Safeguarding the Safeguards: The Extension of Structural Protection to Non-Fundamental Liberties

Abigail R. Moncrieff, Boston University School of Law

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Safeguarding the Safeguards: The ACA Litigation and the Extension of Structural Protection to Non-Fundamental Liberties

Abigail R. Moncrieff*

Abstract

As the lawsuits challenging the Patient Protection and Affordable Care Act (ACA) have evolved, one feature of the litigation has proven especially rankling to the legal academy: the incorporation of substantive libertarian concerns into the structural federalism analysis. The breadth and depth of scholarly criticism is surprising, however, given that judges frequently choose indirect methods, including structural and process-based methods of the kinds at issue in the ACA litigation, for protecting substantive constitutional values. Indeed, indirection in the protection of constitutional liberties is a well-known and well-theorized strategy, which one scholar recently termed “semisubstantive review” and another recently theorized as “judicial manipulation of legislative enactment costs.” This Article situates the Commerce Clause and taxing power arguments in the ACA litigation within the broader context of semisubstantive review and enactment cost manipulation, arguing that these structural theories are ordinary and effectual as means of raising the political cost of libertarian infringements. The Article then considers three possible distinctions between the ACA case and the ordinary case of semisubstantive review, and concludes that the only viable descriptive distinction is that the ACA case involves non-fundamental rather than fundamental liberty interests—the freedom of health and the freedom of contract. I then go on to argue that this distinction should not make a normative difference. If anything, the case for structural invalidation should be stronger when non-fundamental liberty interests are at stake because those are, definitionally, the interests that the American legal system leaves to structural protection. If the Supreme Court invalidates the ACA on structural grounds, it can argue that it was merely safeguarding the safeguards of liberty.

Introduction

Recent populist objections to the Patient Protection and Affordable Care Act (“ACA”) undoubtedly center on concerns for individual liberty, not concerns about governmental divisions of labor.1 As many legal scholars have noted,2 the

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* Peter Paul Career Development Professor and Associate Professor of Law, Boston University School of Law. Many thanks to David Slade and Elizabeth Phelps for excellent research assistance.

Tea Party’s objections to the ACA arise from the perceived anti-libertarian substance of the law, not the federalist structure of the law; they have objected most strongly to the statute’s intrusions on healthcare autonomy and economic liberty. Nevertheless, the litigation that has flowed from the populist movement is focused entirely on structural rather than substantive constitutional doctrines. The litigants have challenged the individual mandate only on the ground that it exceeds Congress’s Article I powers, rather than arguing that the mandate violates substantive due process norms such as the freedom of health and the freedom of contract. There is therefore a tension between the concerns that motivate the ACA lawsuits and the doctrines that are central to the ACA litigation. And that tension is evoking strong reactions among legal academics.

Of course, the seeming inconsistency is, to a large extent, simply a wise litigation strategy. Assertions of a broad freedom of health have consistently failed, even in the comparatively sympathetic Ninth Circuit Court of Appeals.

See Peter J. Smith, Federalism, Lochner, and the Individual Mandate, (March 4, 2011). GWU Legal Studies Research Paper No. 534; GWU Law School Public Law Research Paper No. 534. Available at SSRN: http://ssrn.com/abstract=1777208; Mark A. Hall, Individual versus State Constitutional Rights Under Health Care Reform, 42 Ariz. St. L.J. 1233 (2010) (noting the tension between the individual rights rhetoric underlying the ACA litigation and the “states’ rights” doctrines actually argued); Aziz Huq, In Healthcare Ruling, Libertarianism by Judicial Diktat, The Nation (Feb. 9, 2011); Sen. Committee on the Judiciary, Hearing on “The Constitutionality of the Affordable Care Act,” Testimony of Charles Fried (Feb. 2, 2011), at 4 (“[T]he objection [to the individual mandate], while serious, is not at all about the scope of Congress’s power under the Commerce Clause. It is about an imposition on our personal liberty, a liberty guaranteed by the 5th and 14th Amendments, and guaranteed against invasion not only against federal but also against state power.”); Andrew Koppelman, Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform, 121 Yale L.J. Online 1, 22 (2011) (noting that concerns for individual liberty are driving the litigation).


See supra note 3; Cuccinelli Memo, supra note 3; TMLC Brief, supra note 3


See supra note 2.

See supra note 3.
Lochner-style freedom of contract has been a dead letter for generations; and the current members of the United States Supreme Court, who are likely to be the final arbiters in the litigation, are generally hostile to assertions of implied fundamental rights while sympathetic to structural arguments. The ACA plaintiffs’ decision to argue structural rather than substantive doctrines, thus, may be nothing more than a strategic decision to focus on the arguments that are most likely to succeed.

In another sense, though, the tension between structure and substance in the ACA litigation looks more interesting (or, some would say, more nefarious). The plaintiffs’ structural arguments have convinced primarily those judges and academics who share the Tea Party’s substantive inclinations, and the five judges that have deemed the mandate structurally invalid have all applied a kind of hybrid substantive-structural analysis to reach their conclusions. They have argued that the mandate is not a permissible regulation of interstate commerce because it seems substantively problematic for government to force people to buy things. This hybridization—the importation of libertarian norms into structural analyses—is the feature of the ACA litigation that seems most rankling to the legal academy. One scholar, for example, has accused the ACA plaintiffs and invalidating judges of “smuggling a libertarian-based limitation into constitutional law by concealing it in the garb of federalism.” Other scholars have simply observed that, because the plaintiffs’ structural arguments seem orthogonal to their true (substantive) concerns, even success in the litigation will fail to accomplish their true agenda. As these scholars have noted, state governments will remain free to encroach the substantive liberties that Tea Party leaders want to protect, and under the prevailing judicial analysis, even Congress will remain free to reenact the ACA’s mandate, albeit in slightly altered form. There is therefore a solid consensus among legal scholars—with very few detractors—

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10 There is now a circuit split on the constitutionality of the ACA. That circuit split will require resolution given the national importance of the statute.
12 See supra note 2.
13 See Smith, supra note 2, at 24.
14 See, e.g., Koppelman, supra note 2; Hall, supra note 2.
15 Smith, supra note 2, at 22-24; Koppelman, supra note 2, at 15-16, 23.
that structural invalidation of the ACA would be an inappropriate and ineffective way to protect the substantive libertarianism at the heart of populist objections.

But the breadth and vehemence of this consensus is quite surprising. The invalidating judges’ strategy of hybridizing substance and structure is not novel or even unusual; it is a strategy that has been identified and defended in the legal literature for decades. Indeed, as a significant and still-growing literature has recognized, the Rehnquist Court systematized and thereby largely legitimized the use of structural and other process-based doctrines to protect substantive values—an approach that Dan Coenen, in an extensive survey of Rehnquist Court doctrine, termed “semisubstantive constitutional review” and that Matthew Stephenson recently theorized and defended as “judicial manipulation of legislative enactment costs.”

At least at first blush, the ACA litigation is merely a case of this kind. The five federal judges that have held the individual mandate invalid have simply attempted to raise the political cost of enacting a nation-wide health insurance mandate, motivated by a concern that the mandate presents a novel or gross intrusion of an important liberty interest. Given that this blending of substantive concerns into structural holdings is a common judicial strategy, why is hybridization arousing such strong scholarly objections in the ACA case?

The predominant answer seems to be that, in most scholars’ view, the individual mandate simply does not infringe liberty—at least not in any constitutionally meaningful way—and therefore does not deserve invalidation at
all, whether through substantive or structural doctrines. It is worth considering, however, what the basis for that view is and whether it should matter in the context of semisubstantive review. Although largely implicit in the literature’s considerations of the libertarian arguments, the scholarly critique seems to have taken three different dimensions. First, some scholars have implied that there is no relevant liberty interest at stake at all. For these scholars, the motivating objection to the ACA litigation is a view that the freedom of health and the freedom of contract have no continuing constitutional relevance. Second, some have urged that the identified liberty interests have not been breached in this particular case. Their motivating objection is that the individual mandate does not violate the freedom of health or the freedom of contract—and would not even if those doctrines existed in robust substantive due process forms. Finally, some scholars have implied that the liberty interest is of a kind that should not garner any judicial protection, whether direct or indirect. The motivating objection here seems to be that neither the freedom of health nor the freedom of contract is a “fundamental liberty interest” that gets strict scrutiny when directly enforced, which could arguably mean that the liberties should not be enforced indirectly.

Although each of those objections rests on plausible premises, only the third presents a potentially viable distinction between ordinary semisubstantive rules and the ACA judges’ hybrid decisions. As for the first objection, although the freedom of health and freedom of contract are rarely used to invalidate state action, there can be no doubt that both of these substantive values have continuing constitutional relevance. As for the second, although it is almost certainly true that the individual mandate would not violate the freedom of health or the freedom of contract if those doctrines applied directly, the mandate presents a


23 See, e.g., Koppelman, supra note 2, at 22–23 (citing Jacobson v. Massachusetts for the proposition that the freedom of health does not exist at all); Hall, supra note 2, at 1235 (“[T]here is no constitutional basis for an individually-protected liberty interest to avoid buying health insurance.”); Mark A. Hall, Commerce Clause Challenges to the Individual Mandate, 159 U. Pa. L. Rev. 1825, 1858–64 (2011) (rejecting Randy Barnett’s idea that the 10th Amendment’s reservation of powers to the people could support an anti-commandeering doctrine to protect individual economic liberty).

24 See Moncrieff, supra note 5, at 2247–51 (analyzing the individual mandate under a generously robust version of the freedom of health and concluding that it ought to be upheld against a substantive due process challenge).

25 See, e.g., Hall, supra note 2, at 1236 (“In the modern era, substantive due process is invoked only to protect individual rights that are ‘fundamental’ to ‘ordered liberty,’ but the proposition that people have a fundamentally protected right to be uninsured is almost laughable.”).
serious enough challenge to the asserted liberties that it could provoke structural invalidation under ordinary semisubstantive review.26

As for the third, however, there is little doubt that it presents a plausible descriptive distinction. The scholarship on semisubstantive review has argued that the practice is usually limited to the protection of fundamental constitutional values.27 In cases concerning individual liberty in particular, scholars have treated the Rehnquist Court’s hybrid doctrines as substantive-due-process-lite and equal-protection-lite28—tools for indirect protection of previously-declared fundamental rights and suspect classifications.29 Assuming that these scholars are right and that fundamentalness of the substantive value has been a precondition for semisubstantive review, that point would certainly distinguish the ordinary case from the ACA case. The precondition is conspicuous absent here. To the extent that the freedom of health and freedom of contract are subject to direct judicial protection today, they are subject to something far less stringent than strict scrutiny.

