

3-2011

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Recommended Citation

Chemerinsky, Erwin (2011) "A Defense of the Constitutionality of the Individual Mandate," *Mercer Law Review*. Vol. 62 : No. 2 , Article 9.

Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol62/iss2/9

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A Defense of the Constitutionality of the Individual Mandate

by Erwin Chemerinsky

Under current constitutional law, I do not think this is a close question. It is quite clear that this law is constitutional because it exercises Congress's power. Lest this be taken as the observation of a liberal law professor, Charles Fried—whom no one would call a liberal law professor, former Solicitor General in the Bush Administration—said on Fox television that he had recently been to Australia and purchased a kangaroo hat, and he would eat that hat if the Supreme Court were to declare this law unconstitutional. While I do not find a hat made out of kangaroo skins to be politically correct, and I would be amused to watch Professor Fried eat the hat, I think he is going to be spared this indigestion. He is absolutely right that it is hardly a colorable claim that this law is unconstitutional.

Since 1937, the Supreme Court has struck down no major social program. In fact, you have to go back to when the Supreme Court was invalidating New Deal legislation. I do not think the Supreme Court is going to start here by striking down the health care legislation. In fact, to strike down the health care legislation would require the Supreme Court to pull the threads of many different aspects of post-1937 constitutional law. The temptation might be to say, "Well, there are five conservative Justices; maybe they are not willing to depart from much of post-1937 constitutional law." But remember, so much of the conservative rhetoric over the last several decades has been against judicial activism. It would be an enormous act of judicial activism to strike down this legislation.

I think the real objection to the individual mandate has nothing to do with the scope of Congress's power. It is really an objection to forcing people to buy insurance if they do not want to buy insurance. There is an unarticulated sense that individuals should have a liberty interest to not have health insurance if they do not want to. But not even the strongest opponents of the legislation make that argument, because in post-1937 constitutional law, that is not a colorable argument. The Supreme Court has made it clear in terms of due process that the government can regulate the economy so long as it has a rational basis for doing so. Certainly, Congress has a legitimate interest in making sure that everybody in the country has health care, and it is reasonable to require that everybody either purchase it or pay something to cover the costs.

The reality is everyone is going to need health care at some point in their life. If somebody has a communicable disease, the government can require that it be treated. If somebody is in an automobile accident, they will be taken to the local emergency room and provided treatment. So, requiring that everybody have health insurance is certainly reasonable to meet post-1937 due process requirements.

That, then, is not the basis for the challenge. As Professor Barnett says, the focus of the lawsuits has been on whether or not the individual mandate fits within the scope of Congress's authority. Like Professor Barnett, I want to talk about the Commerce Clause and the Necessary and Proper Clause, but I will come to a very different conclusion.

In terms of the Commerce Clause, I think the one thing that Professor Barnett and I can agree to is the test that the Supreme Court has followed since *United States v. Lopez*⁷² in 1995, and it is one familiar to all of us. The Supreme Court there said that Congress can act under the Commerce Clause in three circumstances. First, Congress can regulate the channels of interstate commerce; second, Congress can regulate the instrumentalities of interstate commerce and persons or things in interstate commerce; and, third, Congress can regulate activities with a substantial effect on interstate commerce.⁷³ The Court clarified that Congress can regulate economic activities which, taken cumulatively, have a substantial effect on interstate commerce.

I want to focus initially, as Professor Barnett does, on the third prong of the test. The one thing that Professor Barnett omits, and which was also omitted by the federal district court in Virginia that struck down the plan, is that the Supreme Court has said that Congress can act under the Commerce Clause so long as it has a rational basis for believing that one of these three requirements is met. So, as to the third prong of the test, in *Gonzalez v. Raich*⁷⁴ the Supreme Court specifically said Congress may act so long as it has a rational basis for believing that it is regulating economic activities that substantially affect interstate commerce.⁷⁵ This tremendously lessens the burden on the government because the rational basis test is so deferential. And I find it striking that when the federal district court in *Virginia v. Sebelius*⁷⁶ granted summary judgment to the challenges, it did not mention this aspect of *Gonzalez v. Raich*. This language of Congress only needing a rational basis is not new to *Gonzalez v. Raich*. It goes back to cases like

72. 514 U.S. 549 (1995).

73. *Id.* at 558-59.

74. 545 U.S. 1 (2005).

75. *Id.* at 2-3.

76. 702 F. Supp. 2d 598 (2010).

*Heart of Atlanta Motel, Inc. v. United States*⁷⁷ and *Katzenbach v. McClung*.⁷⁸

So, the question is whether Congress has a rational basis for believing that an individual mandate is economic activity that has a substantial effect on interstate commerce? Is it economic activity? Professor Barnett, like the federal district court in Virginia, implicitly assumes that economic activity requires that there be an economic transaction. The implicit argument is that Congress can regulate only economic transaction activity, but that is just not so. Take *Gonzalez v. Raich*. There, the Supreme Court said growing a product that is part of a larger crop that is bought and sold in interstate commerce is economic activity.⁷⁹ *Gonzalez v. Raich* changed the law because it broadened what counts as economic activity. Economic activity includes Angel Raich growing marijuana for her own home consumption and use.

