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A MANDATE FOR MANDATES: IS THE INDIVIDUAL HEALTH INSURANCE CASE A SLIPPERY SLOPE?

Ilya Somin,
George Mason University School of Law

Law and Contemporary Problems,
Forthcoming (Symposium on the individual mandate litigation)

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Ilya Somin
Associate Professor of Law
George Mason University School of Law
3301 Fairfax Dr.
Arlington, VA 22041
isomin@gmu.edu
Ph: 703-993-8069
Fax: 703-993-8124

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Ilya Somin*

INTRODUCTION

The 2010 Affordable Care Act's individual mandate has given rise to one of the most important constitutional disputes in recent decades. The provision in question requires that most Americans purchase health insurance by 2014.[1] Twenty-eight states, the National Federation of Independent Business, and numerous private parties have filed lawsuits arguing that the mandate exceeds Congress' powers under the Constitution.[2] The issue will almost certainly reach the Supreme Court. No matter who wins, the decision is likely to set an important precedent.

Both sides in the mandate litigation have argued that we will be sliding down a dangerous slippery slope if their opponents prevail. Opponents of the mandate argue that a decision in its favor would give Congress unlimited power to impose mandates of any kind. [3] That includes the much-discussed broccoli-purchasing requirement posited by federal district Judge Roger Vinson, author of one of the two district court opinions striking down the mandate. If the mandate is upheld, he explains, "Congress could require that people buy and consume

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[1] §1501(b), 10106, Pub. L. No. 111-148, 124 Stat. 119 (2010).

[2] For some of the most important cases challenging the mandate, see decisions cited in notes _____.

[3] See, e.g., Randy E. Barnett, *If Obamacare's Mandate is Approved Congress Can Require Anything*, Washington Examiner, June 6, 2011 (arguing that upholding the mandate would lead to unlimited congressional power to impose mandates); Ilya Somin, *Why the Individual Health Care Mandate is Unconstitutional*, THE JURIST, May 4, 2011 (same).

broccoli at regular intervals, not only because the required purchases will positively impact interstate commerce, but also because people who eat healthier tend to be healthier, and…. put less of a strain on the health care system."[4] Such slippery slope concerns have been prominently emphasized in three of the four federal court decisions striking down the law.[5]

For their part, defenders of the mandate have advanced their own slippery slope scenarios, claiming that a decision striking down the mandate would imperil major Supreme Court federalism precedents, restore the much-reviled *Lochner v. New York*,[6] and prevent Congress from enacting potentially vital regulatory legislation in the future.[7]

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[4] *Florida ex rel. Bondi v. Dep't Health & Human Services*, 780 F.Supp. 2d 1256, 1289 (N.D. Fla. 2011), rev'd in part and upheld in part *Florida ex rel. Att. General v. Dep't Health & Human Services*, 648 F.3d 1235 (11th Cir. 2011).

[5] *Florida ex rel. Att. General v. Dep't Health & Human Services*, 648 F.3d 1235, 1328 (11th Cir. 2011) (holding that "This economic mandate represents a wholly novel and potentially unbounded assertion of congressional authority"); *Florida ex rel. Bondi* at 1286 (striking down the mandate in part because "[i]f it has the power to compel an otherwise passive individual into a commercial transaction with a third party merely by asserting—as was done in the Act—that compelling the actual transaction is *itself* "commercial and economic in nature, and substantially affects interstate commerce"l…, it is not hyperbolizing to suggest that Congress could do almost anything it wanted"); *Virginia v. Sebelius*, 728 F.Supp.2d 768, 781 (E.D. Va. 2010), rev'd 656 F.3d 253 (4th Cir. 2011) (striking down the mandate in part because "the same reasoning [used to defend the mandate] could apply to transportation, housing, or nutritional decisions. This broad definition of the economic activity subject to congressional regulation lacks logical limitation"). For the only decision striking down the mandate without citing slippery slope concerns, see *Goudy-Bachman v. Dep't of Health & Human Services*, 2011 WL 4072875 (M.D. Pa. Sept. 13, 2011), at *13 (rejecting such concerns because the holding of a decision expanding Congressional power to cover the individual mandate would be "limited" and because "an informed electorate would not countenance frivolous mandates").

[6] 198 U.S. 45 (1905).

[7] *See, e.g.*, Mark Hall, *Commerce Clause Challenges to Health Reform*, 125 U. PENN. L. REV. 1825, 1829 (2011) (arguing that a decision striking down the mandate would foreclose "authority under the commerce power to compel purchases or other actions [that] could well be essential to combat a horrifically lethal pandemic"); Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 21 (2011) (arguing that, if the mandate is invalidated, "the desire to rein in government power can create a slippery slope of its own, to a state of affairs in which collective action problems go unsolved"); Erwin Chemerinsky, *Political Ideology and Constitutional Decision-Making: The Coming Example of the Affordable Care Act*, LAW & CONTEMP. PROBS. (forthcoming, contribution to this symposium), at 15-16 (arguing that a decision striking down the mandate would put at risk various civil rights laws and economic regulations, and concluding that "the invalidation of the Affordable Care Act likely will lead to other laws being vulnerable").: Ian Milhiser, *Worse than Lochner*, 29 YALE L & POL'Y REV. 1 (2011) (arguing that "the ubiquitous lawsuits challenging the Affordable Care Act (ACA) are animated by the same interpretative methodology that characterized the infamous Supreme Court decision concerning child labor laws, *Hammer v. Dagenhart*—a methodology which allows judges to impose novel and extra-textual limits upon Congress's enumerated powers"); Jack Balkin, *Rebuttal: The Constitutionality of an Individual Mandate for Health Insurance*, 158 PENNUMBRA 93, 105 2009, available at http://www.pennumbra.com/debates/debate.php?did=23. (arguing that striking down the mandate would require a "radical restructuring" of post-1937 Tax Clause jurisprudence); Simon Lazarus, *Jurisprudential Shell Game*,

Despite the prominent role of slippery slope arguments on both sides of the case, the extensive academic commentary on the mandate litigation does not yet include anything approaching a comprehensive analysis of this aspect of the dispute. This article seeks to fill the gap in the literature. It examines both sides' slippery slope arguments in detail, assessing their coherence and plausibility.

A legal slippery slope argument has two distinct components: logical and empirical.[8] A logical slippery slope occurs if judges cannot coherently distinguish A from B, for example a health insurance purchase mandate from any other mandate that Congress might enact. For present purposes, it should be noted that a logical slippery slope argument need not concede that A is justifiable in and of itself and is only constitutionally suspect because it leads to B. Rather, the constitutionality of A is dependent on the quality of the reasoning justifying it. If the only available argument in its favor is defective because it inevitably also justifies something clearly unconstitutional, such as B, then A is impermissible in its own right for lack of a sound argument in its favor.

In addition, a logical slippery slope can exist even in a situation where the reasoning justifying A in and of itself justifies B, without the need for further extensions of the argument in later decisions. If, for example, the individual mandate is upheld in a decision that explicitly states that Congress can enact any mandate of any kind, it is still coherent to refer to this as a slippery slope, since upholding A (the individual mandate) has still led a justification of B (all

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NATIONAL LAW JOURNAL, Dec. 20, 2010 (claiming that "[i]f conservative jurists invalidate this linchpin of the most important domestic legislation in perhaps half a century, they will restore *Lochner* - letter, spirit, the whole nine yards."); Wilson Huhn, *Constitutionality of the Patient Protection and Affordable Care Act under the Commerce Clause and the Necessary and Proper Clause*, J. LEGAL MEDICINE (forthcoming), at 12-15 (arguing that challenges to the individual mandate seek to revive both *Lochner* and pre-New Deal restrictions on Congress' Commerce Clause powers).

[8] For this distinction see, Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 381 (1985) ("a persuasive slippery slope argument depends for its persuasiveness upon temporally and spatially contingent empirical facts rather than (or in addition to) simple logical inference").

other mandates). Obviously, the slope in this scenario is slipperier and steeper than in a situation where the permissibility of B is not fully clear until after one or more additional cases have been decided.

Many slippery slope arguments proceed on the assumption that the lack of a logical distinction between A and B is enough to prove that a serious danger exists. However, this is not always true. Even if B logically flows from A, future judges might nonetheless reject B, even at the cost of logical contradiction.[9] In addition, to the extent that a decision upholding B requires the enactment of new statutes by the legislature, it might not happen because political constraints prevent such enactments from occurring. For these reasons, a logical slippery slope does not necessarily pose a severe danger in and of itself.[10]

In Part I, I consider the logical and empirical elements of the slippery slope arguments against the individual health insurance mandate. From the standpoint of logic, I conclude that the federal government's arguments really do lead to an unlimited congressional power to impose virtually any mandate, save a few that are precluded by the individual rights provisions of the Constitution. The same result occurs under all three of the government's major arguments for the constitutionality of the mandate: claims that the mandate is authorized by the Commerce Clause, the Tax Clause, and the Necessary and Proper Clause.

The empirical aspect of the issue is more difficult to assess. It depends in part on future political dynamics that are hard to predict. Nevertheless, there is a substantial likelihood that Congress will take advantage of an unconstrained power to impose mandates for the purpose of

[9] *Cf.* Eugene Volokh, *Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1, 58-60 (2003) (discussing workings of judicial-judicial slippery slopes and noting impact of factors other than logic).

[10] Nonetheless, a logical slippery slope could still be important even if it has no empirical effects. If upholding A really does require upholding B, that might undercut the logical soundness of the argument for A, if it seems highly implausible that the relevant constitutional text allows B. I do not pursue this possibility in the present article.

benefiting favored interest groups. Such mandates could be made more palatable to public opinion by posing as public health measures or efforts to strengthen the economy. They could be promoted by classic "Baptist-bootlegger coalitions," combining public health advocates and industry interest groups.[11] Such a coalition can effectively portray an effort to benefit an influential interest group as a measure promoting the public good of the general public.

Part II provides a similar assessment of slippery slope arguments put forward by defenders of the mandate, focusing on fears that striking it down would lead to the restoration of *Lochner*, the unraveling of precedents upholding major post-New Deal government programs, and prevent Congress from enacting important regulatory measures in the future.

From a logical point of view, the validity of these fears depends on the reasoning adopted by the Supreme Court in a future decision striking down the mandate. In theory, the Court could do so in a decision that also overrules or severely limits important precedents. However, such logical implications do not arise from the most likely path by which the Court might strike down the mandate: holding that Congress cannot use the Commerce Clause and Necessary and Proper Clause to regulate "inactivity," defined as imposing mandates merely on the basis of one's presence in the United States. Such a decision would leave intact all existing precedents and major government programs. It would not even come close to restoring *Lochner*, which restricted a wider range of regulatory legislation and affected state laws as well as federal ones. It is also unlikely to seriously impede future efforts to combat epidemics or other emergencies.