The question, then, is whether this descriptive distinction should make a normative difference. Even if semisubstantive review has been limited to fundamental values before, are the justifications for the habit contingent on the fundamentalness of the implicated liberty interest? And even if the existing justifications are contingent on fundamentalness, might there be other justifications that could support the application of hybrid doctrines to protect non-fundamental liberties? Overall, is the extension of structural protection to non-fundamental liberties justifiable?

I think it is. First, the plausible arguments for excluding non-fundamental liberties from indirect protection would rest on a flawed assumption that liberty

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26 See Manning, supra note 18, at 399 (noting that the Court uses hybrid rules to invalidate statutes “even though the outcomes avoided by such rules would not themselves violate the constitution”); Adrian Vermeule, Saving Constructions, 85 Geo. L.J. 1945 (1997) (cataloguing cases in which “avoided” interpretations of statutes were later held to be constitutionally permissible on the merits).


29 Both Rick Hill and Dan Coenen have asserted, after extensive doctrinal review, that this condition is an important one for semisubstantive review. See Hills, Individual Right to Federalism, supra note 18; Coenen, Semisubstantive Constitutional Rules, supra note 18, at 1283. I have my hesitations, particularly with respect to the Rehnquist Court’s Commerce Clause holdings, which seem hard to justify as fundamental rights cases. Lopez, in fact, seems much easier to justify as a Second-Amendment-lite holding, issued before the Supreme Court started openly protecting individual rights to gun ownership. See D.C. v. Heller, 554 U.S. 570 (2008) (holding for the first time that the Second Amendment protects individual rights as well as states’ rights); McDonald v. Chicago, 130 S.Ct. 3020 (2010) (incorporating the Second Amendment’s individual right into the Fourteenth Amendment so that it also binds the states). I will address this issue at length in Part III, infra, but for purposes of the central thesis, I will assume that the ordinary habit has been to apply semisubstantive review in cases that implicate fundamental rights.
interests are statically catalogued as either fundamental or not. But liberties regularly shift in or out of “fundamental” status in response to changing social norms. Indirect review can be a useful testing ground, allowing courts to figure out whether a particular liberty interest should move from non-fundamental to fundamental status. Second, even for those liberties that ought to remain on the non-fundamental side of the divide, the case for using structural doctrines to protect those liberties should be stronger, not weaker. Non-fundamental liberties are, definitionally, the liberties that we have left to political protection—to structural safeguards. If there is ever a time that judges could justifiably use structural doctrines to protect individual liberty, it ought to be when the judges are simply safeguarding the safeguards—bolstering or enforcing structural constitutional norms to ensure that libertarian infringements really are politically preferred.

Of course, this latter view demands that the structural holdings be defensible as safeguarding rather than distorting political safeguards. This point has formed a separate basis for scholarly criticism of the ACA holdings. Many commentators have objected strongly to the ACA cases’ new “action/inaction distinction” on the ground that it is constitutionally and structurally indefensible. As a critique of the invalidating opinions so far, I agree. I will argue, however, that a better-crafted and openly semisubstantive holding in the ACA litigation could rest on sound structural principles, obviating this critique.

Importantly, my purpose here is not to argue in favor of invalidating the ACA. I do not believe that the ACA is unconstitutional or that it should be invalidated, and I do believe that the ACA represents good policy as well as good federalism. Rather, my purpose it to illuminate a different understanding of the ACA holdings—an understanding with strong footing in the legal literature—in the hope of shifting the debate to firmer ground. There might be very good reasons for denying semisubstantive invalidation in the ACA case, including general critiques of semisubstantive review as well as critiques specific to the ACA situation, and my hope is to spark debate on those questions, which seem to me to be the relevant and important ones.

The paper proceeds as follows. Part I situates the ACA holdings’ hybrid substantive-structural analysis within the broader context of semisubstantive constitutional review and judicial manipulation of legislative enactment costs. Part II considers the three possible distinctions between the ACA case and


ordinary semisubstantive review and concludes that the only viable distinction is the doctrinal status of the asserted liberty interests as non-fundamental liberties. Part III argues that this distinction should not make a normative difference on the enactment cost theory of semisubstantive review or, if anything, that it should lend greater rather than lesser justification to the strategy of semisubstantive review. Part IV addresses objections to the ACA courts’ structural analyses and argues that a more skillfully-crafted judicial opinion could rest on defensible and generalizable structural principles. Part V concludes.

I. The ACA Litigation and Semisubstantive Constitutional Review

So far, five federal judges have opined that the ACA’s individual mandate ought to be invalidated. All five have argued that Congress lacks power to penalize individuals for failure to carry health insurance, reasoning that Congress must regulate activity rather than inactivity when it exercises its Commerce Clause power and that it must openly identify exactions as taxes in order to exercise its taxing power.32 Notably, the relevant opinions base their analyses largely if not entirely on substantive libertarian norms rather than structural federalism norms,33 even though the holdings would leave states free to breach the relevant liberties and would, in fact, leave Congress free to reenact the mandate in only slightly altered form.

The scholarly reaction to these opinions has been almost uniformly critical. In addition to questioning the relevance, usefulness, and administrability

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33 See Virginia, 728 F.Supp.2d at 788 (“At 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.”); TMLC, -- F.3d --, 2011 WL 2556039, at *39 (Graham, J., dissenting) (“In the absence of the mandate, individuals have the right to decide how to finance medical expenses. The mandate extinguishes that right. Congress may of course provide incentives . . . to steer behavior, and it may impose certain requirements or prohibitions once an individual decides to engage in commercial activity. It is a different matter entirely to force an individual to engage in commercial activity that he would not otherwise undertake of his own volition.”); Florida, -- F.3d --, 2011 WL 3519178, at *48 (“Although this distinction between regulations that leave individuals with multiple compliance opportunities (like those at issue in Wickard) and mandates that require unique action for compliance appears, at first blush, to implicate liberty concerns not at issue on appeal, in truth it strikes at the heart of whether Congress has acted within its enumerated power. Individuals 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. This suggests that they are removed from the traditional subjects of Congress’s commerce authority[.]”); Florida, -- F.Supp.2d --, 2011 WL 285683, at *22 (reasoning, in a now infamous allusion to the tax on tea that spurred the American Revolution, that the founders would not have “create[d] a government with the power to force people to buy tea in the first place”).
of the action/inaction distinction, several scholars have also criticized, more generally, the incorporation of libertarian norms into structural doctrines. That latter critique, however, is puzzling given the pervasiveness of judicial indirection in the protection of libertarian values.

This Part will demonstrate that both the taxing analysis and the Commerce Clause analysis in the ACA opinions can be understood as instances of a common judicial strategy of raising enactment costs for regulatory projects that implicate substantive constitutional values, including individual liberties.34

A. Taxing

In the first phases of the ACA litigation, the government argued that the individual mandate is constitutional as an exercise of Congress’s taxing power. The plaintiffs, however, have maintained that the mandate is not a tax at all,35 and every court to have decided the case so far has agreed. The government has thus dropped its taxing defense in the litigation.36 Nevertheless, the courts’ analyses of the taxing power have taken a decidedly semisubstantive form, and it is therefore worth reviewing the arguments here.

1. The ACA Judges’ Analyses

Under current doctrine, Congress’s taxing power is extremely broad. Congress may tax for revenue-raising or regulatory ends,37 and it may use taxation to accomplish results that it is not permitted to accomplish through direct regulation.38 Under the Sixteenth Amendment,39 Congress may tax any derived

34 See Stephenson, supra note 18.
35 They have argued in the alternative that the mandate is an unapportioned direct tax that violates Article I, section 2 of the Constitution. U.S. Const. Art. 1, § 2 (“Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers[.]”); see generally Steven J. Willis & Nakku Chung, Constitutional Decapitation and Healthcare, Tax Notes (July 12, 2010) (arguing that the mandate is unconstitutional even if it is a tax because it is an unapportioned direct tax). All of the courts to have addressed the question so far, however, have found that the mandate is not a tax and have therefore failed to reach this alternative argument.
36 Cite. Some courts have continued to consider the question as a jurisdictional one under the Anti-Injunction Act since they are required to address their own jurisdiction regardless of parties’ arguments. Thomas More, -- F.3d --, 2011 WL 2556039, at *4.
37 See generally U.S. v. Sanchez, 340 U.S. 42, 44 (1950) (“It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed[,] . . . even though the revenue obtained is obviously negligible . . . or the revenue purpose of the tax may be secondary[,]”); see also Bob Jones Univ. v. Simon, 416 U.S. 725, 741 n.12 (1974) (noting favorably the Court’s abandonment of the distinction between revenue-raising and regulatory taxes).
38 See Sanchez, 340 U.S. at 44–45 (“Nor does a tax statute necessarily fail because it touches on activities which Congress might not otherwise regulate.”), citing A. Magnano Co. v. Hamilton, 292 U.S. 40, 47 (1934) (“From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment.”); cf. Rivkin & Casey, supra note 16, at 100 (citing Child Labor Tax Case, 259 U.S. 20, for the proposition that Congress may not “evade all of the constitutional limits on its
income, and it may use whatever rules it chooses for determining how much of that income it will tax. Indeed, the Supreme Court has explicitly observed that “Congress’[s] power to tax is virtually without limitation.”

There are, however, five constraints that might arise when Congress passes a tax, four of which are textually explicit constitutional constraints while the fifth is a judicially-created constraint that takes a constitutional dimension. First, a tax and its resulting appropriations must serve the “general welfare.” (Courts, however, defer to Congress in its assessments of the “general welfare,” leaving that constraint with little if any bite.) Second, duties, imposts, and excises must be uniform throughout the country. Third, direct taxes must be apportioned among the states according to their populations. Fourth, income taxes must target only “derived” income. Fifth, a regulatory tax must not actually be a penalty; it must act like a tax.

This fifth (judicially-created) constraint was the central taxing argument in the ACA litigation. While the government maintained that the mandate is an income tax or a uniform excise tax, the plaintiffs argued that the provision is a regulatory penalty that must be sustained, if it can be, only under the Commerce Clause. The crux of the plaintiffs’ argument, however, was not that the mandate has functional characteristics of a penalty; instead it was merely that Congress should not be allowed to defend a regulation as a tax post hoc if the members did not call the provision a tax in its initial passage. The plaintiffs have thus asked the courts to add a new dimension to this implicit constraint on the taxing power: one that would require Congress to admit—during debates, in legislative findings, or in the statute itself—that it is levying a tax rather than imposing a penalty. Although this dimension of the tax/penalty distinction has never been recognized authority by simply imposing ‘taxes’ but failing to note the Supreme Court’s later decisions to the contrary).

See U.S. Const. Amend. XVI.


