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Federalism, Mandates and Individual Liberty

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FEDERALISM, MANDATES AND INDIVIDUAL LIBERTY

I. INTRODUCTION

This article presents the missing federalism and individual liberty portion of Chief Justice Roberts’ 2012 health care opinion. It illuminates and reinforces the commerce power and limited and enumerated powers arguments he makes there just as the Tenth Amendment and the doctrine of federalism more generally illuminate and reinforce the commerce power and the doctrine of limited and enumerated powers in constitutional law and doctrine. It also answers and explains the claims made by the Chief Justice’s critics on and off the bench that his opinion and similar arguments made by like-thinking lower court judges and law professors use a semi-respectable cover of federalism and enumerated powers arguments to mask their real constitutional doctrine and goals—turning back commerce power doctrine to the bad old days of *Hammer v. Dagenhart*\(^2\) and economic due process doctrine to the much-maligned case of *Lochner v. New York*.\(^3\) These critics, in effect, take the Chief Justice and his supporters here to be conservative deconstructionists, intent on reversing the status and valorization of the currently accepted constitutional canon and anti-canon.\(^4\)

Now, the Chief Justice’s critics are right to say that his opinion is based, at least in part, on largely unstated individual liberty grounds, but they are wrong to charge that these are economic substantive due process grounds. There are alternative individual liberty grounds which strengthen the Chief Justice’s anti-mandate argument, rather undercut it, as his critics seek to do. The unconstitutionality of the individual mandate of the Affordable Care Act can be established without turning back the constitutional clock or overturning modern precedent. In fact, this unconstitutionality can be demonstrated using doctrines of federalism and individual

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1 Nat’l Fed’n of Indep. Bus. v. Sebelius (hereinafter, NFIB), 132 S.Ct. 2566, 2573 (2012) (Chief Justice Roberts holding that “[t]he individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority.”).

2 *Hammer v. Dagenhart*, 247 U.S. 251, 273-74 (1918) (striking down a federal statute prohibiting the interstate transport of the products of child labor, the Court says, “The grant of power of Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.”).

3 *Lochner v. New York*, 198 U.S. 45 (1905) (utilizing a liberty of contract right said to be implied by the Due Process Clause of the Fourteenth Amendment to strike down a state statute regulating bakers’ hours of work). *Lochner* and its like are now part of the judicial anti-canon, not the canon; see also, NFIB, 132 S.Ct. at 2609 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting part) (Justice Ginsburg argues that, “The Chief Justice’s crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress’ efforts to regulate the national economy[,]”).

4 Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting part) (Justice Ginsburg argues that, “The Chief Justice’s crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress’ efforts to regulate the national economy[,]”).
liberty expressed in Supreme Court precedent since 1937. My argument here brings together the
doctrine of the Court’s state anti-commandeering cases\(^5\) and their Tenth Amendment/individual
liberty decision in \textit{Bond v. United States}\(^6\) to argue for the unconstitutionality of the individual
mandate. In doing this, it appeals to the spirit and underlying principles as well as to the letter of
the Constitution.\(^7\)

Mandate defenders misrepresent the differences between their constitutional vision and
that of Chief Justice Roberts, taking them to involve a difference in canons, when instead they
arise out of a difference in constitutional gestalts.\(^8\) The two sides here do not accept different
cases and canons; they only have different takes on the same cases and canons. Chief Justice
Roberts’ critics overlook the view of federalism and individual liberty here presented, mainly
because they find no logical space for it in their constitutional worldview which, for example,
sees the Tenth Amendment as merely a truism\(^9\) rather than a recognition of the federalism and
individual rights based limits on the scope of enumerated federal powers. For this reason, they
wrongly conclude that those holding opposing views can only do so because they reject post-
1937 constitutional precedent and doctrine and wish to bring back \textit{Lochner, Hammer}, and the
constitution in exile.\(^10\)

The battle over the constitutionality of the individual mandate is itself part of a larger war
over limiting principles for federal power.\(^11\) One way that the fog of this war manifests itself here

\(^{5}\) \textit{See}, New York v. United States, 505 U.S. 144, 161 (1992) (“We have always understood that even where
Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the
power to directly compel the States to require or prohibit those acts.”); \textit{see also}, Printz v. United States, 521
1961) (“Although the states surrendered many of their powers to the new Federal Government, they retained a
‘residuary and inviolable sovereignty.’”)