From an empirical point of view, the pro-mandate slippery slope scenarios are also, for the most part, unlikely. Regardless of the logical implications of doctrine, federal courts are unlikely to strike down legislation that has widespread popular and elite support. They are also

[11] The theory of the Bootlegger-Baptist coalition was introduced by Bruce Yandle, *Bootleggers and Baptists: The Education of a Regulatory Economist*, 7 REGULATION 12 (1983); see also Yandle, *Bootleggers and Baptists in Retrospect*, 22 REGULATION 5 (1999).

unlikely to impede measures that Congress, the president, and majority public opinion consider necessary to prevent a major emergency. It is, however, possible that a decision striking down the mandate would lead to incrementally more vigorous enforcement of structural limits on congressional power, at the margin. Such enforcement is highly unlikely to strike down major regulatory measures that enjoy widespread support. It could, potentially invalidate minor or highly unpopular laws similar to those the Supreme Court previously struck down in *United States v. Lopez* and *United States v. Morrison*.[12] Ironically, the momentum generated by a decision striking down the mandate could be greater if mandate defenders' claims that it would represent a major retrenchment in constitutional doctrine become widely accepted. By contrast, a decision striking down the mandate would have less precedential effect if jurists endorse the anti-mandate plaintiffs' view that this is an unusual extreme case that goes beyond the bounds of current precedent.

Slippery slope considerations are not enough resolve the individual mandate cases by themselves. Sound constitutional reasoning might require courts to uphold the mandate even if the slippery slope concerns of opponents are valid. Conversely, courts could strike down the mandate on grounds unrelated to slippery slopes. But the prominence of slippery slope arguments in these cases makes it important to assess their soundness.

I. THE SLIPPERY SLOPE CASE AGAINST THE MANDATE.

The slippery slope case against the health insurance mandate comes down to a simple proposition: if the mandate is upheld, Congress will have virtually unlimited power to impose mandates of other kinds.

[12] *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

The federal government argues that the mandate is authorized by the Commerce Clause, the Tax Clause, and the Necessary and Proper Clause. All three arguments logically imply unlimited federal authority to impose virtually any other mandate, especially one that has economic effects of some kind. The only exceptions are those barred by individual rights provisions of the Constitution. In addition, it seems likely that Congress and various interest groups will try to take advantage of this slippery slope in practice.

A. The Mandate as a Logical Slippery Slope.

Defenders of the mandate have relied on the Commerce Clause, the Tax Clause, and the Necessary and Proper Clause to justify the mandate. Some advocates of the mandate claim that these arguments do not lead to unconstrained congressional authority to impose mandates. They contend that health insurance is in some way a special case. Others admit that their reasoning does lead to unlimited congressional authority to impose mandates. The latter have the better of the disagreement.

1. The Commerce Clause.

The federal government has relied most heavily on its argument that the mandate can be upheld under the Commerce Clause.[13] This is also the basis for all of the federal court decisions upholding the mandate so far.[14] Several court decisions supporting the mandate and some

[13] In all the cases challenging the mandate, the federal government has devoted the lion's share of it's briefs to the Commerce Clause argument, and put it first in order. See, e.g., Virginia v. Sebelius, Appellants' Br., available at http://aca-litigation.wikispaces.com/file/view/U.S.+opening+brief.pdf (putting the Commerce Clause issue first and devoting the majority of the brief to it); Florida v. HHS, Appellants' Br., available at http://aca-litigation.wikispaces.com/file/view/U.S.+opening+brief.pdf (same); Thomas More Law Center v. Obama, Appellees' Br., available at http://aca-litigation.wikispaces.com/file/view/U.S.+brief.pdf (same).

[14] See *Thomas More Law Center v. Obama*, 2011 WL 2556039 at *9-15 (6th Cir. June 29, 2011); *Thomas More Law Center v. Obama*, 720 F.Supp. 2d 882, 890-94 (E.D. Mich. 2010), *aff'd* , 2011 WL 2556039; *Mead v. Holder*, 766 F.Supp. 2d 16, 29-34 (D.D.C. 2011), *aff'ed Seven-Sky v. Holder*, (D.C. Cir. Nov. 8, 2011), slip op available

academic commentators argue that the Commerce Clause rationale for the mandate falls short of allowing blank check for future mandates. In effect, they contend that health insurance is a special case. Unfortunately, it turns out to be a lot less special than initially meets the eye.

The Commerce Clause gives Congress authority to regulate "Commerce . . . among the several states." [15] Since the 1930s, a series of Supreme Court decisions have greatly expanded Congress' Commerce Clause authority. These rulings allow the federal government to regulate almost any "economic activity."[16] But the Supreme Court has never addressed the question of whether the Commerce Clause can be used to regulate "inactivity," or whether it can be used to impose economic mandates simply on the basis of residence in the United States.

The most expansive Supreme Court Commerce Clause decision to date was its 2005 ruling in *Gonzales v. Raich*,[17] which held that Congress had the power to ban possession of medical marijuana that had never crossed state lines or been sold in any market. *Raich* was an extremely dubious decision that pushed congressional power far beyond its constitutional limits. But even that opinion did not go far enough to justify the individual mandate. In *Raich*, the Court ruled that Congress could ban the possession of medical marijuana because the latter qualifies as "economic activity," defined as anything that involves "production, distribution, and consumption of commodities."[18] People without health insurance are not, by virtue of that status, producing, consuming, or distributing a commodity of any kind. To the contrary, they have chosen *not* to do any of these things. Thus, despite its extremely broad interpretation of

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athttp://www.cadc.uscourts.gov/internet/opinions.nsf/055C0349A6E85D7A852794200579735/$file/11-5047-1340594.pdf ; *Liberty Univ., Inc. v. Geithner,* 753 F.Supp. 2d 611, 630-35, (W.D. Va., 2010).

[15] U.S. CONST. Art. I, § 8 cl. 3.

[16] See Gonzales v. Raich, 545 U.S. 1, 22-27 (2005) (summarizing this jurisprudence and holding that Congress has virtually unconstrained authority over "economic activity").

[17] 545 U.S. 1 (2005).

[18] *Raich*, 545 U.S. at 25-26 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966))

Congress' Commerce Clause authority, *Raich* does not definitively determine the outcome of the mandate case.

Some defenders of the law claim that the individual mandate is similar to federal laws banning racial discrimination by businesses such as motels and restaurants.[19] But federal anti-discrimination laws apply only to preexisting businesses already engaged in commercial activity in the relevant industry.[20] By contrast, uninsured individuals are not businesses and, by definition, are *not* participating in the insurance industry. The civil rights laws do not require anyone to open up a business or start hiring employees. They merely forbid discrimination by those who do.

Because even the most expansive previous Supreme Court Commerce Clause decisions do not directly address the question of whether Congress can regulate inactivity, mandate opponents have focused on this point as the central element of their case. Supporters, in turn, have come up with several responses. Each of them, however, logically leads to unconstrained congressional power to impose mandates.

a. Arguments that reject the distinction between activity and inactivity.

Some arguments for the individual mandate simply reject the relevance of the distinction between activity and inactivity. In the recent Sixth Circuit case upholding the mandate, Judge Jeffrey Sutton and Judge Boyce Martin took this approach, ruling that the Commerce Clause

[19] See, e.g., Erwin Chemerinsky, *Health Care Reform is Constitutional*, POLITICO, Oct. 23, 2009, available at http://www.politico.com/news/stories/1009/28620.html,

[20] See,e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding regulation of discrimination against customers of a commercial restaurant); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding federal ban on discrimination against customers of a hotel serving interstate travelers). These cases are cited as justifying the constitutionality of the health insurance mandate in Chemerinsky, *supra* note 2.

gives Congress the power to regulate inactivity on the same basis as "activity."[21] This reasoning readily leads to unlimited congressional power to impose mandates. Under current precedent, Congress can regulate any activity that it has a rational basis for believing that it affects interstate commerce, in the aggregate.[22] That, of course, is true of virtually any activity of any kind, especially any economic transaction.[23] And, under *Gonzales v. Raich*, virtually any noneconomic activity can easily be regulated as part of a "broader regulatory scheme."[24]

If the same logic is applied to inactivity, it can be used to justify any mandate of any kind. Certainly, any failure to purchase a product has some substantial economic effect, at least when combined with similar failures by other people. This is true of failures to purchase broccoli, failures to purchase cars, failures to purchase movie tickets, and so on. Each of these choices affects the economy and leaves producers worse off than they would be if more people bought their products.

Even failure to engage in noncommercial activity nearly always has similar effects. For example, a mandate requiring people to eat healthy food and exercise daily can be justified on the grounds that it would increase the demand for health food and gym memberships. Moreover, a population that eats a healthy diet and exercises regularly is likely to be more economically productive, thereby creating yet another "substantial effect" on interstate commerce that can be

[21] *Thomas More Law Center v. Obama*, 2011 WL 2556039 at *14 (holding that "the text of the Commerce Clause does not acknowledge a constitutional distinction between activity and inactivity, and neither does the Supreme Court… As long as Congress does not exceed the established limits of its Commerce Power, there is no constitutional impediment to enacting legislation that could be characterized as regulating inactivity"); id. at *27 (Sutton, J., concurring) ("Does the Commerce Clause contain an action/inaction dichotomy that limits congressional power? No").
[22] *Raich*, 545 U.S. at 24-29.
[23] I have made this argument in some detail in Ilya Somin, Gonzales v. Raich: *Federalism as a Casualty of the War on Drugs*, 15 CORNELL J. L. & PUB. POL'Y 507, 513-16, 519-21 (2006) (symposium on the War on Drugs).
[24] Id. at 516-18.

used to justify a wide range of mandates.[25] Eating broccoli, for example, has a variety of health benefits that might reduce the cost of health care.[26]

Interestingly, the most recent decision upholding the mandate under the Commerce Clause openly concedes that doing so opens the door to virtually all other purchase mandates. In *Seven-Sky v. Holder,* Judge Laurence Silberman of the D.C. Circuit "acknowledge[d] some discomfort with the Government's failure to advance any clear doctrinal principles limiting congressional mandates that any American purchase any product or service in interstate commerce," and admitted that the court too could not see any "apparent" limits.[27] He considered this to be a "troubling, but not fatal" problem with the statute.[28]

b. Defining "economic decisions" as economic activity.