See U.S. v. Ptasynski, 462 U.S. 74, 79 (1983); see also U.S. v. Khariger, 345 U.S. 22, 31 (noting that courts are generally “without authority to limit the exercise of the taxing power”).

See U.S. v. Butler, 297 U.S. 1, 65 (1936) (interpreting the taxing power and General Welfare Clause to cover any regulatory end, not just those that are separately enumerated); Steward Machine Co. v. Davis, 301 U.S. 548, 586–87 (1937) (rejecting the constraint that appropriations must pursue enumerated regulatory purposes).

See South Dakota v. Dole, 483 U.S. 203, 207 (1997) (noting that “courts should defer substantially to the judgment of Congress” on whether a tax furthers the general welfare); Helvering v. Davis, 301 U.S. 619, 640–42 (1937) (holding that Congress has unreviewable discretion in deciding what constitutes the “general welfare”).

See U.S. Const. Art. I, § 8, cl. 2 (“[A]ll Duties, Imposts, and Excises shall be uniform throughout the United States.”); see also Ptasynski, 462 U.S. 74 (applying the uniformity constraint).

See U.S. Const., Art. I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers[.]”); see also Eisner v. Macomber, 252 U.S. 189 (1920) (invalidating a tax on stock dividends as an unapportioned direct tax).

Macomber, 252 U.S. 189 (holding that stock dividends are not “derived” income).

See Child Labor Tax Case, 259 U.S. at 38 (considering the distinction between a tax and a penalty).

See Amar, supra note 30, at 8–12 (criticizing the taxing analysis for being purely semantic).
in the Supreme Court, much less applied to invalidate an exaction, it does have some support in Supreme Court dicta: The Court has said that legislative intent is the touchstone for determining whether an exaction is a tax or a penalty, \(^{49}\) and the members’ references to a provision as a penalty—and active refusal to call it a tax—give some indication of legislative intent (though, of course, the members’ true intent may have been to impose a new tax without suffering the political blowback of raising taxes).

Every court to have decided an ACA challenge so far has adopted this constraint, holding that the mandate must be a penalty because the bill’s proponents said it was. For support, the courts have cited the following facts: The mandate is labeled a penalty in all of the statutorily headings; the mandate is not included in the statute’s list of revenue-raising provisions; the legislative findings center on the mandate’s effects on interstate commerce; and President Obama and his congressional allies repeatedly insisted that the mandate was not a tax.

Notably, these arguments render the distinction between penalties and taxes purely semantic and process-based rather than structural or functional. \(^{50}\) Indeed, unlike the Child Labor Tax Case on which the plaintiffs largely rely, the ACA cases have not rested on any functional aspects of the individual mandate. The argument is not that the exaction is so hefty as to be penal, \(^{51}\) that the exaction contains a scienter requirement, \(^{52}\) that the exaction is triggered by a violation of other regulatory statutes, \(^{53}\) or that the disincentive effect of the exaction will render the revenue effects trivial. \(^{54}\) It is only that pro-ACA legislators and President Obama called the exaction a penalty in all relevant sources.

2. The Tax Holding as Enactment Cost Manipulation

Despite the formalism of the ACA cases’ analyses, the rule they set fits comfortably with other semisubstantive rules intended to increase enactment costs, and there is little doubt that a semantic “t-word” \(^{55}\) rule would in fact make economic impositions harder to pass. Under current doctrine, Congress’s taxing power is significantly broader than its Commerce Clause power. Congress

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\(^{49}\) See Magnano, 292 U.S. at 47. The Court reasoned: “The statute here under review is in form plainly a taxing act, with nothing in its terms to suggest that it was intended to be anything else. It must be construed, and the intent and meaning of the Legislature ascertained, from the language of the act, and the words used therein are to be given their ordinary meaning unless the context shows that they are differently used.” Id. at 46–47. But see Child Labor Tax Case, 259 U.S. at 38 (treating an exaction as a penalty even though Congress labeled it a tax).

\(^{50}\) Amar, supra note 30, at 10 (“No structural purpose would be served by a judicially fabricated Simon Says rule that taxes must always say ‘taxes.’”).

\(^{51}\) See Child Labor Tax Case, 259 U.S. at 38.

\(^{52}\) Id. at 37.

\(^{53}\) See U.S. v. Constantine, 296 U.S. 287 (1937) (holding that an exaction was a penalty because triggered only by a violation of state law).

\(^{54}\) This is an argument that the Supreme Court has rejected in dicta, but the argument would at least center on some functional characteristic of the law. See Sanchez, 340 U.S. at 44 (noting that a tax will be valid even if it “definitely deters” the taxed activity although “the revenue obtained is obviously negligible”).

\(^{55}\) Amar, supra note 30, at 8 (using “the t-word” to describe the ACA courts’ holdings).
therefore has a strong incentive to use its taxing power to accomplish regulatory ends since taxes will be more likely than penalties to survive judicial scrutiny. But taxes are much harder to pass than penalties. As an emerging body of psychology literature is formally demonstrating, voters are significantly more averse to exactions when they are labeled as “taxes” than when they are labeled as “fees” or “payments,” even when the exactions are substantively and functionally identical. A rule that requires Congress to label an exaction a “tax” in order to invoke its taxing power, therefore, will reduce the number of economic impositions that Congress can enact, and it will force members of Congress to allocate their political capital carefully, passing only those taxes that are truly valuable to the legislators.

This general “magic words” strategy for increasing enactment costs—with all its formalism—is quite common. Dan Coenen provided several examples under the moniker of “form-over-substance rules.” Along similar lines, Matthew Stephenson observed that courts often hold Congress to its legislative history, rewarding “good” debate or punishing “bad” debate. Stephenson theorized that such rules are useful in forcing Congress to engage in more politically difficult enactment deliberations when it wants to pass constitutionally troubling legislation. A requirement that Congress use the word “tax” in legislative debates fits comfortably with the legislative history rules that Stephenson discussed. If the courts will refuse to uphold an exaction under the taxing power unless the word “tax” appears in the legislative history, then judges will raise the enactment cost of economic impositions. Finally, because the ACA judges looked to the words of the statute itself as well as the legislative history, the ACA rule also has much in common with ordinary clear statement rules, some of which require Congress to use “magic words” in order to invoke certain constitutional powers. In the end, then, the ACA courts’ analysis of Congress’s taxing power falls comfortably with ordinary tactics of semisubstantive review and enactment cost manipulation.

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57 Coenen, Semisubstantive Constitutional Review, supra note 18, at 1329–35.

58 Stephenson, supra note 18, at 42–55.

B. Commerce

The primary question in the ACA litigation—and the question that has aroused the most scholarly debate—has been whether the mandate can be sustained under Congress’s power to regulate interstate commerce. The government has argued that the decision to buy healthcare at the point-of-service rather than through insurance is an economic decision that Congress may regulate. The plaintiffs have maintained that failure to buy insurance is not regulable economic activity because it is not activity at all; it is inactivity. As noted, five judges have agreed with the plaintiffs, basing their decisions largely on libertarian rather than federalism norms. My goal in this section is not at all to defend the action/inaction distinction or the ACA judges’ opinions generally. Rather, my goal is simply to demonstrate that the Commerce Clause holdings can be situated as semisubstantive holdings intended to increase the enactment cost of a national insurance mandate. I will address the action/inaction distinction’s problems of judicial inadministrability and “structural otiosity” in Part IV.

1. The ACA Judges’ Analyses

Under modern doctrine, there is no doubt that Congress’s authority to regulate interstate commerce extends to decisions that are both individual and intrastate. That is, a given decision needn’t involve more than one state nor even more than one person for the federal government to have jurisdiction over it, as long as repeated instances of that decision will, in the aggregate, either constitute interstate commerce or have a close connection to interstate commerce. These powers might exist under the Commerce Clause itself or, more likely, under the Necessary and Proper Clause, which allows Congress to use any appropriate means to effect the end of regulating interstate commerce.

In the New Federalism era, the Supreme Court has clearly limited the reach of the “close connection” test, but it chose not to limit Congress’s authority to regulate individual decisions that constitute commerce when aggregated. The lesson from Lopez and Morrison was that noneconomic activities—decisions that are not themselves commercial decisions—cannot be regulated if their economic impacts occur through long causal chains. Although the Supreme Court did not openly doubt that individual decisions to carry a gun near a school or to assault a woman would, when aggregated, have real effects on the American economy, it held that the effects were too distant from the regulated decisions for the statutes to be considered commercial regulations.

These cases stand in stark contrast to Raich, in which the Supreme Court upheld a prohibition on intrastate manufacture, sale, and possession of marijuana—actions that the Court treated as economic actions, which, when

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60 See Hills, supra note 28 (calling the Commerce Clause arguments in the ACA litigation “structurally otiose”).
62 See Morrison, 529 U.S. 598; Lopez, 514 U.S. 549.
aggregated, would constitute commerce. The Court thus held that the ban on marijuana production and distribution was, at its heart, a commercial regulation and thus a rational approach to controlling the interstate marijuana market. As the law currently stands, then, the controlling distinction is between statutes targeting economic actions that constitute commerce and statutes targeting noneconomic actions that (eventually) impact commerce.

Under the distinction as drawn, the individual mandate is a permissible regulation. The decision not to buy health insurance is an economic act that, when aggregated, will constitute commerce. Of course, it will not constitute commerce in health insurance; it will instead constitute commerce in uninsured healthcare—in healthcare financed at the point of service. Nevertheless, the aggregated decision to forego insurance will sustain a commercial market in uninsured care that would be less likely to exist if no one made that decision, just as the aggregated decision to grow medicinal marijuana in California will sustain an interstate black market in recreational marijuana that would be less likely to exist if no one made that decision.

While admitting that the decision to forego health insurance is economic, the ACA plaintiffs urge that the legal distinction should also depend on whether a given economic decision is a decision to do something or a decision not to do something. Congress should be allowed to regulate economic activity, they argue, but not economic inactivity. Like the semantic dimension of the tax/penalty distinction, this dimension of the economic/noneconomic distinction has no doctrinal basis but some support in Supreme Court dicta; the Commerce Clause cases consistently refer to economic “activities” rather than to economic “decisions” as the regulable class. Of course, as any economist knows, the decision not to do something is an active decision to do something else. That’s just opportunity cost. But it is conceivable that the Commerce Clause or Necessary and Proper Clause limits the federal government to regulating the taken opportunity rather than the foregone one. That is, the federal government might be allowed to penalize individuals only for taking an opportunity that the government dislikes, not for rejecting an opportunity that the government prefers. In this case, that would mean that Congress would need to penalize individuals for consuming uninsured healthcare rather than penalizing them for failing to buy insurance. That regime is easily imaginable; Congress could impose an annual penalty on anyone who purchased healthcare without insurance during the course of the year, triggered only upon an uninsured visit to the doctor. The penalty in

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64 Raich, 545 U.S. at 25 (“Unlike those at issue in Lopez and Morrison, the activities regulated by the [Controlled Substances Act] are quintessentially economic.”).
65 Id. at 26 (“Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.”).
66 See Vinson at 52–56 (holding that Congress must regulate economic “activities,” not economic “decisions”).
67 Vinson at 51 (openly embracing the “formalism” of holding that Congress may penalize the purchase of uninsured healthcare but not the failure to purchase health insurance).
68 This is essentially identical to the regime at issue in Wickard, 317 U.S. 111. Although the regulatory goal was to decrease supply of and increase demand for traded wheat, Congress did not
that case might need to be higher than the ACA penalty in order to keep the decisional calculus the same (because individuals can avoid healthcare visits for one or two years, thereby triggering the penalty less frequently), but Congress could conceivably create an identical incentive by regulating the “action” rather than the “inaction.”