In fact, lower courts have consistently recognized, even since *Lopez*, that economic activity does not require an economic transaction. Take as an illustration the Federal Drug Free School Zone Act⁸⁰ that makes it a federal crime to have illegal drugs within 1000 feet of a school. Every federal district court found that this was constitutional, even after *Lopez*. Possessing drugs is economic activity because there is a relationship of drugs to the overall economy. As another example, the federal law prohibiting carjacking was adopted by Congress under its Commerce Clause authority. By definition, there is no economic activity in the sense of a commercial transaction, but every lower court that has considered the federal carjacking law⁸¹ has held it to be constitutional.

From this broad perspective of what counts as economic activity, the individual mandate clearly fits within the definition. Whether a person purchases or does not purchase health care is economic activity. The act of purchasing health care is, by definition, economic activity. Congress, here, is compelling economic activity. Even the choice to not purchase health care is economic activity because if a person makes a choice not to purchase health care, the person is making the economic decision to purchase something else or save the money—it is still economic activity. Put simply, if Angel Raich growing marijuana for her own home consumption is economic activity, then certainly the choice whether to engage in an economic transaction to buy or not buy health care is economic activity as well.

77. 379 U.S. 241 (1964).

78. 379 U.S. 294 (1964).

79. *Raich*, 545 U.S. at 25.

80. 21 U.S.C. § 860 (2006).

81. 18 U.S.C. § 2119 (2006).

The other part of the test is that the activity has to have a substantial effect on interstate commerce. The health care industry is about \$800 billion in the United States economy, and that says that what Congress is doing here clearly does have a substantial effect on interstate commerce. So, just as Angel Raich growing marijuana for her own consumption or Filburn growing wheat for his family to eat is economic activity that Congress can regulate, so is this.

Now, what Professor Barnett kept saying in his presentation and what was featured in the briefs of those challenges is that this law is unprecedented, that Congress for the first time is compelling economic activity. That is simply wrong. Consider, for example, the Civil Rights Act of 1964. Title II requires that hotels and restaurants not discriminate based on race. In other words, hotels and restaurants that do not want to accommodate or serve African customers, who want to refrain from economic transactions, are compelled to engage in an economic transaction. That law is compelling economic behavior, and, as you know, the Supreme Court in *Heart of Atlanta Motel, Inc. v. United States* and *Katzenbach v. McClung* upheld it as constitutional, and in every subsequent Commerce Clause case, the Court has sided with those decisions approvingly.

There are other instances where Congress has compelled economic activity. A case that I think is somewhat relevant here but that has not been cited is *Johanns v. Livestock Marketing Ass'n*.⁸² Congress required that every cow producer pay a \$1.00 fee for every head of cattle into a fund to be used for commercial advertising to encourage beef consumption. Congress was forcing an economic transaction—paying in the money for the purpose of other economic transactions, commercial advertising. The Supreme Court upheld the law as constitutional. Think of the federal pollution control laws,⁸³ all of which were adopted by Congress under the Commerce Clause authority. Every time a business or industry is required to put pollution control devices in, they are forced to purchase the devices and engage in economic activity. So, it is just wrong to say that Congress never compels economic activity.

Professor Barnett invokes *Lopez* and *Morrison*, but this is far different from those cases. *Lopez* was about a gun near a school; *Morrison* was about a sexual assault. Those are far more removed from the American economy than an almost trillion-dollar industry, the health care industry. Here, as I said, there is an economic transaction going on, albeit one that is being forced by Congress.

82. 544 U.S. 550 (2005).

83. 42 U.S.C. §§ 7401-7671 (2006).

I want to address, as Professor Barnett did, a second argument, the Necessary and Proper Clause. Professor Barnett quite correctly says that the Supreme Court has held since the 1940s that the insurance industry is interstate commerce. If that is so, then Congress can regulate the insurance industry to make sure that everyone in the country has health insurance. By definition, I think it would be found to be a legitimate government interest; maybe even a compelling government interest under strict scrutiny. If Congress can do that, then the Necessary and Proper Clause lets Congress take any steps that are reasonably related to carry out that objective.

As recently as June 2010 in *United States v. Comstock*,⁸⁴ the Supreme Court strongly reaffirmed the scope of Congress's authority under the Necessary and Proper Clause. The Supreme Court once more said Congress can take any actions that are reasonably necessary to carry out its authority. Congress can reasonably believe that requiring that every person have health insurance is reasonably necessary in order to achieve its goal of making sure that everybody has health insurance. Congress made elaborate findings that, unless everybody has health insurance or pays a fee, the system will not work. So, I think the Necessary and Proper Clause provides a separate independent basis to find that this is within the scope of Congress's authority. What is striking about this argument is it focuses more on the second prong of the *Lopez* test than the third because the second prong of the test says Congress may regulate activities in interstate commerce. The insurance industry is interstate commerce, and Congress can regulate it under the Necessary and Proper Clause.

There is yet another argument apart from the Commerce Clause, and that is Congress's authority for taxing and spending. Congress has required that everybody purchase health insurance or pay a monthly fee that is going to be collected by the IRS. I think there is a very strong argument that this is a tax rather than a penalty, and as a tax, it becomes permissible. Remember, since 1937 the Supreme Court has struck down no federal tax spending program as exceeding the scope of Congress's authority.

As I said, I think in order for the Supreme Court to find this law unconstitutional, it would have to unravel so much of post-1937 constitutional law, and there is no indication whatsoever that the Supreme Court is ready or willing or likely to do this.

(continued on next page)

84. 130 S. Ct. 1949 (2010).