Instead of rejecting the activity-inactivity distinction entirely, some of the rulings upholding the mandate instead argue that the concept of "economic activity" includes all economic decisions. In his district court decision upholding the mandate in *Thomas More Law Center v. Obama,* Judge George Caram Steeh argued that the mandate is constitutional under the Commerce Clause because deciding not to purchase health insurance is an "economic decision."

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[25] *See, e.g.*, John H. Kerr & Marjolein C.H. Vos, *Employee Fitness Programmes, Absenteeism and General Well-Being*, 7 WORK & STRESS 179 (1993) (describing evidence that improved employee health increases productivity).
[26] See, e..g., Kaumudi J. Joshipura, et al., *Fruit and Vegetable Intake in Relation to Risk of Ischemic Stroke,* 282 J. AM. MEDICAL ASS'N 1233 (1999) (eating broccoli reduces stroke risk); Martha Slattery, et al., *Carotenoids and Colon Cancer,* 71 AM. J. CLINICAL NUTRITION 575 (2000) (eating broccoli reduces risk of colon cancer); Lisa Chasen-Taber, et al., *A prospective study of carotenoid and vitamin A intakes and risk of cataract extraction in US women* 70 AM. J. CLINICAL NUTRITION 509 (1999) (eating broccoli reduces risk of cataracts).
[27] *Seven-Sky*, slip op at 33.
[28] Id. In his dissenting opinion arguing that the court lacked jurisdiction to hear the case, Judge Brett Kavanaugh also emphasized that the Commerce Clause argument for the mandate has no limits. See id. at 61 (Kavanaugh, J., dissenting) ("[D]espite the Government's effort to cabin its Commerce Clause argument to mandatory purchases of health insurance, there seems no good reason its theory would not ultimately extend as well to mandatory purchases of retirement accounts, housing accounts, college savings accounts, disaster insurance, disability insurance, and life insurance, for example. We should hesitate to unnecessarily decide a case that could usher in a significant expansion of congressional authority with no obvious principled limit.")

"Economic decisions," he asserted, include decisions *not* to engage in economic activity.[29] In *Mead v. Holder*, District of Columbia case upholding the mandate, Judge Gladys Kessler argued that "[m]aking a choice is an affirmative action, whether one decides to do something or not do something."[30] Similarly, Virginia district Judge Norman Moon concluded that "decisions to pay for health care without insurance are economic activities" in part because they are "economic decisions" whose "total incidence … has a substantial impact on the national market for health."[31]

This approach would allow the Commerce Clause to cover any choice of any kind. Any decision to do anything is unavoidably a decision *not* to use the same time and effort to engage in economic activity that would have an effect on the national economy. If I choose to spend an hour sleeping, I necessarily choose not to spend that time working, buying products, or purchasing health insurance. The "total incidence" of similar "economic decisions" by millions of people undeniably has a "substantial impact" on numerous "national markets."[32] Under this logic, the Commerce Clause authorizes virtually any mandate of any kind. For example, Congress could force workers to get up earlier in the morning so that they would spend more time on the job. Decisions to sleep late clearly have a substantial impact on the national market for labor and the products it produces. As Judge Roger Vinson explains, "There is quite literally no decision that, in the natural course of events, does not have an economic impact of some sort. The decisions of whether and when (or not) to buy a house, a car, a television, a dinner, or even a morning cup of coffee also have a financial impact that — when aggregated with similar

[29] *Thomas More Law Center*, 720 F.Supp. 2d at 893-94.
[30] *Mead*, 766 F.Supp.2d at 36.
[31] *Liberty University*, 753 F.Supp. 2d at 633-34.
[32] Id.

economic decisions — affect the price of that particular product or service and have a substantial effect on interstate commerce."[33]

Judge Kessler's opinion takes the "economic decisions" logic even further, suggesting that Congress has the power to regulate "decision-making" because it is "mental activity."[34] Under her reasoning, the Commerce Clause authorizes Congress to regulate thought as well as action and inaction. Thinking of any kind is "mental activity" too.

An alternative variant of the "economic decisions" argument is the claim that, even if the individual mandate were upheld, Congress could still be denied the power to impose "noneconomic" mandates.[35] Professor Neil Siegel argues that "[a] mandate is noneconomic, as opposed to economic, when Congress is attempting to regulate something other than a market through the mandate. For example, if the Court were to uphold the minimum coverage provision, it would remain beyond the scope of the commerce power for Congress to require individuals to possess firearms in their homes (or in school zones) on the ground that such possession, in the aggregate, substantially affects interstate commerce."[36] The problem with this line of reasoning that virtually any mandate can be characterized as an effort to regulate a market. Similarly,

A mandate requiring individuals to keep guns in their homes would certainly have a substantial effect on the market for firearms, and could be justified as an effort to stimulate that market. At the very least, pretty much any purchase mandate would surely qualify as an "economic" mandate under Siegel's reasoning.

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[33] *Florida ex rel Bondi*, 780 F. Supp. 2d at 1293.
[34] *Mead*, 766 F.Supp.2d at 36.
[35] Neil Siegel, *Four Constitutional Limits that the Individual Mandate Respects*, CONSTITUTIONAL COMMENTARY (Forthcoming), at 7-10, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1930249.
[36] Id. at 10.

c. Is Health Insurance a Special Case?

Perhaps the slippery slope logic of broader arguments for the individual mandate can be avoided by positing that health insurance is a special case, thereby providing a rationale for the insurance mandate that would not apply to most other markets. The federal government claims that forcing people to purchase health insurance actually does regulate economic activity because everyone eventually uses health care in some form. This supposedly unique circumstance has been emphasized in virtually every decision upholding the mandate so far.[37]

As Judge Steeh puts it, people who choose not to buy health insurance are making "an economic decision to try to pay for health care later," using some other means of payment.[38]

The fact that most people eventually use health care does not differentiate health insurance from almost any other market of any significance. If one defines the relevant "market" broadly enough, it is easy to characterize any decision not to purchase a good or service exactly the same way. The government does not argue that everyone will inevitably use health *insurance*. Instead, they define the relevant market as "health *care*." The same frame-shifting works for virtually any other mandate Congress might care to impose. As Judge Henry Hudson

[37] *Seven-Sky*, slip op. at 33 (noting that "the health insurance market is a rather unique one, both because virtually everyone will enter or affect it, and because the uninsured inflict a disproportionate harm on the restof the market as a result of their later consumption of health care services"); *Thomas More Law Center*, 2011 WL 2556039 at *12 (emphasizing the importance of the fact that "Virtually everyone requires health care services at some point"); *Mead*, 766 F.Supp. at 37 (emphasizing " the inevitability of individuals' entrance into th[e health care] market"); *Liberty Univ.*, 753 F.Supp.2d at 633–34 ("Nearly everyone will require health care services at some point in their lifetimes, and it is not always possible to predict when one will be afflicted by illness or injury and require care."); *Thomas More Law Ctr.*, 720 F.Supp.2d at 894 ("The health care market is unlike other markets. No one can guarantee his or her health, or ensure that he or she will never participate in the health care market.... The plaintiffs have not opted out of the health care services market because, as living, breathing beings ... they cannot opt out of this market.")

[38] *Thomas More Law Center*, 720 F.Supp. 2d at 791.

pointed out in the Virginia district decision striking down the mandate, "the same reasoning could apply to transportation, housing, or nutritional decisions."[39]

Consider the famous example of the broccoli mandate raised by Judge Roger Vinson in the Florida case.[40] Not everyone eats broccoli. But everyone inevitably participates in the market for food. Therefore, a mandate requiring everyone to purchase and eat broccoli would be permissible under the federal government's argument. The same goes for a mandate requiring everyone to purchase General Motors cars in order to help the auto industry. There are many people who don not participate in the market for cars. But just about everyone participates in the market for "transportation." We all move from place to place one way or another. Even a person who walks everywhere she goes probably purchases shoes in order to facilitate her movement. How about a mandate requiring all Americans to see the most recent Harry Potter movie? After all, just about everyone participates in some way in the market for "entertainment."

In *Mead*, Judge Kessler argued that health care is special for a different reason: the fact that providers are required to provide emergency services to the uninsured, which is not true of most other markets.[41] But why is that difference constitutionally relevant? The answer seems to be that failure to purchase thereby has adverse economic effects on producers.

Put that way, of course, failure to purchase health insurance turns out to be no different from failure to purchase any other product. Any time someone fails to purchase a product, be it cars, movie tickets, or broccoli, producers are made economically worse off than they would be

[39] *Virginia v. Sebelius*, 728 F.Supp.2d at 781; see also *Seven-Sky*, slip op. at 61 (Kavanaugh, J., dissenting) (noting that this theory "extend as well to mandatory purchases of retirement accounts, housing accounts, college savings accounts, disaster insurance, disability insurance, and life insurance, for example."); Florida ex rel. Bondi, 780 F. Supp.2d at 1289 (noting that "there are lots of markets—especially if defined broadly enough—that people cannot "opt out" of. For example, everyone must participate in the food market.").
[40] See note _____ and accompanying text.
[41] *Mead*, 766 F.Supp. 2d at 36-37.

if the potential buyer had made a different decision. This is true regardless of whether the producers must provide services to some consumers for free or not. At most, the latter condition exacerbates the negative impact on producers. But all sorts of other market conditions and government regulations can negatively affect producers as well. It is not clear why a free service mandate has a special constitutional status that is denied to other circumstances that negatively affect producer profits. If a million people choose not to buy American-made cars, that surely harms Ford and General Motors far more than if they are required to provide free cars to a much smaller number of people.

In addition to claiming that health care is unique based on one or two specific factors, the federal government also sometimes claims that it is unique because of a combination of several factors, such as the shifting of costs from the uninsured to the insured, the unpredictability of health care expenses, and the important role of health care in the economy as a whole, as well as the inevitably of using health care and federal mandatory service requirements.[42]

In one sense, it is surely possible to find some attribute or combination of attributes of the mandate case that make it genuinely unique. For example, the Court could rule that purchase mandates of this type can only be imposed in statutes enacted in March 2010 that include the words "Affordable Care Act" in their official names.