2. The Commerce Clause Holding as Enactment Cost Manipulation

Both as a general matter of federalism and as a particular feature of the “action/inaction” distinction, the ACA cases’ Commerce Clause analyses can be understood as enactment cost manipulation. Admittedly, scholarly theories of semisubstantive review have generally treated federalism as a substantive value that can receive indirect protection rather than as a tool for providing indirect protection. Nevertheless, a few scholars have argued, as both a descriptive and normative matter, that delegation to states is a good way to protect individual liberty; the Supreme Court has repeatedly argued that federalism is a means of protecting liberty rather than an end in itself; and there can be little doubt that delegations to states will raise the enactment cost of a national regulatory project. It is not at all implausible, therefore, that Commerce Clause limitations can and do function as semisubstantive rules, increasing enactment costs for constitutionally troubling regulations. (Within Coenen’s typology, federalism limits are species of “who” rules, shifting authority to the states.) That said, my argument here does not at all depend on downplaying the substantive value of federalism; my goal is only to demonstrate that federalism has the additional feature of increasing enactment costs. Furthermore, the specific holding in the ACA cases, which requires Congress to penalize taken opportunities rather than foregone ones, can be understood as a semisubstantive rule intended to raise the enactment cost of incentives for personal financial management.

First, there can be little doubt that, as a general matter, delegations to states will raise the enactment cost of a national regulatory project. Assuming that the members of Congress and the stakeholders that motivate them want a

punish farmers for failing to buy wheat on the general market. Instead, it punished them for growing too much untraded wheat of their own.

69 See generally Coenen, Semisubstantive Constitutional Review, supra note 18; Manning, supra note 18. But see Hills, Individual Right to Federalism, supra note 18.


uniform national policy, a holding that they must accomplish their goal through state regulation will require them to use horizontal rather than vertical federalization—a strategy with significantly higher transaction costs. For obvious reasons, getting fifty state statutes passed is harder than getting one federal statute passed. Even if all of the states were willing to attempt coordinated regulation, herding the cats of fifty state legislatures can be quite difficult. Of course, Congress can pass conditional grants to incentivize state cooperation, but that strategy, first, usually requires some kind of unpopular revenue increase to fund the grants and, second, allows individual state holdouts (like Arizona with Medicaid). Commerce Clause holdings, thus, are capable of raising enactment costs.

That said, not all Commerce Clause holdings have the effect of prohibiting federal regulation and delegating the decision to the states, but a semisubstantive Commerce Clause holding could. In Lopez, for example, the Court issued a narrow holding with no substantive dicta and with two easy options for congressional reenactment; the majority opinion implied that the statute would have been constitutional if it had included either a jurisdictional element or congressional findings of a general impact on commerce. In response, Congress reenacted the provision the next year, including both of the suggested provisions, and nobody has challenged the statute since. The reenactment had slightly higher costs than the initial attempt by requiring legislative findings, but the difference was likely minimal. The Gun Free School Zones Act has thus been in nearly continuous effect since its initial passage in 1990, notwithstanding the Supreme Court’s holding.

If, instead of issuing this narrow holding, the Court had treated the Commerce Clause challenge as a semisubstantive argument with Second Amendment implications, it could have made a bigger difference to the statute’s enactment costs. The Supreme Court could have incorporated broad Second

75 514 U.S. at 561–62 (noting that the GFSZA “contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce”).
76 Id. at 562–63.
78 A direct Second Amendment challenge would have been sure to fail at the time, but it might succeed today. See, e.g., Amicus Brief on Behalf of: Academics for the Second Amendment; Second Amendment Foundation; Congress of Racial Equality; National Associations of Chiefs of Police and American Federation of Police Amicus Brief Supporting Neither Party (Jun. 2, 1994) (arguing that the Second Amendment forbade the Gun Free School Zones Act (GFSZA) even though respondent Lopez had not raised a Second Amendment challenge); cf. D.C. v. Heller, 554 U.S. 570 (2008) (holding for the first time that the Second Amendment protects individual rights as well as states’ rights); McDonald v. Chicago, 130 S.Ct. 3020 (2010) (incorporating the Second Amendment’s individual right into the Fourteenth Amendment so that it also binds the states).
Amendment principles into its Commerce Clause analysis, in typical semisubstantive form, holding for example that individual decisions about where to carry or how to use a legally-owned gun are beyond Congress’s power to regulate (perhaps unless the discrete actions themselves cross state lines). A semisubstantive holding, then, could have made it impossible for Congress to regulate guns near schools without either relying on state implementation or, say, criminalizing all concealable weapons (thereby targeting the economic market instead of the individual behavior). Both of those approaches probably would have had higher enactment costs. This view suggests either that Lopez was not a semisubstantive holding at all or that the Lopez Court was more cautious about semisubstantive analysis given that the Second Amendment interest was not “fundamental” at the time. The point for now, though, is that Commerce Clause holdings are capable of bearing all the usual characteristics of semisubstantive review and enactment cost manipulation, and the Supreme Court has indicated that it conceives of federalism limitations in this way.

Furthermore, the precise rule that the ACA courts have created—the “action/inaction” distinction—can be understood as an attempt to raise enactment costs for federal incentives related to personal financial management. Assume, for the time being, that the holding is really about taken opportunities versus foregone opportunities (rather than “action” versus “inaction”) and that its applicability is limited to individuals’ financial management decisions. I will propose and discuss these two limitations more extensively in Part IV. The rule, then, would be that congressionally created incentives for saving must be tax incentives (as just discussed), entitlement programs like Social Security and Medicare (which also exercise the taxing and spending power), or penalties that arise when individuals resort to bad opportunities due to their failures to save. They must not be regularized penalties that apply to the everyday business of failing to save. Understood this way, the rule has a clear substantive element insofar it relates only to individuals’ freedom to manage their finances however they see fit.

The rule also has relevant features of enactment cost manipulation. One concern that the courts might have about the ACA is that the individual mandate is overinclusive by requiring all individuals to carry insurance, including those who save enough to afford out-of-pocket healthcare. A requirement that the penalty attach to a taken opportunity rather than a foregone one would require Congress to show its hand in this regard, allowing the legislature to impose a penalty on the consumption of uninsured healthcare if the free-rider problem is

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79 Rick Hills has argued that Lopez constitutes semisubstantive protection for Fourteenth Amendment rights in education. Hills, Individual Right to Federalism, supra note 18, at 889–91 (situating Lopez alongside Fourteenth Amendment education cases by treating it as a case about “school safety and discipline”); see also Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). I find this argument far less persuasive than the Second Amendment possibility; there is no plausible argument that individuals, whether parents, students, or teachers, should have a right to carry a gun to school in order to improve their educations.

80 See generally Stephenson, supra note 18, at 34–36 (discussing overinclusiveness as a reason for substantive review and narrow tailoring requirements).
enough to justify the mandate or a penalty on the consumption of *uncompensated* healthcare if problems of cost-shifting are necessary to justify the mandate.\(^8\)

C. Conclusion

The ACA cases so far undoubtedly represent extensions of New Federalism doctrines, and they rest on shaky structural premises. Nevertheless, the cases’ incorporation of libertarian norms into the structural doctrines is far from novel. Both the taxing power analysis and the Commerce Clause analysis can be easily situated within the broader context of semisubstantive constitutional review. Both holdings will increase the enactment cost of a national insurance mandate, forcing Congress to decide and reveal whether the collective interest in requiring health insurance coverage is really important enough to justify the intrusion on individuals’ healthcare autonomy and economic liberty.

II. Three Objections to Semisubstantive Review in the ACA Case

Given that semisubstantive review is so common, the scholarly outrage at the ACA judges’ references to libertarian norms seems surprising. For most scholars, however, that outrage seems primarily directed at the asserted liberty interests themselves. The central scholarly objection seems to be that the mandate poses no important threat to individual liberty, not that individual liberty must always be irrelevant to federalism analysis.\(^8^2\) The question, then, is what makes a liberty interest important enough to garner indirect judicial protection.

The literature has implied three possible distinctions between the ACA case and the ordinary case of semisubstantive review. First, there might be no relevant liberty interest at stake at all. Second, the identified liberty interests might not have been breached in this case. And third, the liberty interest might be of a kind that should not garner any judicial protection, whether direct or indirect. This Part will consider each of these possible objections in turn and will conclude that only the third presents a plausible descriptive distinction between the ACA cases and the ordinary habit of semisubstantive review.

A. Whether the ACA Involves Any Constitutional Liberty Interest

One possible objection to semisubstantive analysis in the ACA case—and the one suggested in scholars’ assertions that there is no individual right to be uninsured—is that there is no constitutionally relevant liberty interest at stake.

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\(^{81}\) Neither of these options would, in my view, represent good policy. A penalty at the point-of-service is simply draconian for the millions of uninsured Americans who already file for bankruptcy due to medical bills, and it is less likely than the mandate to incentivize coverage. As a purely legal and constitutional matter, however, this feature of the ACA holdings is certainly reminiscent of information-forcing enactment cost manipulation.

\(^{82}\) Compare Hills, Individual Right to Federalism, supra note 18 (cataloguing and defending the Rehnquist Court’s semisubstantive federalism holdings), with Hills, supra note 22 (arguing that semisubstantive review is inappropriate in the ACA case). Other scholars have less outwardly differentiated between the ACA case and others, but they have made their objections to the libertarian arguments known, particularly in their regular invocations of *Lochner*. Cites.
The point here is not that the mandate does not infringe the constitutional liberty interests that the plaintiffs have raised (the subject of the next subsection) but rather that the liberty interests themselves are not constitutionally relevant. A desire to be uninsured, the argument goes, is simply not a constitutional interest.