\(^{6}\) Bond v. United States, 131 S.Ct. 2355 (2011) (holding that individuals, as well as states, can bring Tenth
Amendment challenges to the constitutionality of federal statutes).

\(^{7}\) In the immortal words of John Marshall, “Let the end be legitimate, let it be within the scope of the constitution,
and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist
with the letter and spirit of the constitution, are constitutional.” McCulloch v. Maryland, 17 U.S. 316, 421 (1819).

\(^{8}\) \textit{See}, Lawrence Solum, \textit{The Decision to Uphold the Mandate as Tax Represents a Gestalt Shift in
Constitutional Law} (June 28, 2012), http://lsolum.typepad.com/legaltheory/2012/06/the-decision-to-uphold-
the-mandate-as-a-gestalt-shift-in-constitutional-law.html (describing a gestalt as a norm that provides “the
core ideas” and one that creates a “holistic picture” which is “shaped by all the relevant legal materials”).

\(^{9}\) \textit{See}, United States v. Darby, 312 U.S. 100, 124 (1941) (after quoting the Tenth Amendment, Justice Stone says,
“The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the
history of its adoption to suggest that it was more than declaratory of the relationship between the national and state
governments as it had been established by the Constitution before the amendment or that its purpose was other than
to allay fears that the national government might seek to exercise powers not granted, and that the states might not
be able to exercise fully their reserved powers.”).

\(^{10}\) \textit{See}, Randy E Barnett, \textit{Commandeering the People: Why the Individual Health Insurance Mandate is
activity, not inactivity. In none of these cases did the government mandate that citizens engage in economic activity
by entering into a contract with a private company.”).

\(^{11}\) \textit{See}, \textit{id.} at 637 (“If, however, Congress is allowed to regulate any decision that has an economic effect, or that
Congress deems essential to its regulatory ambitions, then the scheme of limited and enumerated powers would be at
is in the confusion and disagreement over the basic terms of the debate and their meanings. Individual mandate opponents argue that the mandate is unprecedented and unconstitutional, while supporters reply that even the founders created economic mandates. Secondly, these mandate opponents argue that Congress’ commerce power is limited to the regulation of economic activity, so that it cannot constitutionally regulate inactivity. In response, mandate defenders point out that the activity/inactivity distinction is a novelty without foundation or support in constitutional text or precedent. They add that anything that can be described as inactivity can also be described as a form of activity. Thirdly, opponents charge that the individual mandate improperly commandeers the people, while defenders note the anti-commandeering cases protect state sovereignty, not individual rights. They note that the Constitution, unlike the Articles of Confederation, was designed to operate directly upon the people and not through the medium of the states.

an end. Because it is both unnecessary under existing doctrine and also improper, the individual health insurance mandate is unconstitutional.”).

12 See, e.g., Randy E. Barnett, Still Unprecedented: Recycling the Same Two Examples of Supposed Economic Mandates, (April 13, 2012 3:59 pm) http://www.volokh.com/2012/04/13/still-unprecedented-recycling-the-same-two-examples-of-supposed-economic-mandates/ (“Every court that has considered the constitutionality of the insurance mandate, including those judges that upheld its constitutionality, have concluded that this mandate is unprecedented. The fact that these two examples have been so well discussed, debunked, and rejected explains why the Solicitor General cited neither in his oral argument when Justice Kennedy characterized this Commerce Clause mandate as unprecedented.”).

13 See, e.g., Einer Elhauge, If Health Insurance Mandates Are Unconstitutional, Why Didn’t the Founding Fathers Back Them? (April 13, 2012), http://www.newrepublic.com/article/politics/102620/individual-mandate-history-affordable-care-act?page=1 (in the 1790’s, Congress passed, and Presidents Washington and Adams signed, three laws which required that “ship owners buy medical insurance for their seaman,” “all able-bodied men . . . buy firearms” and “seamen to buy hospital insurance for themselves . . . there is no evidence that any of the few framers who voted against these mandates ever objected on constitutional grounds.”).