However, in order to establish a viable legal rule, the Court will have to not only find something unique about the individual mandate, but, as the Eleventh Circuit puts it, explain why

[42] See, e.g., *Florida ex rel Atty. General*, 648 F.3d at 1295 (noting that "the government submits that health care and health insurance are factually unique and not susceptible of replication due to: (1) the inevitability of health care need; (2) the unpredictability of need; (3) the high costs of health care; (4) the federal requirement that hospitals treat, until stabilized, individuals with emergency medical conditions, regardless of their ability to pay; (5) and associated cost-shifting").

this factor is "constitutional[ly] relevan[t]."[43] Why is this particular fact or combination of facts relevant under the Commerce Clause such that a health insurance mandate passes scrutiny, but a broccoli mandate or car purchase mandate does not? For all of the factors listed above, the only possible answer seems to be that they increase the impact of not having health insurance on the economy, thereby also affecting interstate commerce. For example, cost-shifting could lead to economically harmful free-riding by the uninsured,[44] the unpredictability of health expenses increases the negative economic effect of serious health problems that afflict the uninsured, and so on. But, as already noted,[45] failure to purchase any product of any kind also has a substantial effect on the economy, at least when aggregated with similar decisions by millions of other consumers.

Perhaps the relevant distinction is that failure to purchase health insurance has a bigger economic effect than failure to purchase other products, due to the unusual characteristics of the health care market cited by the government. That, of course, is by no means obvious. Depending on how many people fail to purchase a given product, it could be that their decisions have as much or more of an economic effect than failure to get health insurance. The federal government cites a figure of $43 billion per year as the estimated cost of unpaid for medical care consumed by the uninsured.[46] That is unquestionably a large amount of money. But it is actually only a tiny fraction of the US economy, less than 0.003% of US GDP for 2010.[47] Even if the individual health insurance mandate completely eliminates this problem, it is easy to imagine other

[43] Id.
[44] See, e.g., Siegel, supra note _____.
[45] See nn. and accompanying text.
[46] *Florida ex rel Atty. General*, 648 F.3d at 1245 (citing figure provided by the federal government).
[47] The US 2010 GDP is estimated to be about 14.66 trillion dollars. COUNCIL OF ECONOMIC ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 2011 188 (2011) .

purchase mandates that have a comparable or larger effect on the economy, especially if (as in the case of the health insurance mandate) millions of people are covered by them.

In any event, it is unlikely that the Supreme Court will instruct lower courts to assess the constitutionality of mandates based on how great their economic impact is relative to that of the health insurance mandate. Current doctrine holds that courts "[w]e need not determine whether [the regulated] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding."[48] If the individual mandate is upheld, the same principle is likely to be applied to mandates on inactivity. The Court is highly unlikely to adopt a rule that requires lower courts to precisely measure the magnitude of a mandate's economic effect. And it is hard to imagine any mandate for which there is not a "rational basis" for believing that it would have a "substantial effect" on interstate commerce. Certainly, that is likely to be true for virtually any purchase mandate. And even non-purchase mandates are likely to have such an effect, especially if they impact a substantial number of people.[49]

2. The Tax Clause

The federal government also contends that the mandate is constitutional because it is a tax authorized by Congress' power to impose taxes for the "general Welfare." With one exception, every federal judge who has ruled on this claim so far has rejected it, including three

[48] *Raich*, 545 U.S. at 22.
[49] See discussion above.

who concluded that the mandate is constitutional under the Commerce Clause.[50] They ruled that the mandate is a financial penalty for refusing to comply with a federal regulation.

As recently as 1996, the Supreme Court reiterated the crucial distinction between a penalty and a tax. It ruled that "[a] tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government," while a penalty is "an exaction imposed by statute as punishment for an unlawful act" or - as in the case of the individual mandate - an unlawful omission.[51] The individual mandate is a clear example of a penalty, where Congress requires people to purchase health insurance, and then punishes them with a fine if they fail to comply. In September 2009, President Obama himself noted that "for us to say that you've got to take a responsibility to get health insurance is absolutely not a tax increase."[52]

If this emerging judicial consensus is reversed and the mandate qualifies as a tax merely because it punishes violators with a fine, then Congress could require Americans to do almost anything on pain of having to pay a fine if they refuse. It could certainly use this power to force citizens to buy virtually any product, including broccoli, General Motors cars, or anything else.

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[50] *Florida ex rel. Att. General v. Dep't Health & Human Services*, 648 F.3d at 1313-23 (holding that the mandate is a penalty not a tax);, *Thomas More Law Center v. Obama*, 2011 WL 2556039 at *16-22 (6th Cir. June 29, 2011) (Sutton, J., concurring) (holding that the mandate is not a tax); id. at *34 (Graham, J., dissenting, same); *Virginia ex rel. Cuccinelli*, 728 F.Supp. 2d at 788 (concluding that the mandate "is, in form and substance, a penalty as opposed to a tax"); *Mead*, 766 F.Supp. 2d at 40-41 (ruling that the individual mandate is a penalty, not a tax); *Liberty Univ*, 753 F. Supp. 2d at 629 ("I conclude that the better characterization of the exactions imposed under the Act for violations of the employer and individual coverage provisions is that of regulatory penalties, not taxes."); *Florida ex rel. McCollum v. U.S. Dep't. of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1140 (N.D. Fla. 2010) (holding "that Congress imposed a penalty and not a tax"). For the sole exception, see *Liberty Univ. v. Geithner*, 2011 WL 3962915 (4th Cir. Sept. 8, 2011) at *16-21 (Wynn, J., concurring). The majority opinion in this case ruled that the mandate was a tax as defined by the Anti-Injunction Act, but emphasized that the Act's definition of "tax" was broader than that of the Constitution. Id. at *5-15.

[51] *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224-25 (1996) (quoting *New Jersey v. Anderson*, 203 U.S. 483, 492 (1906), and *United States v. New York*, 315 U.S. 510, 515 (1942)).

[52] Quoted in Somin, *Why the Individual Mandate is Unconstitutional*.

This slippery slope cannot be avoided by pointing to the fact that the fine imposed by the individual mandate is incorporated into the Internal Revenue Code[53] and collected by the IRS.[54] A fine for violating any other mandate – including the broccoli mandate or the car mandate - could be structured in exactly the same way without thereby imposing any meaningful constraints on congressional power. Similarly, congressional power to impose mandates will remain unconstrained if it is limited to the imposition of fines that collect at least some revenue.[55] Any fine that is enforced at least once can pass such a test. For these and other reasons, at least one leading academic defender of the tax argument concedes that it gives Congress virtually unlimited power to impose mandates, arguing only that it might be constrained by political factors.[56]

The tax argument does have a built-in constraint in so far as it is limited to mandates enforced by monetary penalties, as opposed to criminal punishments. However, a heavy fine can still be an onerous punishment. Moreover, the subject matter potentially covered by the mandates remains unconstrained, even if there is a restriction on the type of punishment that can be meted out to violators.

3. The Necessary and Proper Clause.

[53] See 26 U.S.C. § 5000(A).
[54] The federal government has emphasized these points in its defense of the Tax Clause argument. See, e.g.,); Florida v. HHS, Appellants' Br., at 50-51, 54, available at http://aca-litigation.wikispaces.com/file/view/U.S.+opening+brief.pdf
[55] This possible limitation is suggested in id. at 50.
[56] *See* Brian D. Galle, *Conditional Taxation and the Constitutionality of Health Care Reform*, 120 YALE L. J. ONLINE 27, 34-36 (2010); for a critique of Galle's argument, see Erik Jensen, *The Individual Mandate and the Taxing Power*, N. KENTUCKY L. REV. (forthcoming) (symposium). For the argument that the mandate is not authorized by the Tax Clause even if it is a tax, because it would be an unconstitutional unapportioned "direct tax," see Steven J. Willis & Nakku Chung, *Constitutional Decapitation and Healthcare*, 128 TAX NOTES 169, 187 (2010)

The Necessary and Proper Clause argument for the mandate similarly lacks constraints. The Clause gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution" other powers Congress is granted by the Constitution.[57] Since the iconic case of *M'Culloch v. Maryland*, the Supreme Court has defined "necessary" broadly to include anything that is "useful or convenient" for the execution of any federal power.[58] In its recent decision in *United States v. Comstock*, the Court expanded the definition of necessary even further, ruling that it encompasses anything that "constitutes a means that is rationally related to the implementation of a constitutionally enumerated power."[59] Under this broad definition of "necessary," the mandate probably qualifies. The federal government argues that requiring people to purchase health insurance is needed to ensure that people will not wait to buy health insurance until after they get sick, something they may be incentivized to do because the health care bill forbids insurance companies from turning away customers with preexisting conditions. However, it is possible to argue that the mandate is not "necessary" even in this broad sense because it is not needed to execute a regulation of commerce or economic activity, but merely to counteract a negative effect of one of Congress' own regulations. This position was adopted by Judge Roger Vinson in his district court opinion striking down the mandate.[60]

Even if the mandate is "necessary," it may not be "proper." In cases such as *Printz v. United States*, the Court has emphasized that these are two separate requirements imposed by the

[57] U.S. Const. Art. I, § 8, cl. 18.
[58] *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819).
[59] *United States v. Comstock*, 130 S.Ct. 1949, 1956 (2010). For discussion of this point, see Ilya Somin, *Taking Stock of* Comstock*: The Necessary and Proper Clause and the Limits of Federal Power*, 2009-10 CATO SUPREME COURT REV. 239, 242-43.
[60] *Florida ex rel. Bondi*, 780 F.Supp. 2d at 1297 ("rather than being used to implement or facilitate enforcement of the Act's insurance industry reforms, the individual mandate is actually being used as the means to avoid the adverse consequences of the Act itself").

Clause. Congressional legislation must meet both.[61] Critics of the individual mandate have argued that it should be struck down as "improper" even if it is unnecessary.[62]

If the Supreme Court rejects Judge Vinson's analysis of necessity and adopts a definition of "proper" broad enough to encompass the individual mandate, the same logic would justify almost any other requirement Congress might impose on individuals. Pretty much any mandate could be defended as "useful or convenient" for the execution of one congressional power or another. Since the Court has ruled that the Commerce Clause gives Congress the power to regulate almost any "economic activity,"[63] any purchase mandate will certainly. Such a mandate can always be portrayed as part of an attempt to regulate the relevant market. A broccoli mandate, for example, would be upheld as an effort to regulate the market in food. Similarly, a car purchase mandate can be justified as an effort to regulate the market in cars or transportation.