But the premise underlying this objection is clearly wrong. The ACA plaintiffs have raised broader liberty interests than a freedom to be uninsured, and those broader interests undoubtedly retain constitutional relevance. The plaintiffs have in fact raised two constitutional liberty interests, the freedom of health and the freedom of contract. Their arguments have centered on both the right to control their own medical care and the right to choose whether and when to enter into a contract with a private individual or corporation.

Admittedly, the Supreme Court has never applied a bare freedom of health to invalidate state action, and no court has applied the freedom of contract since the death of the *Lochner* era in 1937. The rarity of judicial invalidation, however, does not establish that the liberty interests are constitutionally irrelevant. In the modern rights paradigm, there is a widely acknowledged “double standard” of judicial review, by which some constitutional rights garner strict judicial protection while others are left primarily to political safeguards. Within this paradigm, economic liberties are left almost entirely to politics, and at least some parts of the freedom of health are likewise. The Supreme Court’s opinion in *Washington v. Glucksberg*, for example, held that the freedom to obtain a physician’s assistance in hastening death ought to be left to political elaboration in the states. Importantly, however, the modern paradigm neither denies that healthcare autonomy and economic liberties exist nor denies that they should be protected; rather, it holds that the political process suffices to provide that

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83 See generally Moncrieff, supra note 5, at 2215–27 (tracing the freedom of health through Supreme Court precedent and noting that it has been used to invalidate state action only when combined with reproductive freedoms).


85 The judiciary will review deprivations of economic liberty, including those effected through regulation, under the Takings Clause, see Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), though the Supreme Court almost never invalidates regulations on this basis. See generally Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985).

86 See Washington v. Glucksberg, 521 U.S. 702, 735 (1997) (“Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”); see also Hills, Individual Right to Federalism, supra note 18, at 894 (characterizing the *Glucksberg* holding as leaving a substantive due process question to political elaboration in the states). Interestingly, the Court doubled down on this view with a structural holding in Gonzales v. Oregon, 546 U.S. 243 (2006), holding that the federal government may not prohibit the states from using federally controlled substances for physician assisted suicide.

87 See generally Strauss, supra note 9, at 381–86 (defending the propriety and usefulness of recognizing a freedom of contract).
protection.88 (This point is a doctrinal rather than a theoretical one. There have been academic arguments that economic liberties are unworthy of constitutional consideration,89 but courts have held only that such liberties do not require judicial protection.)

In one of the first and most influential statements of modern rights analysis—the Carolene Products footnote in which Justice Stone delineated the kinds of legislative encroachments that require strict judicial review90—the justification for refusing scrutiny to economic liberties was not that they were unimportant or nonexistent. Rather, it was that judicial protection is necessary and appropriate only when the political process fails to provide adequate protection of its own.91 On Justice Stone’s view, judicial review is particularly important for legislation that arises from distortions in the political process (such as prejudice against “discrete and insular minorities”) and for legislation that creates new distortions in that process (such as restrictions on voting, speech, assembly, and association).92 This basic idea evolved into one of the most influential holistic theories of constitutionalism and judicial review with John Hart Ely’s Democracy and Distrust, which argued that judges should intervene only to correct distortions in the representative process.93 As a descriptive matter, the “representation reinforcement” theory does not actually explain why particular rights fall on one side or the other of the “double standard”; courts often give heightened protection to fully represented rights and classes and sometimes deny heightened protection to underrepresented rights and classes.94 But that is not the important point for present purposes. The point here is that, doctrinally speaking, the justification for relegating some rights to political protection has never been that those rights are constitutionally unimportant or nonexistent. It has only ever been a notion about the proper judicial role in rights enforcement. Indeed, if economic liberty were entirely irrelevant to substantive constitutional rights, the judiciary would not even bother with rational basis review; it would simply dismiss all such arguments for failure to state a claim.

88 Justice O’Connor made this point explicit in her Glucksberg concurrence, writing: “Every one of us at some point may be affected by our own or a family member’s terminal illness. There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State’s interests in protecting those who might seek to end life mistakenly or under pressure.” Glucksberg, 521 U.S. at 737 (O’Connor, J., concurring).
91 Admittedly, Justice Stone started the footnote with a distinction between enumerated and unenumerated rights, id., but that particular distinction has fallen by the wayside in the modern era of implied fundamental rights. See generally Baker & Young, supra note 84, at 81–82 (noting a few reasons that the textual distinction is unsatisfying in the modern era rights).
92 Carolene Products, 304 U.S. at 152 n.4.
94 See Baker & Young, supra note 84, at 83–84.
There can be no doubt, then, that the ACA plaintiffs have evoked constitutionally relevant libertarian norms. Those norms might not be deserving of indirect protection through semisubstantive review, but they are unquestionably constitutional in nature.

B. Whether the Individual Mandate Violates the Asserted Liberty Interests

A second and more plausible objection to semisubstantive review in the ACA litigation lies in the view that the individual mandate does not violate the freedom of health or the freedom of contract. This argument could take one of two forms, both of which rest on plausible premises but only one of which could distinguish the ACA case from the ordinary case of semisubstantive review. The first possible argument is that no court would invalidate the individual mandate even if the judges were applying the substantive doctrines in their most robust forms. The second is that the individual mandate cannot be said to violate the substantive doctrines because the mandate was enacted through the supermajoritarian political process, which serves as the only testing ground for violations of non-fundamental liberties like the freedom of health and the freedom of contract. Again, both of these arguments rest on plausible premises, and the second argument presents a viable distinction between this case and the ordinary semisubstantive case—a distinction that I will address at length in the next subsection and in Part III. The first argument, however, utterly fails to differentiate the ACA litigation from ordinary semisubstantive cases.

Although it is almost certainly true, as a doctrinal matter, that a court applying a robust freedom of health and a robust freedom of contract would uphold the individual mandate against those challenges, semisubstantive review does not depend on the presence of an actual constitutional violation. In fact, the opposite may be true. Process-based invalidations seem to be more common for statutes that would not be held invalid on direct review.95 That said, it is of course also true that semisubstantive invalidation is and ought to be inappropriate for a challenge that raises no true constitutional concerns, even if it nominally appeals to a constitutionally relevant interest. Courts have therefore applied semisubstantive review only for statutes that raise serious constitutional questions or doubts—or at least pose genuine challenges to broad constitutional values.96 But the individual mandate does that.

95 See Manning, supra note 18, at 404 (“Indeed, the defining feature of constitutionally inspired clear statement rules is that even when a given interpretation of a statute would not violate the constitutional provision(s) from which the triggering value emanates, that interpretation might still be said to collide with the background value itself.”); Young, supra note 18, at 1552 (arguing that “soft limits” on constitutionally sensitive regulations are justifiable as judicial “resistance norms”); Vermeule, supra note 26 (proving this point as an empirical doctrinal matter); Richard A. Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 816 (1983) (noting that semisubstantive review creates “a judge-made constitutional ‘penumbra’” by invalidating statutory applications that would not be unconstitutional on direct review).
96 See Young, supra note 18, at 1551 (defending semisubstantive review as a means of “push[ing] interpretations in directions that reflect enduring public values”).
1. The Freedom of Contract

Take the freedom of contract argument. I’ll be the first to admit that the arguments against the mandate are weak. Even under the *Lochner* doctrine in its most robust form, the case against the mandate would be significantly harder to make than scholars have implied in their passing references to the ACA plaintiffs’ *Lochner*-like arguments. The *Lochner* Court itself upheld insurance rate regulations against substantive due process challenges under an exception for “statutes fixing rates and charges to be exacted by businesses impressed with a public interest”; it allowed indirect approaches to rate regulation, including regulations of insurance brokers’ commissions, and might therefore have upheld the mandate as a measure intended to decrease rates by combating adverse selection; and the *Lochner*-era Supreme Court twice dodged the question of whether compulsory insurance laws might breach the freedom of contract. Notably in this regard, the first state requirement for auto insurance passed in Massachusetts in 1925, at the height of the *Lochner* era, and mandatory workers’ compensation regimes, which some states treated as insurance requirements, hit the scene in the 1910s. It is therefore not at all obvious that compulsory insurance provisions would violate the freedom of contract even if the substantive doctrine were enforced directly.

Nevertheless, there is something to Randy Barnett’s insistence that a health insurance requirement is different in kind from all other laws compelling private economic transactions. First, unlike other such penalties, including those upheld in *Wickard v. Filburn* and *Heart of Atlanta Motel v. United States* as well as all other kinds of compulsory insurance provisions, the ACA mandate is triggered simply by being a living resident of the United States. One need not buy a car, buy a home, employ people, open a motel, or grow wheat in order to trigger the ACA’s penalty. Second, unlike other bare requirements of residency, the individual mandate is a requirement for private behavior. It is certainly not a

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97 See O’Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U.S. 251, 257 (1931); German Alliance Ins. Co. v. Kansas, 233 U.S. 389, 412–13 (1914). Notably, during this era, insurance was not considered to be “interstate commerce”; Congress, therefore, could not implement rate regulations, but the states could. See Paul v. Va., 75 U.S. 168 (1868), overruled by U.S. v. South-Eastern Underwriters Ass’n, 322 U.S. 533 (1944).


99 See O’Gorman, 282 U.S. at 257 (reasoning that brokers’ commissions, “being a percentage of the premium,” bore “a direct relation to the rate charged the insured” and were therefore “a vital element in the rate structure”).

100 See Alaska Packers Ass’n v. Industrial Acc. Com’n, 294 U.S. 532 (1935) (noting that a California court had characterized that state’s workers’ compensation regime as “compulsory insurance” but upholding the regime against a freedom of contract challenge on the ground that it merely assigned liabilities); Hawkins v. Bleakly, 243 U.S. 210, 219 (declaring to address the constitutionality of a compulsory workers’ compensation regime that did not bind the party before the Court). See also In re Opinion of the Justices, 81 N.H. 566 (1925) (upholding New Hampshire’s compulsory auto insurance law against equal protection and dormant commerce clause challenges but failing to address a freedom of contract challenge).