14 See, Barnett, supra note 10, at 600 (“by limiting the substantial effects doctrine to economic intrastate activity, the Supreme Court provided the modern legal ‘test’ or ‘criterion of constitutionality’ for whether a regulation of intrastate activity is what ‘may truly be said’ to be necessary under the Necessary and Proper Clause. By this doctrine Congress is held within its enumerated powers and denied the ‘right to do merely what it pleases.’”).

15 See, e.g., Mark A. Hall, Commerce Clause Challenges to Health Care Reform, 159 U. PA. L. REV. 1825, 1834 (2011) (“Commerce clearly includes both the purchase of products and their manufacture and sale. Because regulation includes mandating as well as prohibiting behavior related to products, it follows logically that ‘regulating commerce’ can include mandating a purchase.”).


17 See, Barnett, supra note 10, at 583 (“A newfound congressional power to impose economic mandates to facilitate the regulation of interstate commerce would fundamentally alter the relationship of citizen and state by unconstitutionally commandeering the people.”); id. at 626-27 (quoting U.S. Const. amend. X) (“[T]he anti-commandeering cases that limit the commerce power of Congress were ultimately grounded by the Supreme Court in the text of the Tenth Amendment. Yet the letter of the Tenth Amendment is not limited to the states. It says that the ‘powers not delegated by the Constitution to the United States . . . are reserved to the states respectively, or to the people.’ . . . In this way, the text of the Tenth Amendment recognizes popular as well as state sovereignty.”).

18 Id. at 636 (“True, extending its anti-commandeering doctrine from the states to the people would be novel, but this is due entirely to the novelty of the individual mandate itself. Before Congress attempted to commandeering the American people, the Court never needed to explain why such a thing was improper.”).

19 See, New York, 505 U.S. at 163; see also, Printz, 521 U. S. at 918-19.
Even this brief listing of the disagreements over basic terms and distinctions shows that the two sides in the mandate debate cannot be using terms like “mandate,” “activity” and “commandeer” in the same ways. As a result, these terms have confused, rather than clarified, the constitutional issues in question. For this reason, this article starts by examining the use of these terms in the health care debate in order to sort out problems and to suggest improvements. It concludes that, of the three terms just mentioned, the commandeering notion best expresses and supports the constitutional arguments against the individual mandate. It is also the term with the firmest grounding in constitutional precedent and principle.

Once the terms of the dispute have been sorted out, this article moves on to banishing the ghost of *Lochner*, which hangs over the debate in strange ways. Mandate opponents primarily cast their critique of the mandate in terms of federalism and the commerce power, but sometimes let individual liberty claims slip out. Mandate supporters, in turn, use *Lochner*, *Hammer* and other cases from the constitutional anti-canon as rhetorical clubs to claim that these federalism and commerce power arguments are just a cover to reverse the New Deal Settlement, thereby undoing generations of doctrine and precedent. Although these claims are frequently made by mandate defenders, they are unfounded. Once the ghost of *Lochner* is thus banished, the New Federalist doctrine of federalism and individual liberty can be seen. Chief Justice Roberts and the other New Federalists do not reject the New Deal Settlement (in fact, they demonstrate the continuity and consistency of the two views), but they do not see that settlement as creating a general federal police power. They still hold to the notion of limited and enumerated powers