Some defenders of the individual mandate suggest that the Necessary and Proper Clause can only be used to justify a mandate that is genuinely part of a broader economic regulatory scheme as opposed to ones that are "freestanding measures for increasing desirable consumer behavior," such as the broccoli mandate.[64] But any such "freestanding" measure can be portrayed as part of a broader effort to strengthen the economy by improving public health or an effort to regulate the industry in question (such as the food industry). Even if the measure in question is enacted as a separate stand-alone bill, it can be defended as an adjunct to previous federal efforts to control health care markets or the improve the economy. Such arguments may not be enough

[61] *Printz v. United States*, 521 U.S. 898, 923-24 (1997) (holding that a law that is not "proper" can exceed the scope of Congress's power under the Necessary & Proper Clause)
[62] See, e.g., Randy Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 NYU J. L. & LIBERTY 581, 621-34 (2010); Somin, *Why the Individual Health Care Mandate is Unconstitutional.*
[63] See, e.g., *Raich*, 545 U.S. at 25-27.
[64] Hall, supra note _____ at 1866.

to pass demanding means-ends scrutiny. But current jurisprudence requires only that the means chosen be "rationally related to the implementation of a constitutionally enumerated power."[65] By that standard, the broccoli mandate – and virtually any other mandate – will easily pass muster.

4. Collective Action Federalism.

In an important recent article, Robert Cooter and Neil Siegel have proposed a possible way to uphold the individual mandate without necessarily creating an unconstrained slippery slope for other mandates.[66] Cooter and Siegel argue that that the congressional powers enumerated in Article I, Section 8 of the Constitution should be interpreted in light of the goal of giving Congress the authority it needs to address collective action problems among the states.[67] A collective action problem arises when members of a group desire a good, but have insufficient incentive to contribute to its production, because they can instead try to free ride on the efforts of others.[68] This is likely to occur in cases where the good in question is a "public good" for the group in question, one for which there is no way to prevent group members from consuming it even if they have not contributed to its provision.

Cooter and Siegel's argument would give Congress the power to enact mandates (and other legislation) in cases where it is needed to solve collective action problems arising between state governments, and otherwise deny it. This would potentially avoid a slippery slope towards

[65] *Comstock*, 130 S.Ct. at 1956.
[66] Robert Cooter & Neil Siegel, *Collective Action Federalism*, 63 STAN. L. REV. 115, 159-80 (2010); see also Siegel, *Free-Riding on Benevolence, Collective Action Federalism and the Individual Mandate* Law & Contemp. Probls. (forthcoming) (applying the theory to the individual mandate).
[67] Cooter & Siegel, supra note ___ .
[68] For basic expositions of collective action theory, see, e.g., MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (rev. ed. 1971); RUSSELL HARDIN, COLLECTIVE ACTION (1982).

unlimited federal power to enact mandates. A federal mandate that did not resolve a collective action problem could still be invalidated by courts.

Cooter and Siegel are agnostic on the question of how much deference courts should grant to congressional determinations that a collective action problem exists.[69] If a mere "plausible" argument for the existence of a collective action problem is sufficient to trigger judicial deference, then in practice Congress would still be able to enact virtually any mandate.[70] The federal government could always posit that some sort of collective action problem inhibits the enactment of any mandate that has enough political support to get through Congress. Indeed, the very fact that many states had not yet enacted a mandate, or not enacted a strong enough version of it, could be cited as evidence for the "plausible" assumption that a collective action problem exists.

Under this minimal level of scrutiny, even the much-discussed broccoli mandate could probably be upheld. Increasing consumption of broccoli might lead to an improvement in public health that would reduce health care costs and increase economic productivity.[71] But individual states face a collective action problem in enacting such a mandate. Any state that enacted a broccoli mandate on its own might face outmigration by residents who prefer a tastier, but less healthy diet. As a result, its tax base would be eroded, while neighboring states that fail to enact a mandate benefit at the first state's expense.

Even though the states as a group would be better off if all or most enacted a broccoli mandate, collective action problems prevent them from doing so without some form of federal

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[69] Cooter & Siegel, supra note _____ at 180-83.
[70] Id. at 181 (outlining this as one possible level of deference).
[71] Research suggests that broccoli has a wide variety of health benefits. See Health Food Guide, *The Health Benefits of Broccoli Make it a Meal Time Winner*, available at http://healthfood-guide.com/HealthBenefitsOfBroccoli.aspx; CNN, *Broccoli Beats Most other Veggies in Health Benefits*, Apr. 17, 2000 (citing research), available at http://articles.cnn.com/2000-04-13/health/broccoli.benefits.wmd_1_brassica-chemoprotection-laboratory-broccoli-isothiocyanates?_s=PM:FOOD. See also works cited in note _____.

intervention. This collective action argument would likely fail any form of rigorous scrutiny. But it surely meets minimal standards of plausibility in a regime of heavy judicial deference to Congress.

Things would be different if courts applied collective action federalism in a less deferential way. The federal government could potentially be required to provide strong evidence that a collective action problem exists, For example, it could be required to prove the existence of a collective action problem by a preponderance of evidence (the usual legal standard in civil cases). In that event, the individual mandate itself might not survive judicial scrutiny.

States' failure to enact an individual mandate of their own might not be due to a collective action problem, but a result of genuine opposition to this policy - either because state officials believe that it will be ineffective or because they oppose it on other grounds, such as a belief that it infringes individual freedom. State governments might also oppose a mandate simply because it is unpopular.

Here, the fact that twenty-eight state governments have expressed their opposition to the mandate by filing lawsuits against it strongly suggests that their failure to enact their own mandates is not primarily the result of a collective action problem.[72] If it were, state governments should welcome the mandate, not oppose it. If the mandate is a public good for the states that they want but cannot provide for themselves, one would expect them to embrace its provision by the federal government.

One could potentially argue that the relevant public good is not the individual mandate itself, but the purposes it is intended to serve, such as reducing health care costs and enabling coverage of preexisting conditions. However, this approach ignores the possibility that the mandate creates more costs than benefits for some of the states in question. Even if it contributes

[72] See nn. and accompanying text.

to the production of a public good for a given state, if the benefit it creates is not worth the cost from the point of view of that state's government, it is on net a public bad rather than a public good.

In theory, it is possible that state leaders support the mandate on policy grounds, but still believe it to be unconstitutional (perhaps because they do not accept Cooter and Siegel's collective action interpretation of Article I). In practice, however, there is not a single example of a state government that has joined the litigation against the mandate, while also expressing support for it as a policy. Almost the only prominent political leader who seems to believe that the federal mandate is unconstitutional while embracing it at the state level is former Massachusetts Governor and current GOP presidential candidate Mitt Romney. Romney, of course, is faced with the difficult political problem of accounting for his past support of an individual mandate in Massachusetts to Republican presidential primary voters, most of whom strongly oppose the federal mandate.[73]

In a forthcoming article, Neil Siegel argues that the individual mandate does solve a collective action problem because individual states that enact a mandate will face "free-riders."[74] If a single state enacts an individual mandate while coupling it with a regulation forbidding insurance companies from denying coverage to individuals with preexisting conditions, unhealthy, uninsured individuals might migrate in from other states in order to take advantage of the latter regulation. This would in turn create a risk pool dominated by the relatively unhealthy, especially if comparatively healthy individuals begin to migrate to other states that do not have a preexisting conditions mandate.[75]

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[73] See Glen Johnson, *Romney Support for Individual Mandate Complicates Health Care Politics*, BOSTON GLOBE, May 12, 2011.
[74] Siegel, Free-Riding on Benevolence, supra note _____.
[75] Id. at 37-40; For a similar argument, see Koppelman, supra note _____ at 16-17.

Siegel's analysis is a useful and insightful contribution to the debate. But it ignores some important ways in which a state could enact an individual mandate while avoiding this form of free-riding. One simple way would be to require insurance companies to cover individuals with preexisting conditions only if the latter had previously purchased health insurance on their own and did not wait to do so until they got sick. This rule would apply whether the person had previously lived within the state or not. It would thereby prevent out of staters from "gaming" the system by migrating in just after becoming sick. There would be no unconstitutional discrimination against out of staters because the same rule could also apply to state residents.

Alternatively, states could prevent free-riding by allowing insurance companies to charge "actuarially fair" rates to people with preexisting conditions that reflect the true expected costs of their future medical care.[76] This would lead to higher rates for uninsured people who choose to migrate into the state only after getting sick, thereby reducing the risk that they would take advantage of the individual mandate state by free-riding on it.

A second possible collective action problem that the individual mandate might solve is that of uninsured individuals who consume free health care despite being able to pay for insurance.[77] This is, potentially, a collective action problem among individuals. All might be better off if everyone who can afford to buy health insurance did so, thereby reducing the burden on taxpayers and health care providers. But, in the absence of a mandate, some individuals have incentives to free-ride on the system by consuming health care they don't have to pay for.[78] But while this may create a collective action problem for individuals, it is *not* a collective action

[76] For a description of actuarial fairness, see Sharona Hoffman, *Unmanaged Care: Towards Moral Fairness in Health Care Coverage*, IND. L.J. 659, 670-72 (2003).
[77] Siegel, *Free-Riding on Benevolence*, at 10-13.
[78] The extent to which this is a genuinely serious problem is debatable, as is the question of whether an individual mandate can solve it. *See* Gary Lawson & David Kopel, *Bad News For Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267, 288-89 n.90 (2011) (citing evidence that cuts against both of these propositions. Here, I assume the validity of both claims, and suggest that there is no interstate collective action problem even if they are true.

problem among state governments. A state government that wants to eliminate such free-riding within its borders can do so by enacting an individual mandate of its own, regardless of what other states do. Alternatively, it can simply deny state-funded medical care to people who can afford health insurance but choose not to buy it. Obviously, states might not choose to adopt either of these measures for a variety of policy, political, or moral reasons. But there is no interstate collective action problem preventing them from doing so.

Finally, it is important to emphasize that individual states might actually derive competitive benefits from an individual mandate if it works as proponents claim. if a mandate succeeds in increasing access to health care, while reducing its costs, that would make any state enacting it attractive to both individual migrants and employers. The latter would benefit because they would face lower health care costs for employees. Obviously, a mandate requiring people to purchase their products would also be attractive to insurance companies, who would surely want to stay in the state for that reason.[79] Since states compete with each other for taxpayers and businesses,[80] an individual mandate that delivers the benefits that advocates promise would be a major competitive advantage for a state that enacted it. Indeed, the advantage would be greatest if other states failed to match this innovation. These competitive benefits might offset the dangers of free-riding even if the latter cannot be completely prevented.

In sum, the opposition of the majority of state governments to a federal individual mandate strongly suggests that the failure of all but one state to enact is not the result of collective action problems. While free-rider problems are a potential concern, states could find ways to control them without a federal mandate.