101 Cites.

102 317 U.S. 111 (1942).

public duty of citizenship like registering for the draft or serving on a jury—requirements for participation in popular government. Nor is it a tax (because not labeled a tax!) nor even an obligation to participate in a public entitlement program like Social Security or Medicare (which have participation requirements even for those who did not pay into the systems through taxation). The individual mandate is a requirement that all residents of the United States enter into private contracts with private insurance companies. Third, the ACA mandate is not quite like other simple incentives for private purchases, such as the first-time homebuyer tax credit. Unlike other such incentives, the ACA mandate has been accompanied by an extensive rhetoric of obligation, including the “mandate” moniker as well as state-interest justifications related to free-rider and collective action problems. Perhaps these kinds of “expressive” harms shouldn’t matter, but they often do.¹⁰⁴ (Notably, no one treated the first-time homebuyer credit as a requirement that everyone buy a house, even though it was functionally indistinguishable from the insurance mandate. All U.S. residents who failed to buy a house in the relevant tax years paid $8000 more in taxes than they otherwise would have, which as a percentage of compliance cost is pretty close to the $695 penalty for failure to buy health insurance.)¹⁰⁵

Overall, these arguments are almost certainly insufficient to invalidate the ACA on direct substantive review. Indeed, all they really prove is that the ACA mandate has never been done before. That said, however, the arguments do raise a hint of constitutional doubt under a basic freedom of contract; if nothing else, novelty demonstrates that the precise constitutional question has never been answered before. And these arguments certainly appeal to a general public value of economic liberty.¹⁰⁶ All told, then, the right answer is likely that the mandate is constitutionally unproblematic, but the ACA plaintiffs have done enough to trigger ordinary semisubstantive review.

2. The Freedom of Health

In addition to their broad assertions of economic liberty, the plaintiffs have raised the more limited argument that the individual mandate impermissibly intrudes on healthcare autonomy. This argument, too, is quite weak on the direct doctrinal analysis. The negative liberty interest that the Supreme Court has recognized in freedom of health cases is merely an application of the interest in bodily autonomy—a freedom to control medical decisions in order to control

¹⁰⁵ See generally IRS, First-Time Homebuyer Credit (June 21, 2011), http://www.irs.gov/newsroom/article/0,,id=204671,00.html. The average home cost about $250,000 in 2009, making the penalty about 3% of the cost of compliance. The average family health insurance plan costs about $12,000, making the penalty about 6% of the cost of compliance.
one’s bodily health. That freedom clearly includes a freedom to reject healthcare—an extension of the common law rule that forced treatment is a battery—and it also includes a freedom to obtain at least some kinds of healthcare, particularly including reproductive services.\footnote{107}

The ACA mandate, however, is a requirement for health \textit{insurance}, not health \textit{care}. Individuals with health insurance remain free to reject whatever care they don’t want, and they remain free to consume whatever care they do want, though they might need to pay out of pocket for care that the insurer deems medically unnecessary.\footnote{108} The negative liberty interest is therefore largely if not entirely intact.\footnote{109} In short, the individual mandate does not require anyone to “eat their broccoli”—only to pay for it.\footnote{110}

Nevertheless, the mandate raises a handful of plausible constitutional concerns under the freedom of health, including two narrow doctrinal questions and one broad values-based challenge.

As a doctrinal matter, courts do sometimes invalidate mandatory payment structures when constitutionally important goods and services are at issue. In the First Amendment context in particular, the Supreme Court has invalidated two kinds of purely fiscal regimes that seem roughly analogous to the individual mandate. First, subsidization and fee-setting regimes for artistic, religious, or political expression are unconstitutional if they are not neutral with respect to ideological content.\footnote{111} Even though such regimes obviously leave speakers free to engage in their preferred expressive activities with their own money, the Court has held that government may not distort the relative price to the speaker of various expressive contents. The same rule might render medical necessity review constitutionally problematic once government starts requiring everyone to have an insurance contract\footnote{112}; medical necessity review and its resulting payment

\footnotesize{\textsuperscript{107}} See generally Moncrieff, supra note 5, at 2216–27.\footnotesize{\textsuperscript{108}} See id. at 2247–51 (discussing the relevance of medical necessity review to the constitutionality of the individual mandate under a freedom of health); B. Jessie Hill, What is the Meaning of Health, 37 Am. J.L. & Med. (forthcoming 2012) (discussing the ways in which the ACA will involve government in definitions of medical necessity, potentially in abrogation of a freedom of health).\footnotesize{\textsuperscript{109}} But see Marshall B. Kapp, If Americans Have a Right to Refuse Medical Treatment, Do They Have a Right to Refuse to Purchase Medical Insurance?, 37 Am. J.L. & Med. (forthcoming 2012).\footnotesize{\textsuperscript{110}} See generally Andrew Koppelman, Health Care Reform: The Broccoli Objection (Jan. 19, 2011), Balkinization, available at http://balkin.blogspot.com/2011/01/health-care-reform-broccoli-objection.html; Florida, -- F.Supp.2d --, 2011 WL 285683, at *24 (“Congress could require that people buy and consume 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 are thus more productive and put less of a strain on the health care system.”).\footnotesize{\textsuperscript{111}} See Rosenberg v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) (invalidating a university policy of refusing to fund religious student groups on the ground that the policy would chill religious expression on campus); Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123 (1992) (invalidating a fee-setting regime for parades and assemblies in public places on the ground that the regime was not content-neutral and would therefore chill expression).\footnotesize{\textsuperscript{112}} There is one important difference, which is that the payment decisions are made by private companies rather than state agencies. Under the state action doctrine, that difference might make all the difference, even though insurance companies are highly regulated. See American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999) (holding that private insurers’ utilization review,
decisions are emphatically non-neutral with respect to the relative values of medical services, and they definitely distort the relative price to the patient of various treatment decisions. Second, the Supreme Court has held that laws requiring cross-subsidizations of private commercial speech are unconstitutional, even though such regimes obviously leave speakers free to craft and convey their own messages with their remaining funds. The individual mandate creates the same kind of mandatory cross-subsidization for healthcare by requiring individuals to purchase comprehensive coverage rather than insuring only against their individual risks. The purpose and effect of the minimum coverage provisions is to pool risk more broadly, redistributing from the healthy to the sick.

I do not mean to suggest here that the individual mandate violates the freedom of health simply because it resembles unconstitutional speech regimes. The freedom of speech is given significantly greater weight in constitutional law than the freedom of health; there is a rule in First Amendment law that financial allocations constitute protectable expressive actions, which obviously makes economic regulations harder to pass in the First Amendment context; and the broad value underlying the First Amendment is the freedom of belief, which is more likely to have communitarian and financial dimensions than the highly individualistic and physical value of bodily integrity. The point here, however, is only that the individual mandate is not free and clear of constitutional doubt simply because the statute is about insurance rather than care. The mere retention of negative liberty is not always sufficient in constitutional analysis. At a minimum, these analogical arguments might be enough to create the kind of constitutional question or doubt that frequently triggers semisubstantive review.

At a higher level of generality, the individual mandate raises a specter of excessive governmental involvement in healthcare decisionmaking, as the Tea
Party has made clear in persistent references to healthcare rationing\textsuperscript{118} and socialized medicine\textsuperscript{119} (the two bogeymen that the freedom of health would be most likely to prohibit\textsuperscript{120}). Although the penalty attached to the individual mandate is far from draconian and although individuals remain free in the post-ACA world to choose whatever course of treatment they prefer (as long as they can afford it), the mandate is undoubtedly a requirement for participation in a national healthcare system. It is plausible that the freedom of health is, broadly speaking, about allowing individuals to choose their healthcare environment, including the choice of whether any outside or government entity oversees their healthcare consumption decisions.

Like the freedom of contract arguments, these arguments are undoubtedly insufficient to hold the mandate unconstitutional on a direct freedom of health challenge. But they probably would be sufficient to trigger ordinary semisubstantive review if the freedom of health were entitled to indirect protection.

C. Whether Non-Fundamental Liberties Get Indirect Protection

The third possible objection to semisubstantive review in the ACA litigation—and the one that seems to drive scholars’ invocations of \textit{Lochner} when criticizing the plaintiffs’ libertarian arguments—is the view that non-fundamental liberties should not receive any judicial protection at all, whether direct or indirect. This objection is the only one that provides a viable descriptive distinction between the ACA case and the ordinary case of semisubstantive review.

Both Dan Coenen, in his exhaustive review of Rehnquist Court semisubstantive review, and Rick Hills, in his less-exhaustive consideration of the Rehnquist Court’s federalism jurisprudence, found that the Court provided indirect protection only to \textit{fundamental} substantive values,\textsuperscript{121} or at least substantive questions that are categorically aligned with fundamental values.\textsuperscript{122}


\textsuperscript{120} See Moncrieff, supra note 5, at 2238–51.

\textsuperscript{121} See Hills, Individual Right to Federalism, supra note 18, at 889–91; Coenen, Semisubstantive Constitutional Rules, supra note 18, at 1283.

\textsuperscript{122} Hills’s argument was really that the Rehnquist Court protected “noneconomic” liberties in this way. He thus aligned the Commerce Clause cases with the “zone of privacy” in Fourteenth
Assuming that is true, the ACA case is certainly different from other semisubstantive cases. There can be little doubt that the freedom of health and freedom of contract are not currently fundamental liberties for constitutional purposes. The freedom of contract lost its fundamental status with the death of the *Lochner* era in 1937. As for the freedom of health, the Supreme Court once referred to the freedom to reject care as a “significant liberty interest,” but it applied something less than strict scrutiny in that case and has deferred to a wide range of state interests in freedom of health cases. And the one federal appellate opinion that deemed the freedom to obtain care a fundamental liberty interest was promptly overturned en banc and then denied certiorari.

There might, therefore, be a genuine descriptive distinction between the ACA case and the usual case of semisubstantive review insofar as the asserted liberties are not fundamental liberties. The question, though, is whether that distinction should make a difference.

### III. Extending Indirect Protection to Non-Fundamental Liberties

In the end, the best possible objection to the incorporation of libertarian norms in the ACA cases is the argument that semisubstantive review does not and should not extend to non-fundamental liberties. In its best light, the argument would go as follows: Non-fundamental liberties are those that we self-consciously leave to political protection. It is precisely because these substantive values are adequately represented in the ordinary political process that judicial review is unnecessary. Definitionally, then, a duly enacted statute cannot be said to violate non-fundamental substantive due process because the only process that is due for the deprivation of these liberties is bicameralism and presentment; those procedures are sufficient to ensure that the collective interest in regulating is strong enough to justify the infringement of liberty. In short, semisubstantive review is judicial review “lite,” and that practice is inappropriate for liberties that have been removed from judicial protection altogether.

Although this argument has normative force, its conception of fundamentalness is too static and its conception of political safeguards overly simplistic. Semisubstantive review in the context of non-fundamental liberties could serve two important and normatively desirable purposes. First, it could allow the judiciary to test political reactions to libertarian infringements in order

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Amendment law by pointing out that the boundaries of both doctrines seem to be defined by their “noneconomic” nature. This point does not quite argue that only fundamental rights get indirect protection, but it suggests that liberty interests must be in the same “zone” as fundamental rights in order to get protection. See Hills, supra note 18, at 889–91.

123 See Washington v. Harper, 494 U.S. 210, 221–22 (1990) (“We have no doubt that . . . respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.”).

124 See generally Moncrieff, supra note 5 (noting that the freedom of health might be fundamental given the Court’s usual balancing approach in freedom of health cases but also noting that a wide range of regulatory projects count as “compelling state interests” for healthcare regulation).