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20 See, *Lochner*, 198 U.S. at 45; see also, supra note 4 (describing that *Lochner* and its like are now part of the judicial anti-canon, not the canon).
21 See, infra notes 35-37 and accompanying text.
22 See, *NFIB*, 132 S.Ct. at 2629 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (Justice Ginsburg critiques the Chief Justice’s reading of the Commerce Clause as “stunningly retrogressive,” saying that his opinion “bears a disquieting resemblance to . . . long-overruled decisions.”); see also, Hall, supra note 15, at 1862 (“[N]ot only would [opposition to ACA] reinstate *Lochner*-esque protections of economic liberties, but the modern constraints would be far stronger than those in the *Lochner* era.” (2011); see also, Jamal Greene, *What the New Deal Settled*, 15 U. PA. J. CONST. L. 265, 287 (2012) (“*Lochner*, then, is the hardest-working case in the U.S. Reports. It is both a synecdoche and a rhetorical resource . . . . Like an athletic seven-footer, *Lochner* alters even the shots that it cannot block.”).
23 Most simply defined, the “New Deal Settlement” refers to doctrine followed by the Court since 1937: see also, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (holding that Congress has authority to regulate various operations of an interstate company, including labor relations in manufacturing that have a substantial effect on interstate commerce); see also, Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt* 1, 2 (Georgetown Public Law Research Paper No. 12-152, October 16, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2152653 (internal citations omitted) (“Whatever direct legal effects the Court’s decision ultimately produces, the thesis of this Essay is that the most important and far-reaching legal effects of *NFIB* are likely to be indirect. *NFIB* marks a possible shift in what we can call the ‘constitutional gestalt’ regarding the meaning and implications of what is called the ‘New Deal Settlement.’”).
24 See, *NFIB*, 132 S.Ct. at 2590-91 (Chief Justice Roberts acknowledges that, “The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions.”); see also, United States v. Lopez 514 U.S. 549, 552 (1995) (internal citation omitted) (In one of the leading New Federalism cases, Chief Justice Rehnquist begins his discussion of constitutional doctrine in
and to the idea that federalism and the Tenth Amendment protect individual rights and well as state sovereignty. This protection, in both cases, takes the form of an anti-commandeering principle, which is part of a more general limit on federal power to coerce states and individuals (as seen, for example, with regard to the Medicaid expansion and contraception mandate portions of the ACA\textsuperscript{25}).

II. UNPRECEDENTED, UNLIMITED AND UNCONSTITUTIONAL

i) LIBERTY AND MANDATES

The world has never had a good definition of the word liberty, and the American people, just now, are much in want of one. We all declare for liberty; but in using the same word we do not all mean the same thing. With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men’s labor. Here are two, not only different, but incompatible things, called by the same name—liberty. And it follows that each of the things is, by the respective parties, called by two different and incompatible names—liberty and tyranny.\textsuperscript{26}

\textsuperscript{25}NFIB, 132 S.Ct. at 2603 (quoting New York v. United States, 505 U.S. 144, 194 (1992)) (holding that “Congress ‘crossed the line distinguishing encouragement from coercion’ in the way it has structured the funding: Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States' existing Medicaid funds.”); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1137 (10th Cir. 2013) (internal citations omitted) (“The government urges that there can be no substantial burden here because ‘[a]n employee's decision to use her health coverage to pay for a particular item or service cannot properly be attributed to her employer.’ There are variations on this same theme in many of the amicus briefs supporting the government's position [that] one does not have a RFRA claim if the act of alleged government coercion somehow depends on the independent actions of third parties . . . . This position is fundamentally flawed because it advances an understanding of ‘substantial burden’ that presumes ‘substantial’ requires an inquiry into the theological merit of the belief in question rather than the intensity of the coercion applied by the government to act contrary to those beliefs.”); Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 410 (3d Cir. 2013) (“[R]eligious exercise is substantially burdened by a law that puts substantial pressure on a person to commit an act discouraged or forbidden by that person's faith, and the Hahns' Mennonite faith forbids them not only from using certain contraceptives, but from paying for others to use them as well.”).

\textsuperscript{26}Abraham Lincoln, Address at Sanitary Fair, Baltimore, Maryland (April 18, 1864) \textit{in VII THE COLLECTED WORKS OF ABRAHAM LINCOLN} 301-02 (Roy P. Basler, ed., 1953) (emphasis in original).
Constitutional and political disputes in the United States sometimes arise out of disagreements concerning the scope and meaning of liberty. In Lincoln’s day the conflict was between the slaveholders’ definition in which, according to Chief Justice Roger Taney’s notorious statement, African-Americans had “no rights which the white man was bound to respect” and Lincoln’s view, based on the Declaration of Independence, that “all men are created equal.” So, too, it has been in other constitutional/political disputes, even in the health care debate which culminated in the Supreme Court’s NFIB decision. That decision is not explicitly focused on issues of liberty; instead, the main constitutional issues explicitly involved there are Congress’ commerce, taxing and spending powers as well as federalism. But questions of individual liberty underlie and give rise to these issues. After all, as the Court has said elsewhere, federalism and enumerated powers limitations on Congressional power are designed to protect individual liberty and not merely as ends in themselves. Thus, for example, when the advocates on both sides came to sum up their cases in the NFIB oral argument, they cast their arguments in terms of individual liberty, not merely as a rhetorical flourish or as a play