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[79] Siegel acknowledges that, unlike states that enacted a preexisting conditions regulation without a mandate, Massachusetts has not faced an exodus of insurers since its enacted its individual mandate. Siegel, supra note _____ at 44.

[80] See McGinnis & Somin, supra note ___ and literature cited therein.

None of the above would matter if the Court applies a highly deferential standard to congressional claims that a mandate is needed to prevent interstate collective problems. Even if wrong, the collective action rationale for a federal mandate is surely at least plausible. But it might well be enough to justify a decision striking down the mandate if such congressional assertions are subjected to more rigorous judicial scrutiny.

5. Individual Rights as a Constraint on the Mandate Slippery Slope.

Some defenders of the individual mandate admit that upholding it would give Congress virtually unlimited power to impose other mandates as far as structural limits on its power are concerned, but argue that particularly onerous mandates will still be forestalled by judicial enforcement of constitutional individual rights. For example, Charles Fried admits that Congress would have unlimited authority to force people to purchase products such as broccoli, but argues that it could not force people to actually eat the broccoli they bought.[81] Neil Siegel advances a similar argument.[82]

It is in fact far from clear whether current jurisprudence would preclude a mandate requiring people to eat broccoli or other healthy food. The Supreme Court has posited that the Due Process Clause of the Fourteenth Amendment gives individuals a right to refuse unwanted medical treatment.[83] But it is far from clear that this right would apply against the less onerous and intrusive requirement that they eat healthy food. The latter would not require unpleasant probing of the body or supervision by medical professionals. Moreover, a requirement to eat

[81] See Charles Fried, *Testimony Before the Senate Committee on the Judiciary Hearing on the Constitutionality of the Affordable Care Act*, February2 , 2011 at 4. (stating that "As for the veggies, I suppose such forced feeding would indeed be an [unconstitutional] invasion of personal liberty, but making you pay for them would not, just as making you pay for a gym membership which you can afford but do not use would not.").
[82] Neil Siegel, *Four Constitutional Limits that the Individual Mandate Respects*, CONSTITUTIONAL COMMENTARY (Forthcoming), at 10-13, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1930249.
[83] *Washington v. Glucksberg*, 521 U.S. 702 (1997).

healthier food might be upheld by the Court on the same grounds that it previously upheld vaccination requirements.[84] Such a requirement could benefit society as a whole as well as the individual it is imposed on.[85] A healthier population is more productive and imposes lower health care costs on the public fisc.[86]

Even if the Court interprets the Due Process Clause to forbid mandates requiring individuals to eat food, it would not, as Fried admits, use that Clause to prevent Congress from imposing purchase requirements. As he recognizes, Congress could still force people to purchase virtually any product, including broccoli or a gym membership.[87] Thus, even if Fried is right about the Due Process Clause, a victory for the government in the mandate case would create a substantial logical slippery slope.

Obviously, some potential federal mandates would be precluded by individual rights provisions of the Constitution. For example, Congress could not establish a mandate requiring people to attend religious services or pledge allegiance to the flag,[88] or force women to have abortions. Equally, it could not impose mandates that violate other constitutional rights, such as the right to freedom of speech other rights protected by the Bill of Rights. I was wrong to fail to point this out in one of my earlier writings on this subject.[89] But an extraordinarily wide range of mandates would not be foreclosed, including nearly all purchase mandates.[90]

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[84] *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).
[85] See id. at 29 (upholding vaccination requirements in part because they "keep in view the welfare, comfort, and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few.").
[86] See discussion in § I.A.4, infra.
[87] See note ____.
[88] See, e..g, *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).
[89] *See* Ilya Somin, *Insurance Mandate has Fatal Flaws*, NEWSDAY, Aug. 16, 2011. Neil Siegel has justifiably criticized me for this omission. See Siegel, *Four Limits*, supra note _____ at 8 n.16.
[90] A rare exception is that the Establishment and Free Exercise Clauses of the First Amendment might preclude mandates requiring people to purchase religious objects such as crosses or menorahs, or memberships in religious organizations.

B. The Mandate as an Empirical Slippery Slope.

Even if the individual mandate is a logical slippery slope, it does not necessarily mean that a decision upholding would create any risks in the real world. Perhaps political factors would prevent Congress from enacting any significant number of mandates. Abusive or wasteful mandates might be politically unpopular, thereby making it unlikely that Congress would adopt them. Even one of the district court decisions striking down the mandate rejects slippery slope concerns in part because "an informed electorate would not countenance frivolous mandates."[91] In his concurring opinion upholding the mandate, Judge Jeffrey Sutton similarly suggests that the slippery slope dangers posed by the mandate are capable of "political resolution."[92]

Andrew Koppelman argues that, even if mandates can be used to benefit interest groups, subsidies are likely to be a more effective tool for doing so. Since current jurisprudence gives Congress nearly unlimited power to enact subsidies, no additional risk is created by adding an unlimited power to enact mandates.[93]

It is true that subsidies are easier to hide from the voters than purchase mandates. But the latter have their own advantages for politicians and interest groups. In an era of tight budget constraints, a purchase mandate can transfer money to a favored industry without requiring additional government spending or tax increases, either of which might be difficult to achieve. It is very hard for the federal government to directly transfer as much money to an industry as it would get from forcing millions of new customers to buy their products.

[91] *Goudy-Bachman*, 2011 WL 4072875 at *13.
[92] *Thomas More Law Center*, 2011 WL 2556039 at *33 (Sutton, J., concurring).
[93] Koppelman, supra note _____ at 20-21.

Moreover, the visibility of mandates will not necessarily prevent their enactment. There is a wide variety of ways that purchase mandates could be sold to the public. Congress need not admit that they are intended to help powerful interest groups. They could instead be defended as efforts to stimulate the economy by helping a vital industry (the same justification as was used to justify government bailouts of the banks and auto industry). Forcing people to purchase broccoli or other food could be defended as a public health measure. Indeed, paternalists have successfully advocated numerous coercive regulations on precisely those kinds of grounds.[94] There is no reason why they could not use similar strategies to justify purchase mandates. An alliance between well-intentioned paternalists and industry interest groups is precisely the kind of "baptist-bootlegger" coalition that has often been successful in the past.[95] Given widespread political ignorance, voters will often be hard-pressed to tell whether such proposals will really increase public health or not.[96] Even if "an informed electorate" would indeed reject "frivolous mandates,"[97] the electorate we actually have is often very poorly informed.[98]

Empirically, state governments who are not subject to the same structural constitutional limits as the federal government, have sometimes enacted very onerous mandates, notwithstanding their political visibility. In the nineteenth and early twentieth century, many states even had mandates requiring adult male citizens to engage in forced labor repairing

[94] These include a variety of restrictions on smoking, restrictions on the sale of fatty foods and others. See, e.g., JACOB SULLUM, FOR YOUR OWN GOOD: THE ANTI-SMOKING CRUSADE AND THE TYRANNY OF PUBLIC HEALTH (1998) (describing use of public health rhetoric to justify restrictions on smoking, including some where the health rationale was weak); Yandle, supra note _____ (describing other paternalistic health regulations backed by similar public health campaigns);
[95] See Yandle, supra note __.
[96] For evidence of widespread political ignorance and its impact on policy, see, e.g., Ilya Somin, *Political Ignorance and The Countermajoritarian Difficulty: A New Perspective on the "Central Obsession" of Constitutional Theory*, 89 IOWA LAW REVIEW 1287 (2004), and other sources cited therein.
[97] *Goudy-Bachman*, 2011 WL 4072875 at *13.
[98] See Somin, *Political Ignorance and the Countermajoritarian Difficulty* (reviewing the available evidence).

roads.[99] In modern times, onerous state mandates have to a large extent been curtailed by interstate mobility. People subjected to such mandates can "vote with their feet" against them.[100] This gives states strong incentives to avoid enacting onerous mandates. By contrast, federal mandates would be much harder to avoid in this way, since "voting with your feet" against a federal mandate requires emigration, a much costlier proposition than migrating to another state.

An alternative way in which the mandate slippery slope might become irrelevant is the possibility that, even if the federal government loses the mandate case and is forbidden to enact mandates regulating inactivity, it could still enact whatever mandates it wanted so long as they are tied to some sort of "economic activity," as that concept is broadly defined by the Court.[101]

For example, the broccoli mandate could be limited to adults who are employed for pay, which is clearly a form of economic activity. Similar "tie-ins" could be used to legitimate other mandates. Such linkage could indeed allow the federal government to impose onerous or abusive mandates. However, they are still less likely than free-standing mandates. Mandates tied to economic activity have the disadvantage, from the federal government's point of view, of disincentivizing that activity. The more onerous the mandate, the stronger the disincentive. Since incumbent politicians suffer serious political costs whenever an economic downturn occurs, they may be reluctant to tie mandates to economic activity, especially if the mandates are costly or highly unpleasant. A mandate tied to some form of economic activity that only a small number of people engage in would not carry as much risk. But it would also offer less in the way of

[99] See *Butler v. Perry*, 240 U.S. 328, 331 (1916) (upholding such laws against Thirteenth Amendment challenge, and listing numerous states that imposed them).
[100] See generally Ilya Somin, *Foot Voting, Political Ignorance, and Constitutional Design*, 28 SOCIAL PHILOSOPHY AND POLICY 202 (2011) (discussing benefits of foot voting).
[101] See discussion in § I.A.1, infra.

benefits to producer interest groups and public health groups, since far fewer people would be forced to purchase the product in question.

Finally, it is important to emphasize the sheer range of interests that could potentially lobby for mandates benefiting them if the insurance mandate is upheld. The logic of the pro-health care mandate argument can justify virtually any mandate to purchase or do anything. This opens the door to the machinations of an extraordinarily large number of interest groups. Even if the vast majority of them fail, it seems likely that at least a small percentage of them will figure out a way to take advantage of the opportunity. And a small percentage of the total could still turn out to be a significant absolute number of successful mandates.