125 See Abigail Alliance, 495 F.3d 695.

126 I noted hesitations about Coenen’s and Hills’s characterizations of the precedents in note 29, supra.
to discern whether a liberty interest ought to garner stronger judicial protection. Second, even for liberties that clearly are and ought to remain non-fundamental, semisubstantive review allows the judiciary to give heightened protection to structural rules when they are most important: when they are serving as the only safeguard of liberty. I will flesh out each of these arguments in turn.

A. Value Uncertainty and Enactment Cost Manipulation

In Matthew Stephenson’s theory of semisubstantive review, his central claim is that judicial manipulation of legislative enactment costs helps to cure a particular informational problem in the judicial balancing of constitutional constraints against collective preferences. The problem he identified is that all constitutional constraints should and do give way when a collective interest in breaching them is sufficiently strong, but the political branches have better information than the judiciary about the true strength of an asserted collective interest. By raising the cost of political action when constitutional values are at stake, the judiciary gains important information about public preferences and collective needs and thereby cures the information asymmetry. If the political branches can reenact the problematic policy at the judicially-manipulated higher price, then the asserted collective interest is much more likely to be genuine.

Stephenson’s theory, however, explicitly assumes away any uncertainty about the value of the underlying constitutional constraints. Indeed, Stephenson differentiated more generally between the countermajoritarian difficulty, which he deemed a legitimacy problem with judicial definition of constitutional values, and the balancing difficulty, which he deemed an informational problem in judicial determinations of constitutionally relevant facts.

The dichotomy between fact and value, though, is not actually as strong as Stephenson implied. The importance of a particular constitutional constraint is not an abstracted, fact-free value that judges unilaterally declare and then perpetually enforce. Instead, constitutional values are evolutive. They are both contingent on and responsive to popular social norms—contingent because the judges are themselves part of the populace and thus part of the shifting social environment, and responsive because the judges seem aware of their own legitimacy constraints and willing to concede to popular pressures rather than risk

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127 See Stephenson, supra note 18, at 11 (“I advance the stronger claim that judicial imposition of additional enactment costs on legislatures enables courts to reduce their comparative informational disadvantage. The better-informed government decisionmakers will only be willing to act when their true interest in the policy is sufficiently strong; government exaggeration of its true interest becomes a less viable strategy.”).
128 Id. (“[T]he Article assumes away concerns about whether the courts assign the appropriate level of normative significance to various rights, values, and interests.”).
130 Id. at 9–11.
court packing or some other institutional attack. As a result, individual liberties can and do shift between fundamental and non-fundamental status as social norms change—as we all know from the death of the Lochner era. And the phenomenon is not always as stark as “the shift in time”; the first declaration of an abortion right, for example, looked like a strict scrutiny rule, but as the right has evolved in the face of popular resistance, its judicial protection has ebbed. In short, popular political preferences are relevant not only to state interest overrides but also to the strength of the constitutional constraints in the first place.

Take, then, Stephenson’s theory that judicial resistance to anti-libertarian legislation is a useful way to gain information about the strength of an asserted state interest. The same theory ought to apply when the information the judiciary lacks is the strength of popular interest in a general libertarian norm. If a non-fundamental libertarian constraint seems to be gaining in popularity, the judiciary can use indirect protection and enactment cost manipulation to test political willpower. If the political process continues to infringe the liberty interest without provoking further litigation, the judiciary can decide that the liberty is not worth elevating to fundamental status. If, however, the political process can’t overcome the higher enactment cost to pass additional legislation, then the interest in liberty must be stronger than its non-fundamental status would imply. Or if many or all further infringements provoke constitutional challenges, then perhaps the judiciary should conclude that political safeguards are failing to account for the strong libertarian preferences of a minority group, and the judiciary should assign fundamental status to the liberty interest on that ground. A minority group’s willingness to incur the costs of litigation reveals important information about the depth of its preferences.

To make this point more concrete, let’s consider the ACA case. It certainly seems plausible that the Tea Party movement is, in part, an assertion of popular dissatisfaction with the non-fundamental status of economic liberty and/or healthcare autonomy. It also seems plausible, as a purely descriptive and predictive matter, that a deeply held and widely felt dissatisfaction of this kind could motivate the Supreme Court to elevate the freedom of contract and/or the freedom of health to fundamental status. But the actual depth and breadth of popular dissatisfaction is extremely hard to judge based on a single controversy.

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131 For an exhaustive historical survey of this phenomenon, see Barry Freidman, The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution (2009).
134 This idea has much in common with the notion of popular constitutionalism, though I mean to offer a much more limited idea than the wholesale theories advanced by Larry Kramer and others. See, e.g., Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004); Mark Tushnet, Taking the Constitution Away from the Courts (1999); see also Jeremy Waldron, Law and Disagreement (1999); Jack M. Balkin & Reva B. Siegel, Principles, Practices, and Social Movements, 154 U. Pa. L. Rev. 926 (2006). The argument is not that the people are or should be ultimately responsible for defining the boundaries of constitutional liberties. It is only that the judiciary frequently does lend relevance to the subjective preferences of the governed when deciding how libertarian boundaries are defined and enforced, and enactment cost manipulation can help the judiciary in that project.
particularly for the politically insulated judiciary. The Supreme Court is therefore in a poor position to decide whether or not it ought to heighten judicial protection for these two interests based solely on the Tea Party’s arguments against the ACA.

Structural invalidation, however, would help the judiciary to overcome its informational problem. Imagine that several states, including some that are party to the current litigation, enacted individual mandates after structural invalidation of the ACA. That would serve as a strong signal that the libertarian interest was not the problem with the ACA—that the Tea Party plaintiffs were motivated by a genuine federalism interest or by pure political opportunism. Or imagine that several states enacted mandates, but they were all non-plaintiff states. That would indicate that the libertarian interest is stronger in some states than in others, which might be enough to justify the federalism holding. Or imagine that Congress enacted an individual mandate under its taxing or spending powers or enacted a penalty for purchases of uninsured or uncompensated healthcare. Any of those outcomes would indicate that the libertarian interest was not held deeply or widely enough to block the (now costlier) federal legislation. On the other hand, imagine that the political process became incapable of reenacting a mandate in any of its permissible (costlier) forms. Although that single case would not be enough to justify a change in constitutional doctrine, it would provide the judiciary with relevant information about evolving norms and preferences surrounding the freedom of health and the freedom of contract.

These points might seem inconsistent with the view of non-fundamental liberties that I have presented throughout the paper so far. As I noted, the doctrinal justification for giving mere “rational basis” review to non-fundamental liberties has always been that the supermajoritarian political process provides sufficient protection. If that’s true, then there should be no need for the judiciary to know or care whether popular will has shifted in the direction of assigning greater import to a non-fundamental liberty. In all of the relevant cases, the people and their representatives will be able to effect the end of libertarian protection simply by voting against infringing legislation.

As I noted briefly above, however, this representation-reinforcing theory does not explain the complement of fundamental liberties that the judiciary has chosen to protect or the methods the judiciary has chosen for protecting them. Again as a purely descriptive and predictive matter, the judiciary seems to care about popular libertarian preferences and to shift liberties between fundamental and non-fundamental status in response to shifting norms. Without attempting to justify or defend that habit, my point here is only that enactment cost manipulation is a useful way for the courts to gain information about libertarian preferences, just as it is a useful way for the courts to gain information about regulatory preferences. To the extent that the Court wants to test the breadth and

135 See generally Wilkinson, supra note 70; Hills, Westphalian Liberalism, supra note 18; Maltz, supra note 70.
136 See Baker & Young, supra note 84, at 83–84 (discussing cases that fail to track the representation reinforcing theory).
depth of a popular demand for stronger substantive liberties, semisubstantive review will help it to do so.

B. Safeguarding the Safeguards

But even if the judiciary wants to keep economic and healthcare freedoms in non-fundamental status, it still makes sense for the courts to take structural doctrines more seriously when non-fundamental liberties are at stake—and therefore to incorporate libertarian concerns into their structural analyses. Indeed, the case for using semisubstantive review ought to be stronger, not weaker, when the threatened liberties are non-fundamental.

There have been many defenses of semisubstantive review over the decades (as well as many critiques), but the one overarching justification for the practice is that it allows courts to make constitutional violations harder without making them impossible.137 This has two virtues. First, it decreases error costs associated with direct judicial balancing of state and individual interests,138 and second, it better preserves the political branches’ coequal role in elaborating substantive constitutional norms.139

As noted above, there is a strong argument to be made that these effects lose their desirability when the substantive constitutional value at issue is a non-fundamental liberty. Assuming that such liberties are non-fundamental because the political process can be trusted to strike the right balance between collective and individual interests, there is no reason for the judiciary to make these kinds of constitutional intrusions any harder than they already are under supermajoritarian regulatory requirements. Judicial oversight of the interest balance is entirely unnecessary, and the judiciary ought not to have a coequal role in elaborating these norms.

This argument is fine and good if the regulatory process has unquestionably abided by all of its structural requirements and limitations. But if there is ever a time that structural limitations ought to matter, it is when the regulatory process is threatening to intrude on a liberty interest that is constitutionally important but not judicially enforced. That is, the argument that a duly enacted statute cannot be said to violate a non-fundamental liberty interest may be exactly right—but it ought to raise the question of whether an infringing statute was, in fact, duly enacted. When non-fundamental liberty interests are implicated in a structural constitutional challenge, it makes sense for the judiciary to pay extra attention to and to be extra strict about structural constitutional rules. In such cases, the judiciary can claim to be safeguarding the safeguards of liberty at a time when those safeguards demonstrably matter.

To make this point more concrete, contrast the ACA situation as I’ve presented it with an alternative presentation. Imagine that I have overstated the threats to liberty that the ACA presents, either in the characterization of the

137 See generally Stephenson, supra note 18; Young, supra note 18; Monaghan, supra note 17, at 28 (noting the desirability of congressional involvement in the elaboration of constitutional rights).
138 See Stephenson, supra note 18.
139 See Monaghan, supra note 17.
constitutional questions or in the characterization of the liberty interests themselves. That is, imagine that the ACA raises no serious doubts under the freedom of health or freedom of contract, or imagine that the freedom of health and freedom of contract are entirely irrelevant. If that were true (and it was true that the ACA’s enactment process might have violated structural constitutional constraints), what would be the value of strict judicial construction and enforcement of structural rules? It would be only the values of the rules themselves: federalism in the abstract and deliberation in the abstract. Those values might be important as abstracted safeguards of liberty or just as abstracted values, and it might therefore be worth enforcing the structural rules regardless. But it ought to be clear that the total value of enforcement would increase if there were also a constitutional liberty interest at stake.