28 See, supra note 26, at 499-500 Address at Chicago, Illinois (July 10, 1858) (“[B]ut when they look through that old Declaration of Independence they find that those old men say that ‘We hold these truths to be self-evident, that all men are created equal,’ and when they feel that that moral sentiment taught in that day evidences their relation to those men, that it is the father of all moral principles in them, and that they have a right to claim it as though they were blood of the blood, and flesh of the flesh of the men who wrote that Declaration, (loud and long continued applause) and so they are. That is that electric cord in that Declaration that links the hearts of patriotic and liberty-loving men together, that will link those patriotic hearts as long as the love of freedom exists in the minds of men throughout the world [Applause.”). Lincoln’s speech was given in response to the Supreme Court’s Dred Scott decision.
29 NFIB, 132 S. Ct. at 2572-73 (the power to regulate commerce presupposes the existence of commercial activity to be regulated. This Court's precedent reflects this understanding: As expansive as this Court's cases construing the scope of the commerce power have been, they uniformly describe the power as reaching ‘activity.’ The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce.” (internal citations omitted)); Id. at 2600 (“The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.”). 
30 See, id. at 2578 (quoting THE FEDERALIST No. 45, at 293 (J. Madison)) (“Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which ‘in the ordinary course of affairs, concern the lives, liberties, and properties of the people’ were held by governments more local and more accountable than a distant federal bureaucracy.”).
31 See, Bond, 131 S.Ct. at 2364 (internal citations omitted) (“Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.”).
for Justice Kennedy’s vote, but, more importantly, as an explanation and support for their other arguments. Solicitor General Verilli told the Court that, “There is an important connection, a profound connection between that problem and liberty.” He continued, arguing that Medicaid expansion beneficiaries “will be unshackled from the disabilities that those diseases put on them and have the opportunity to enjoy the blessings of liberty.” In reply to General Verilli, Paul Clement said, “Let me finish by saying that I certainly appreciate what the Solicitor General says, that when you support a policy, you think that the policy spreads the blessings of liberty. But I would respectfully suggest that it’s a very funny conception of liberty that forces somebody to purchase an insurance policy whether they want it or not.” And so, here, too, one person’s liberty is another’s tyranny.

When Lincoln gave his address in 1864, he certainly was not arguing for the moral equivalence of different definitions of liberty or value relativism. He gave his life for a contrary assertion. The NFIB advocates take a similar view. But, as Lincoln suggests, using the same word (here “liberty”) to mean different things confuses, rather than facilitates, debate. This is exactly what happened in the health care litigation concerning terms such as “mandate,” “(in)activity” and “commandeer”—all terms used, at least in part, to express deprivation of individual liberty. This article will next examine these terms and their use in the health care debate in a search for what exactly is at stake for liberty here in constitutional terms. My hope is that this will clarify the underlying issues and differing conceptions of liberty in the debate and the case, the better to decide between them as a matter of constitutional principle and doctrine.

ii) UNPRECEDENTED MANDATES?

The arguments of the health care debate opponents on the constitutionality of the individual mandate could hardly be more divergent. Critics of the individual mandate assert that it is unprecedented, gives Congress unlimited power and, therefore, is unconstitutional. In

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33 Id.
34 Id. at 83.
35 Barnett, supra note 10, at 606.
contrast, some mandate defenders argue that not only are economic purchase mandates like the individual mandate not unprecedented, but were, in fact, well known and constitutionally accepted by the framers themselves (thus making unlikely that such mandates are suspect on originalist grounds).  