II. SLIPPERY SLOPE ARGUMENTS IN FAVOR OF UPHOLDING THE MANDATE.

While opponents of the health insurance mandate have emphasized slippery slope arguments more than defenders, the latter have advanced a number of slippery slope arguments of their own. Among the most important are claims that striking down the mandate will reinvigorate the long-repudiated economic liberties jurisprudence of the *Lochner* era,[102] arguments that striking down this mandate will prevent the enactment of future mandates needed to protect public health,[103] and fears that a victory for mandate opponents will lead to a more general erosion of post-New Deal jurisprudence expanding congressional power.[104] In my view, the first two predictions are highly implausible on both logical and empirical grounds. The third

[102] See, e.g., Milhiser, supra note ____; Lazarus, supra note _____;.
[103] See, e.g., Hall, supra note _____ at 1829.
[104] See, e.g., Balkin, supra note _____; Koppelman, supra note _____.;Erwin Chemerinsky, *Political Ideology and Constitutional Decision-Making: The Coming Example of the Affordable Care Act*, LAW & CONTEMP. PROBS. (forthcoming, contribution to this symposium), at 15-16 (arguing that a decision striking down the mandate would put at risk various civil rights laws and economic regulations, and concluding that "the invalidation of the Affordable Care Act likely will lead to other laws being vulnerable"); Huhn, supra note _____ at 12-15.

is more plausible, but will only come true if there is a favorable alignment of political forces and judicial personnel on the Supreme Court. Ironically, they may be more likely to come true if mandate supporters succeed in persuading jurists that the overruling of the mandate will be a major break with precedent as opposed to a striking down of an unusual statute not covered by previous cases.

A. A Return to *Lochner*?

Analogies between the case against the individual mandate and the long-repudiated "substantive due process" economic liberties jurisprudence of the *Lochner* era are highly strained at best. There are, to be sure, a few superficial similarities between the two. Just as the *Lochner*-era cases protected economic liberties such as freedom of contract, so a victory for the individual mandate plaintiffs would protect the economic freedom to refuse to purchase health insurance, at least against mandates imposed by the federal government. In addition, some mandate opponents have emphasized the liberty aspects of the case. In one of the district court opinions striking down the mandate, Judge Henry Hudson wrote that "[a]t its core, this dispute is not simply about regulating the business of insurance—or crafting a scheme of universal health insurance coverage—it's about an individual's right to choose to participate."[105] This statement has been seized upon by some mandate defenders as an admission that the plaintiffs' case is really a reprise of *Lochner*.[106]

However, the doctrinal differences between the anti-mandate case and *Lochner* are far more significant than the relatively modest similarities. One obvious difference is that the *Lochner*-era cases restricted state as well as federal restrictions on economic liberty. They held

[105] *Virginia v. Sebelius*, 728 F.Supp. 2d at 779.
[106] See, e.g., Lazarus, supra note_____.

that the Due Process Clause created an individual right against certain types of constraints on freedom of contract, not merely a structural constraint against one level of government.[107] By contrast, if the individual mandate plaintiffs win, state governments would remain free to enact health insurance mandates, as the state of Massachusetts has already done.

Even with respect to the exercise of power by the federal government, individual liberty only enters the picture in the mandate cases only in so far as it is protected indirectly by the application of structural limits on federal power. As a unanimous Supreme Court reiterated in the recent case of *Bond v. United States*, "[f]ederalism secures the freedom of the individual" as well as the prerogatives of state governments.[108]

Whenever a limit on federal power is enforced by the court, the authority denied Congress cannot be used to infringe on individual freedom. But that does not make the individual mandate case a reprise of *Lochner* unless any decision enforcing limits on government power qualifies as such. Even Judge Hudson's opinion does not contain anything that goes beyond this relatively uncontroversial proposition. To the contrary, he recognizes that current precedent gives Congress broad power to regulate even "noneconomic" activity so long as "these regulatory powers are triggered by some type of self-initiated action" on the part of the person being regulated.[109] That includes entering into an employment relationship, buying a product, operating a business, and so on.

Finally, any decision striking down the mandate is likely to leave wide scope for other federally imposed economic regulation, including laws that substantially restrict a wide range of economic liberties. If the Supreme Court strikes down the mandate, it will most likely do so

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[107] See, e.g., Lochner, 198 U.S. at 54; *Adair v. United States*, 208 U.S. 161 (1908) (holding that the Due Process Clause forbids state bans on "yellow dog" contracts in which workers agree not to join unions); *Adkins v. Children's Hospital*, 266 U.S. 522 (1923) (striking down state-imposed minimum wage for women).
[108] *Bond v. United States*, 131 S.Ct. 2355, 2364 (2011).
[109] *Virginia v. Sebelius*, 728 F.Supp.2d at 782.

because the mandate is a regulation of "inactivity," forcing people to purchase products based merely on the fact of their presence within the United States. As the Eleventh Circuit decision striking down the mandate puts it, "[t]he government's position amounts to an argument that the mere fact of an individual's existence substantially affects interstate commerce."[110]

This approach would leave intact Congress' power to use the Commerce Clause to regulate any and all "economic activity," broadly defined in *Raich* to include anything that involves "production, distribution, and consumption of commodities."[111] That definition easily encompasses virtually any employment relationship or purchase of a product.

To be sure, the Court could potentially overrule or scale back *Raich*, thereby opening the door for greater restrictions on federal economic regulation. However, it seems highly unlikely that the Court will choose that approach in overruling the mandate, given that any viable anti-mandate majority will have to include Justice Anthony Kennedy, who signed on to the *Raich* majority and is unlikely to be willing to cut back on that opinion to any significant degree. At the very least, nothing in the logic of the anti-mandate argument requires the Court to create anything remotely resembling *Lochner*-era restrictions on either state or federal regulation.

Two of the federal court decisions striking down the mandate at least partly disclaim reliance on the activity-inactivity distinction.[112] However, they both adopt rules that are very similar to the approach they claim to reject.

The Eleventh Circuit chose not to fully adopt "the formalistic dichotomy of activity and inactivity."[113] But it ultimately concluded that the mandate falls outside the scope of the

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[110] *Florida*, 648 F.3d at 1295. As discussed below, the Eleventh Circuit ultimately did not rely exclusively on the activity-inactivity distinction in striking down the mandate. However, this part of its reasoning exactly parallels that argument.

[111] *Raich*, 545 U.S. at 25-26 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966))

[112] See Florida, 648 F.3d at 1286 ("find[ing the distinction]… useful only to a point").*Goudy-Bachman*, 2011 WL 4072875 at *14 (ruling that "This court rejects any distinction between activity and inactivity for purposes of Commerce Clause analysis").

Commerce power because "[i]ndividuals subjected to this economic mandate have not made a voluntary choice to enter the stream of commerce, but instead are having that choice imposed upon them by the federal government."[114] Similarly, The Middle District of Pennsylvania struck down the mandate because it "regulates many individuals who have not yet entered the market—whether one defines the market as the broader market for health care services or the market for health insurance."[115] This, of course, permits regulations limited to individuals or firms who *have* already voluntarily entered a market or "the stream of commerce," including markets for goods and services and markets for employment, such as that regulated by the maximum hours law for bakers that the Court invalidated in *Lochner.* Congress could also continue to regulate interstate movement through the "use of the channels of interstate" commerce and the "instrumentalities" of interstate commerce.[116] In sum, the approach adopted by the Eleventh Circuit and the Middle District would still allow Congress to use the Commerce power regulate almost any voluntary economic activity.

The resort to *Lochner* analogies in the individual mandate debate is an example of what David Bernstein recently called the use of that case by commentators as a "vacuous rhetorical shortcut" for denouncing "what they consider the 'activist' sins of their opponents" even in situations where the legal issues in question have little or no connection to *Lochner* and the Due Process Clause.[117] Both liberals and conservatives have used such rhetoric effectively on many occasions.[118] But in many cases including this one, it obscures more than it reveals.

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[113] Florida, 648 F.3d at 1287.
[114] Id. at 1291-92.
[115] *Goudy-Bachman*, 2011 WL 4072875 at *14.
[116] *Lopez*, 514 U.S. at 558-59; *Morrison*, 559 U.S. at 609.
[117] DAVID E. BERNSTEIN, REHABILITATING LOCHNER 129 (2011).
[118] See id. at 1-2, 126-29 (giving examples).

B. Forestalling Future Essential Mandates.

More plausible than the fear that an anti-mandate decision will return us to the *Lochner* era is the possibility that it might prevent future mandates that will be needed to forestall some terrible disaster. For example, Mark Hall worries that "authority under the commerce power to compel purchases or other actions could well be essential to combat a horrifically lethal pandemic."[119] Presumably, he has in mind the possibility that the federal government might need to react to a mandate by requiring people to be vaccinated or quarantined.

It is impossible to definitively assess all such potential scenarios. We cannot know exactly what kinds of emergencies might arise in the future or what kinds of mandates might be used to address them. At the same time, it is important to recognize that a ruling striking down the mandate would still leave Congress and the states with very broad authority to address emergencies.

Consider Hall's example of an epidemic of a contagious disease. Even if the federal government were unable to combat it using mandates, states would remain free do so.[120] In the case of an epidemic limited to one or a few states, state governments would have strong incentives to take any measures needed to combat it, including mandatory vaccinations or quarantines. A state government that failed to do so would tend to lose business, and its political leaders would be subject to severe retribution at the polls. Even the most inattentive or ignorant of voters are likely to notice a rampaging epidemic that the state has failed to control.

If the epidemic was nationwide in scope or covered a very wide area, state governments might find it harder to counter it. In that event, the federal government could still incentivize them to adopt mandates by using its currently very broad authority to enact conditional federal

[119] Hall, supra note at 1829.
[120] See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding state vaccination laws).

spending.[121] Moreover, even a direct federal vaccination mandate could be upheld so long as it was premised on some "self-initiated action" or activity.[122] For example, Congress could require any individuals who cross state lines to be vaccinated, thereby undercutting the possibility of interstate externalities that individual state governments might be unwilling to prevent.

Mandates enforced by conditional spending or ties to some kind of "economic activity" might, of course, prove to be politically unpopular. They might be resisted by state governments (in the case of conditional spending) or powerful interest groups. However, such resistance is unlikely to prevail in an emergency situation where there is broad agreement that vaccinations or quarantines are essential. Moreover, any political resistance to vaccination mandates could arise at the federal level just as readily as at the state level.

Resistance is also likely to be diminished if there is a clear and obvious connection between the reason for the mandate and the "activity" to which it is tied. For example, crossing state lines clearly increases the risk of spreading a contagious disease. At the very least, emergency mandates with "tie-ins" are no more likely to prove politically infeasible than stand-alone mandates. If anything, as discussed above,[123] the continuing availability of a wide range of tied mandates might suggest that a decision striking down the individual mandate might be too narrow rather than too broad. At least some abusive mandates could use tie-ins to get around it.