It is also worth contrasting this view with semisubstantive review of fundamental liberties. I have mentioned a few times that the argument for semisubstantive review ought to be stronger for non-fundamental liberties than for fundamental ones. The obvious reason is that fundamental liberties are, definitionally, those that should not be invaded for the satisfaction of pure majoritarian interests. The justification for removing such liberties from the political process is not entirely clear—it might be because majoritarian enactment processes will not account for strongly felt minority interests\[^{140}\]; it might be because fundamental rights are “implicit in the concept of ordered liberty\[^{141}\] and therefore necessary for societal functioning\[^{142}\]; or it might be because fundamental liberties are those that are morally required, regardless of majority views.\[^{143}\] Regardless, however, the purpose and effect of affording strong judicial protection to fundamental liberties is to take them away from majoritarian or even supermajoritarian regulatory processes. Semisubstantive review, however, does not do that. Unlike direct substantive invalidation, semisubstantive review allows the political process to re-infringe liberty simply by paying a higher enactment cost. There might be good reasons to pursue this strategy—a sense that the collective regulatory need is compelling enough to justify the intrusion on liberty, a sense that the intrusion on liberty is not significant enough to deserve full-blown substantive invalidation, or a sense that the political branches should have a role in elaborating substantive constitutional values, for example. But the theoretical case for mere semisubstantive review of fundamental liberties is harder to make—requires greater nuance—than the case for safeguarding the safeguards of non-fundamental liberties.

\[^{140}\] See Ely, supra note 93.
\[^{143}\] See generally Ronald Dworkin, Taking Rights Seriously (1978).
IV. Safeguarding or Distorting the Safeguards?

Of course, the argument that judges are merely safeguarding the safeguards demands that semisubstantive structural holdings be defensible as enforcing rather than distorting the structural rules. Otherwise, judges are doing something other than upholding the constitutional mechanisms of libertarian protection (which might nevertheless be justified as enactment cost manipulation or something similar but which requires additional argument). This potential problem has been a common critique of semisubstantive review generally, particularly with respect to the constitutionally motivated rules of statutory construction, which often lead judges to pursue unnatural interpretations of statutory language.\(^{144}\) It has also been a common critique of the holdings in the ACA cases, as scholars have accused the ACA judges of creating two judicially inadministrable and structurally otiose rules in their holdings: both the “t-word” rule for the taxing power and the action/inaction distinction for the Commerce Clause power. As critiques of the judges’ holdings so far, I agree. An openly semisubstantive opinion, however, could do much better.

A. Taxing

In the absence of semisubstantive analysis, the taxing argument in the ACA opinions looks purely formalistic. The rule that the ACA judges have set so far is that Congress may not pass a tax without using the word “tax” in its deliberations. But the judges provide no theoretical justification for that rule, and unlike functional analyses in the cases on which the judges rely, the analysis here does not give any hint as to why Congress’s taxing power cannot sustain the individual mandate. The problem is not that the mandate is not, in fact, a tax. It’s just that members of Congress and President Obama refused to admit that it is a tax. In the absence of some kind of substantive democratic or libertarian concern, this rule is just silly.

But, of course, there are substantive concerns underlying the rule. First and most obviously, the general value of democratic accountability comes into question when Congress has apparently hidden the ball during its enactment deliberations. It’s not clear, though, that this kind of abstracted accountability concern should matter for Article I, Section 8 analysis. Congress did not lie about the effect the mandate would have on individuals, and that effect is relevant to taxing and revenue-raising for the general welfare—ends that Congress may pursue under its power to “lay and collect taxes.”\(^{145}\) Given the course that the deliberations took, an informed voter should have realized and probably did realize that the mandate looked and quacked a lot like a tax. Overall, then, the argument that a bill’s supporters must use the word “tax” is not really an argument that they must make their deliberations more transparent, but rather that they must make their deliberations more negatively salient.\(^{146}\)

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144 Cites.
146 See Schenk, supra note 56, at 256–63 (distinguishing among transparency, salience, and complexity).
If the “t-word” analysis incorporated concerns about economic liberty and healthcare autonomy, however, then a requirement for this particular kind of negative salience would become much more rational—and much more limited. The ACA plaintiffs’ substantive concerns are that Congress has imposed a new requirement on residency and that Congress has obligated participation in a national healthcare system. Both of those potentially troubling aspects of the mandate aligns well with the general aversion to “taxes.”

First, unlike penalties, taxes are requirements of residency. At least in the public consciousness and largely in reality, taxes are unavoidable obligations of living in the United States whereas penalties attach to bad behavior and can be avoided through good behavior. If the freedom of contract problem with the mandate is that it creates an unavoidable obligation of residency, as Randy Barnett has repeatedly suggested, then it might make sense to require Congress to use the word “tax” in its deliberations in order to ensure that voters understand this particular feature of the mandate. In other words, because the word “tax” is more salient as an obligation of residency, its presence in the debate will provide better, more honest structural protection against this particular freedom of contract problem. The holding, then, could be that Congress must use the word “tax” when it wants to create a new universal obligation, sustainable under its taxing power, because the presence of the word “tax” will help voters to realize and understand the proposal’s implications for economic liberty. It will therefore provide better and honest structural protection against infringements of the non-fundamental liberty interest.

Second, unlike penalties, taxes are more closely associated with redistribution and social welfare. Particularly in a country with a safety net and a progressive income tax, voters likely associate taxing and spending programs much more closely than penalties with issues of redistribution. If the freedom of health problem with the mandate is that it requires universal participation in a scheme of cross-subsidization and health-based redistribution, then the word “tax” will do a better job than the word “penalty” at stimulating debate on the value and propriety of those effects. A semisubstantive ACA case, then, could hold that Congress must use the word “tax” rather than the word “penalty” when it wants to create or enhance constitutionally problematic redistributive programs—like healthcare-related redistributive programs—because the presence of the word “tax” will help voters to realize and understand the proposal’s implications for this kind of healthcare autonomy. The word “tax” will enhance the operation of the liberty’s structural safeguards.

In short, the word “tax” is generally more negatively salient than the word “penalty,” but the ACA holding needn’t be a general requirement that Congress use a negatively salient word in order to exercise its taxing and spending power. Two reasons for that saliency are directly related to the ACA plaintiffs’ and judges’ substantive libertarian concerns. The ACA judges could therefore reasonably hold that the political process—because it is the only testing ground for and safeguard against economic and healthcare liberties—must raise the libertarian concerns in a salient way if it wants infringements to survive.
constitutional scrutiny. The “t-word” rule will create that specific kind of salience in this case, enhancing (not distorting) the structural safeguard.

B. Commerce Clause

Like the “t-word” rule, the action/inaction distinction is a formalistic one, and it is also extremely likely to cause problems of judicial inadministrability in its general form. If, however, the judges engaged more openly in semisubstantive review and took into consideration the narrow libertarian arguments that the plaintiffs have made, then they could craft a much more manageable and rational rule.

The problem that the mandate seeks to solve is that individuals are irrationally optimistic about their personal health\(^1\) and are therefore insufficiently risk averse in managing their healthcare finances. Because individuals believe that they are unlikely to require costly medical interventions, they don’t save enough to be able to afford such interventions when needed. Congress attempted to correct this problem by penalizing the irrationality itself—by penalizing the everyday business of failing to save—rather than by penalizing the bad effects of that irrationality, such as the consumption of uninsured or uncompensated healthcare. The plaintiffs’ substantive argument is, in large part, an argument that individuals have a right to be irrational in this particular way, at least so long as the irrationality is not causing acute harms. The irrational individuals are making decisions about contracts and decisions about healthcare, both of which are constitutionally protected even when irrational, and it might be true that not all of these individuals are consuming uncompensated care, filing for bankruptcy, or contributing to adverse selection as a result.

In its best form, a semisubstantive holding would reason that this irrationality problem looks more like a behavioral problem falling under the states’ police powers than a commercial problem falling under Congress’s enumerated powers. A regularized penalty for a lifestyle decision or for a cognitive failure does not “regulate commerce . . . among the several states”\(^2\), it regulates an individual behavioral problem that sometimes (or even usually) has commercial implications. This semisubstantive view aligns the case much more closely with \textit{Lopez} and \textit{Morrison}, which hinged on the Court’s characterization of carrying guns and abusing women as behavioral rather than economic problems.

Of course, a semisubstantive invalidation would also need to hold that the mandate cannot be sustained under the Necessary and Proper Clause. The correction of optimism bias is undoubtedly one possible means of correcting adverse selection problems and regulating health insurance markets, both commercial ends, such that the mandate ought to be permissible under a typical Necessary and Proper Clause analysis. Under an openly and aggressively semisubstantive analysis, however, the Court could hold that a regularized penalty


\(^2\) U.S. Const. Art. I, § 8, cl. 3.
for failing to save is not a proper tool for the national government to use due to their substantive libertarian implications. The Court could argue that national incentives for saving, all of which will intrude on economic liberty to one degree or another, should take openly compulsory forms such as taxes or should attach only to acute bad effects such as consumption of uninsured care (should target taken opportunities rather than foregone ones) so that voters will be able to see clearly and to combat effectively the anti-libertarian consequences of the enactments. Otherwise, the decision to incentivize savings should rest with the states, which provide better safeguards for liberty than Congress given their advantages of diversity, voice, and exit.

Notably, the analysis in the ACA cases so far and the semisubstantive analysis that I propose here would (like all semisubstantive analyses) leave options open for Congress to reenact the mandate’s precise incentive, either through t-word taxation or through penalties on taken opportunities. To the extent that Article I, Section 8 intends to facilitate corrections of interstate collective action problems, the ACA cases would not fully disrupt that goal. If there is such a collective action problem in health insurance markets and if that problem is problematic enough to justify the intrusions on healthcare autonomy and economic liberty, then Congress will be able to reenact the mandate at the higher enactment cost.

V. Conclusion

I want to reiterate that I believe the ACA to be constitutional under all current doctrines. I also am not personally inclined to value the libertarian interests that the ACA plaintiffs have asserted. I count myself a lucky resident of Massachusetts, where I am already obligated to carry health insurance, and I believe that the functional benefits of a national mandate will far outweigh any anti-libertarian costs. Nevertheless, the scholarly reaction to the ACA cases seems out of proportion to the opinions’ faults, and the scholarly discomfort with the blending of substance and structure seems entirely misguided. The ACA plaintiffs’ arguments and the invalidating judges’ opinions represent ordinary semisubstantive arguments, and I can see no reason why the habit of giving structural protection to substantive values should not extend to non-fundamental liberties. Indeed, it seems a good idea, at least in the abstract.

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149 See supra Part I.B.1.
150 See generally supra note 70.