); *Hearing Before the Judiciary*, *supra* note 37, at 104 (stating that the individual mandate in the ACA is a “much less intrusive and less intimate imposition” than the vaccination requirement upheld in *Jacobson*); Hall, *supra* note 23, at 1236. Of course, in determining whether the individual mandate interferes with a protected right, it is first necessary to define the appropriate level of generality at which to define the right. Compare *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (Scalia, J., plurality opinion) (urging the Court to define the right at the “most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified”), *with id.* at 137-41 (Brennan, J., dissenting) (urging the Court to define the right at a higher level of generality). But even if we define the right at a high level of generality – say, as the right not to engage in a commercial transaction – it is clear that the individual mandate would trigger (and survive) only rational-basis review. See *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488 (1955); *Florida ex rel. McCollum v. U.S. Dep’t of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1161-62 (N.D. Fla. 2010) (explaining that the *Lochner* line of cases had been “discarded” and rejecting plaintiffs’ substantive due process challenge to individual mandate after applying rational basis review); Hall, *supra* note 32, at 3.

¹¹² Massachusetts would also presumably be constitutionally prohibited from requiring its citizens to obtain health insurance. *But see Fountas v. Comm’r of the Mass. Dep’t of Revenue*, No. 08-0121-B, 2009 WL 3792468, at *4-13 (Mass. Super. Ct. Feb. 6, 2009) (rejecting substantive constitutional challenges to the Massachusetts individual mandate).

¹¹³ See Hall, *supra* note 32, at 24 (arguing that the view that Randy Barnett has advanced would “constitute a federal-only version of *Lochner*, one that protects economic liberties from Congressional, but not state, action”).

would be doctrinally incoherent.¹¹⁴ But if the courts import this libertarian objection into federalism doctrine in the fashion that the opponents of the individual mandate have urged, the protection for individual liberty – and thus the corresponding limitation on federal authority – will be *even greater* than it would be if the limitation were imposed as a matter of substantive due process. Under the latter doctrine, compelling government interests can sometimes justify an interference with individual liberty. Under the approach proposed by the individual mandate’s opponents, in contrast, Congress would be categorically precluded from compelling individuals to take actions that they otherwise would prefer not to take, even if the states were simply unable, because of collective action problems, to address a problem of national scope and importance.¹¹⁵

Smuggling a libertarian-based limitation into constitutional law by concealing it in the garb of federalism – a move that Rick Hills calls “libertarianism lite”¹¹⁶ – can only deepen the suspicions of those who already view arguments about federalism as simply a guise for some other policy agenda.¹¹⁷ If opponents of the individual mandate wish to raise a libertarian objection, then they are free to do so; but they should do so in an intellectually coherent way, and they should be clear about the consequences – both for state and federal authority – that inevitably would follow.

CONCLUSION

In 1964, the Attorney General of the Commonwealth of Virginia filed an amicus brief in *Heart of Atlanta Motel v. United States*¹¹⁸ urging the Court to

¹¹⁴ See Koppelman, *supra* note 31, at 24.

¹¹⁵ See, e.g., Hall, *supra* note 32, at 26 (“A categorical rejection of regulating pure inactivity would appear to preclude, for instance, federal action to mandate vaccination or preventive measures even in the worst conceivable public health emergency, such as an outbreak of the avian flu The Fifth or Ninth Amendments would produce no such result because their protection of individual liberties is balanced against legitimate government objectives.”). It is possible, I suppose, to incorporate consideration of the government’s interest into an analysis to determine whether any given regulation is “proper” under the Necessary and Proper Clause. If nothing else, this approach would be a significant departure from the Court’s longstanding approach to analyzing congressional assertions of authority under that Clause.

¹¹⁶ Hills, *supra* note 65.

¹¹⁷ See, e.g., Friedman, *supra* note 75, at 384 (“Those who came of age with pictures of foaming segregationists cursing civil rights marchers, or African-American students trying to enter schools desegregated by order of national courts, are likely to be enamored of national authority and skeptical of leaving matters to the states to solve.”); Peter J. Smith, *Federalism, Instrumentalism, and the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV. 906, 909 (2006); see also Hills, *supra* note 65.

¹¹⁸ 379 U.S. 241 (1964).

invalidate the Civil Rights Act of 1964.¹¹⁹ The brief noted that “the Constitution was ordained and established to ‘secure the Blessings of Liberty’” and then asked, “Can anyone seriously maintain that our forefathers deemed it to be a part of ‘liberty’ that the Congress of the United States could dictate to them those persons whom they must serve in their private business establishments?”¹²⁰ The brief then cited the Ninth Amendment’s reminder that the “‘enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people’” and argued that “[s]ince the day of its ratification, one of those rights has been the right to discriminate in private business establishments.”¹²¹ “How,” the brief asked, “can it now be asserted that the Commerce Clause, which was already a part of the Constitution, has somehow destroyed that right?”¹²² There is an eerie echo of these arguments in the lawsuit filed by the current Attorney General of Virginia (and others) to challenge the constitutionality of the ACA. One need not assume that the current challenges are tainted by the same invidious desire to defend a shameful practice in order to be troubled by the federalism arguments that they advance.

No one disputes that “the Constitution divides authority between federal and state governments for the protection of individuals”¹²³ – and, in particular, for the protection of individual liberties. But federalism achieves this goal indirectly by dividing power between the federal government and the states and thus reducing “the risk of tyranny and abuse from either front.”¹²⁴ We disserve federalism – and the Constitution’s direct protections for individual liberty – when we seek to mold it to incorporate whatever objections we happen to have to the politically controversial legislation of the day.

¹¹⁹ Brief Amicus Curiae on Behalf of the Commonwealth of Virginia at 2, *Heart of Atlanta Motel*, 379 U.S. 241 (No. 515).

¹²⁰ *Id.* at 4 (quoting U.S. CONST. pmb.).

¹²¹ *Id.* (quoting U.S. CONST. amend. IX).

¹²² *Id.*

¹²³ *New York v. United States*, 505 U.S. 144, 181 (1992); *see also* *Bond v. United States*, 131 S. Ct. 2355 (2011).

¹²⁴ *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *see also* THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).