Logically, two explanations might account for this disagreement on the constitutionality of purchase mandates generally and of the individual mandate in particular. One possibility is that both sides in the argument are talking about the same thing when they say “mandate” and it is simply the case that one side is factually and constitutionally correct in its arguments and that the other side is not. This is certainly the tenor of Einer Elhauge’s account of the debate. The second possibility is that neither side is making factually false assertions; rather, they are instead using the same word, “mandate,” to refer to two different notions or things, of differing constitutionality, much like the two sides in Lincoln’s liberty example. The question in the latter case, then, becomes exactly what those different things are and what their constitutional significance is. In what follows, I make the argument for the second possibility, based upon a distinction between conditional and unconditional mandates, that is, between mandates involving those already engaged in the regulated activity and those not doing so.

Let us first examine what Professor Elhauge says on framing era and other mandates and the conclusions regarding the individual mandate he seeks to draw from his eighteenth century and other examples. After that, we will turn to the argument between Elhauge and several individual mandate critics on the relevance and salience of his purported founding era purchase mandate examples. My aim here is not to pick a winner or to settle a factual dispute between the

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36 See, e.g., Neil S. Siegel, Four Constitutional Limits That the Minimum Coverage Provision Respects, 27 CONST. COMMENT. 591, 593 (2011) (“If anxiety about unlimited federal power attracts the attention of five Justices, they will take a hard look at what the government's limiting principles are.”); see also, Ilya Somin, Insurance Mandate Has Fatal Flaws, NEWSDAY (Aug. 16, 2011, 7:24 PM), http://www.newsday.com/opinion/oped/somin-insurance-mandate-has-fatal-flaws-1.3101602 (“In this case, the law is improper because its logic would give Congress virtually unlimited power to mandate anything, destroying the balance between the federal government and the states.”).

37 See, Siegal, supra note 36; see also, Barnett, supra note 10, at 607.

38 Mandate supporter Einer Elhauge, for example, asserts, “It turned out that the constitutional challenge not only lacked any persuasive authority, but simply ignored the fact that the constitutional framers themselves had approved many purchase mandates, including mandates to buy health insurance itself!” Einer Elhauge, Obamacare On Trial, 1-2 (2012).

In this article, I will use Elhauge as my main example of defenders of the constitutionality of purchase mandates who deny that the individual mandate is unprecedented. I do this because he is representative of this group in a particular way; he says more and goes further than the others, often making explicit what is only implicit in most other arguments. This fact facilitates quicker and deeper analysis of the underlying issues here.
Elhauge starts by noting three federal purchase mandates enacted (with the support of numerous framers) during the 1790’s requiring that “ship owners buy medical insurance for their seamen,” “all able-bodied men…. buy firearms” and “seamen….buy hospital insurance for themselves”39 noting (with special satisfaction) that the third mandate example was a founding era individual mandate. Turning to the modern era, he finds a purchase mandate in “‘agency fees’ to cover the cost of services received from a union acting as a bargaining agent” for employees who do not, in fact, wish to be represented by the union.40 By Elhauge’s lights, these are purchase mandates because they are government requirements that individuals buy certain things, whether or not they want to buy them. These instances of purchase mandates, both old and new, Elhauge would have us conclude, shows that the individual mandate is not unprecedented, hence unconstitutional. To the contrary, it has, he feels, varied and venerable precedent in its favor. In any event, he points out that the Constitution has “no anti-innovation clause,”41 which is an undeniable truth.

Individual mandate opponents seek to undercut and refute Elhauge’s examples and his arguments in several ways. Randy Barnett notes that the statute in the gun purchase example does not actually require the purchase of a gun (guns can be obtained in a variety of other ways) and that, in any event, it “was an exercise of Congress’s militia power,” rather than its commerce power.42 It, therefore, provides neither precedent nor authority for the individual mandate. Philip Hamburger further attempts to distinguish Elhauge’s examples by arguing that the alleged purchase mandates relating to seamen are, history demonstrates, exercises of federal naval, rather than commerce, powers.43 A number of mandate opponents point out that Elhauge’s examples of supposed purchase mandates involve those already voluntarily engaged in the activity the

39 Id. at 3.
40 Id. at 60.
41 Id. at 16.
mandate concerns. Barnett also distinguishes between mandates affecting those already engaged in the activity being regulated and mandates compelling action by those not already so engaged. The next question is whether these distinctions make any constitutional difference.