C. Generating Momentum for Future Decisions Restricting Federal Power.

For much the same reasons as a decision striking down the mandate would not lead to a restoration of *Lochner*, it also would not require courts to strike down significant post-New Deal

[121] See *Sabri v. United States*, 541 U.S. 600 (2004); *South Dakota v. Dole*, 483 U.S. 203 (1987).
[122] *Virginia v. Sebelius*, 728 F.Supp.2d at 782.
[123] See § I.B, infra.

regulatory legislation.[124] Congress would still retain broad power to regulate virtually any kind of "economic activity," broadly defined to include any action involving the production, consumption, or distribution of a commodity.[125] As discussed above, virtually every major piece of regulatory legislation adopted by Congress since the New Deal era falls within that authority.

Yet, even if a decision striking down the health insurance mandate does not logically require a slippery slope leading to the invalidation of numerous other statutes, it could still lead to that result by generating judicial and political momentum for it.[126] If it is invalidated by the Supreme Court, the individual mandate would be the most important law struck down on limited powers grounds since at least the 1930s, when the Supreme Court invalidated several important New Deal laws before ultimately giving Congress broad power to regulate economic transactions.[127]

Such a decision could potentially lead judges to strike down other federal laws by legitimating the general idea of judicial enforcement of limits on congressional power. It could potentially also give a boost to conservative and libertarian political movements such as the Tea Party movement, which seek to reestablish strong judicial limits on federal power.[128]

While this scenario is plausible, its realization would require a lot more than just a decision striking down the individual mandate. There is little appetite for a wide-ranging assault on Congressional power on the present Supreme Court. The four most liberal justices – Ruth Bader Ginsburg, Elena Kagan, Stephen Breyer, and Sonia Sotomayor have consistently voted

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[124] See § I.A., infra.
[125] Id.
[126] See, Volokh, supra note ____ at 58-60 (discussing judicial-judicial slippery slopes).
[127] See especially *Schecter Poultry Corp. v. United States*, 495 U.S. 295 (1935) (striking down the National Recovery Act, one of the broadest regulatory statutes in U.S. history).
[128] *See* Ilya Somin, *The Tea Party Movement and Popular Constitutionalism*, 105 NW. UNIV. LA. REV. COLLOQUY 300 (2011) (describing and partially defending this aspect of the Tea Party's agenda); for a more negative view, see Jared A. Goldstein, *Can Popular Constitutionalism Survive the Tea Party Movement?*, 105 NORTHWESTERN UNIV. L. REV. COLLOQUY 288 (2011).

against any significant structural constraints on congressional power. Two of them are Obama appointees presumably selected in part because of their willingness to uphold the president's signature legislative achievement against constitutional challenges. Even if they lose the mandate case (probably in a narrow 5-4 decision), they are unlikely to suddenly change their overall stance on federalism issues. Instead, they are likely to interpret any such decision narrowly, as liberal-leaning judges have done in the case of *Lopez* and *Morrison*, previous Supreme Court decisions limiting Congress' Commerce Clause authority.[129]

The five conservatives include two justices, Anthony Kennedy and Antonin Scalia, who signed on to the Court's expansive vision of congressional power to regulate "economic activity" in *Gonzales v. Raich*.[130] Moreover, with the exception of Justice Clarence Thomas, all of the conservative justices have endorsed such pillars of post-New Deal jurisprudence as *Wickard v. Filburn*,[131] which held that the power to regulate interstate commerce includes the authority to limit the growth of wheat that had never been sold in any market. Likewise, all but Thomas seem to accept the Court's very broad interpretation of Congress' Spending Clause authority to appropriate money for any purpose it deems to be in the "General Welfare."[132]

For a decision striking down the mandate to lead to a major general rollback of congressional power, either several Supreme Court justices would have to repudiate their past opinions, or they would have to be replaced by new justices significantly more willing to strike down federal laws than their predecessors. The former seems highly unlikely. The latter would require a sweeping political victory by the Tea Party and its allies sustained for long enough to

[129] See Somin, supra note _____at 511-19 (explaining how the majority opinion in *Raich*, which was joined by all of the liberal justices then on the Court, interpreted Lopez and Morrison extremely narrowly).
[130] 545 U.S. 1 (2005). Scalia wrote a separate concurring opinion that relied on the Necessary and Proper Clause. However, his vision of the scope of federal power is ultimately almost as broad as that of the majority. See Somin, *Gonzales v. Raich*, supra note _____ at 529-31 (discussing Scalia's opinion).
[131] 317 U.S. 111 (1942). For Thomas' disagreement, see Lopez, 514 U.S. at 572-77 (Thomas, J., concurring).
[132] See *Sabri*, 541 U.S. at 602-605 (interpreting that power very broadly with the agreement of all the conservative justices with the partial exception of Thomas).

replace several Supreme Court justices. Such a triumph is not impossible, but seems improbable given the closely balanced alignment of political forces in the United States over the last two decades and the failure – at least so far - of the Tea Party to gain traction among political moderates.

Even if conservative and libertarian critics of federal power significantly increase their political influence in the near future, it would still be difficult for the Supreme Court to strike down major federal programs that enjoy widespread popular support, such as Medicare or Social Security.[133]

Indeed, the individual mandate itself is vulnerable in large part because of its relative unpopularity.[134] It is unique among major new federal programs enacted over the last several decades in failing to secure broad bipartisan support at the time of enactment, or even the support of majority public opinion.[135] If the Obama health care plan and its individual mandate were as popular as Social Security or Medicare, it is highly unlikely that the Court would be willing to strike it down, regardless of the strength of the legal arguments against it.

In sum, it is possible that a decision striking down the mandate will lead to stronger constraints on congressional power generally, even if this is not logically required by the reasoning of the anti-mandate decision itself. An empirical slippery slope can potentially occur

[133] See BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009) (describing constraints on the Court's willingness and ability to strike down popular laws).

[134] Recent survey data suggests that the mandate is opposed by as many as 82% of Americans, and that the Affordable Care Act as a whole has more opponents than supporters. See Bradley W. Joondeph, *Beyond the Doctrine: Five Questions that will Determine the ACA's Constitutional Faith*, at 9 (RICHMOND L. REV., forthcoming) (health care symposium).

[135] See Lawrence Jacobs & Suzanne Mettler, *Structural Framing: Health Care Reform and Changing American Politics*, Paper Presented at the American Political Science Association Conference, September 2011, at 2-11 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1903135 (showing that opponents of the law have consistently outnumbered supporters in public opinion polls since August 2009, and noting sharp differences with Social Security, which enjoyed broad support almost from the beginning).

even in the absence of a logical one.[136] At the same time, such an empirical slippery slope would require major changes in the personnel of the Supreme Court, and in the more general alignment of political forces.

The most that is actually likely to happen is an incremental erosion of the Supreme Court's most expansive previous federal power precedents, such as *Raich*. And even that might require at least some change in the Court's personnel.

Interestingly, a decision striking down the individual mandate may be more likely to generate momentum for additional constraints on federal power if it is seen as a major break with past precedent, as mandate supporters tend to portray it. If lower court judges see it that way, they will be more likely to reconsider the continued validity of previous expansive Commerce Clause decisions such as *Raich* and *Wickard.* They could end up giving these rulings a narrower interpretation than has heretofore been the case. If, by contrast, mandate opponents succeed in convincing judges that this is an unusual extreme case that can be decided against the federal government while leaving preexisting precedents intact, a doctrinal slippery slope will be less likely to occur. For both sides, the rhetorical strategies they adopt with a view to winning the present case might undermine their positions in future federalism cases should they lose this one.

In my view, a slippery slope towards stronger judicial enforcement of constraints on federal power might well be a good thing. In past works, I have argued that current precedent gives Congress far too much authority.[137] Not all slippery slopes are necessarily harmful. Be that as it may, assessment of the normative desirability of a slippery slope is separable from an assessment of its positive probability. In this case, the latter seems relatively low.

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[136] See note _____ and accompanying text, describing this distinction.

[137] See, e.g., Somin, supra note _____; John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: The Case for Judicial Review in a Federal System*, 99 NW. U. L. REV. 89 (2004); Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461 (2002)

CONCLUSION

Overall, the slippery slope concerns raised by opponents of the individual mandate have greater logical and empirical heft than those raised by defenders. If the Supreme Court upholds the mandate, it is likely to give Congress a virtual blank check for future mandates. And that blank check will probably be used on behalf of at least some influential interest groups. By contrast, it is highly unlikely that a decision striking down the mandate will lead to a return to the *Lochner* era, prevent future mandates needed to combat emergencies, or lead to a general unraveling of post-New Deal jurisprudence on federal powers. Admittedly, the latter scenario could occur given a favorable alignment of judicial personnel and political forces. But the odds against it are long even if the mandate plaintiffs win.

The agenda of this article is a necessarily limited one. It does not by itself resolve the question of whether the Supreme Court should uphold the mandate. Even if slippery slope considerations cut in favor of striking down the law, other concerns might outweigh this. For example, one could argue that a decision upholding the mandate is still compelled by the original meaning of the Constitution,[138] fidelity to precedent, or the dangers of judicial intervention on issues where judges have little expertise.[139] One could also argue that the courts should give Congress unusually high deference when it enacts particularly important legislation, such as the

[138] For originalist arguments in defense of the mandate, see, e.g., Jack Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010); Koppelman, supra note ____; and Akhil R. Amar, *The Lawfulness of Health Care Reform*, YALE L.J. ONLINE (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1856506##. For criticism, see, e.g., Randy E. Barnett, *Jack Balkin's Interaction Theory of "Commerce*," U. ILL. L. REV. (forthcoming); Gary Lawson & David Kopel, *Bad News For Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267 (2011); Robert G. Natelson & David B. Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICH. L. REV. FIRST IMPRESSIONS 55 (2010) .

[139] See, e.g., DONALD HOROWITZ, THE COURTS AND SOCIAL POLICY (1977) (warning against such intervention).

2010 health care bill.[140] Similarly, a court could also strike down the mandate on originalist or doctrinal grounds even if it discounts potential slippery slope risks.[141]

At the same time, the prominence of slippery slope arguments on both sides of the debate suggests that the resolution of these issues is important, even if it is not the only relevant factor. Moreover, that resolution could create a slippery slope of its own by affecting our perception of future slippery slope claims. Poor assessment of current slippery slope issues might make us more vulnerable to similar slippery slopes in the future.

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[140] See Amar, supra note _____ at 3 (arguing that "judges should approach health care reform with far *more* deference than what is due ordinary, everyday, less-than-iconic, inside-the-beltway acts of Congress").
[141] See *Goudy-Bachman*, 2011 WL 4072875 at *12-14 (striking down the mandate despite rejecting the slippery slope argument against it).