Elhauge is aware of, but unfazed by, this “already engaged in commerce” distinction and argument. He argues that Barnett’s acknowledgement that the founding era maritime mandates are exercises of Congress’ commerce power logically then permits the imposition of purchase mandates in one market on those participating in a wholly different market. Is this a fair or cogent inference? I think not. There is a closer relationship that Barnett and the other individual mandate critics see between activity and mandate in Elhauge’s examples than Elhauge admits. In his examples, those voluntarily participating in an economic activity may be required to purchase something that is functionally related to their voluntary economic activity that is a fair or concomitant cost associated with that voluntary, underlying economic; it is not, in that sense, something from a totally unrelated economic market. This sort of necessary connection appears elsewhere in constitutional doctrine, in the essential nexus requirement in regulatory takings doctrine, for example. The Supreme Court has a history imposing these sorts of conditions and a demonstrated ability to apply them. The Court’s purpose in doing, both here and in regulatory takings doctrine, is twofold. It seeks to deny Congress unlimited power over individuals. It also will permit Congress to impose reasonable conditions on activity, but not to coerce those

44 See, e.g., Matthew J. Franck, The Founders Loved Mandates?, NATIONAL REVIEW ONLINE (May 1, 2012, 4:00 AM), http://www.nationalreview.com/articles/297347/founders-loved-mandates-matthew-j-franck/page/0/1 (“Before you say, ‘Wow, no deductible or co-pay for sick seamen,’ notice two things. First, this provision is a regulation of commerce in which somebody is already engaged . . . as many commentators have long since noted.”). 45 Randy E. Barnett, In What Sense is the Personal Health Insurance Mandate “Unconstitutional”? , in Conspiracy Against Obamacare (Trevor Burrus, ed. 2013) (“But regulating HOW one engages in economic activity (or prohibiting an activity) and mandating THAT one engage in economic activity are not the same thing. It is the latter that is unprecedented.”) (emphasis in original).

46 Elhauge, supra note 38, at 6 (“One could argue that laws for seamen and ship owners mandated purchases from people who were already engaged in some commerce. But this is no less true of everyone subject to the health insurance mandate.”).

47 Id. at 11 (“Randy . . . . Barnett acknowledge[s] that our early maritime statutes exercised the commerce power, but distinguish them on the grounds that they were imposed on actors who were already in commerce. But this argument concedes that these precedents show that if one is engaged in commerce in one market, such as the shipping market or the seamen labor market, then Congress has the power to impose a mandate to purchase in a totally unrelated market—such as the medical insurance market.”).

48 See, Nollan v. California Coastal Comm’n, 483 U.S. 825, 837 (1987) (“The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition . . . . [T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation.”).
engaging in that activity. This is the line between regulating economic activity and mandating it. This line disappears in an approach, like Elhauge’s, which allows almost any connection to be a sufficient jurisdictional hook for purposes of constitutional validity. With the disappearance of this line goes any meaningful limit on congressional power.

Is Medicare a helpful example for Elhauge’s argument? He clearly thinks so, rejecting an “already engaged in commerce” distinction and objection, denying that it is a “distinction of substance.” He goes on to say that his challengers would accept the assertion that “Congress can mandate the purchase of health insurance as long as it conditions that mandate on engagement in some commercial activity.” He feels that, “[T]he challengers would have to admit that a statute saying that ‘anyone who has ever engaged in commercial activity must buy health insurance’ would be constitutional.” But these are certainly not concessions that mandate challengers have ever made or accepted. These statements are, for example, in conflict with assertions by a majority of the NFIB justices that any interpretation of the commerce power giving Congress effectively unlimited power cannot be constitutional or correct.

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49 See, Id. (“. . . [E]ven though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster. Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was.”); NFIB, 132 S. Ct. at 2603 (2012) (quoting New York v. United States, 505 U.S. 144, 166 (1992)) (“ . . . Congress has ‘crossed the line distinguishing encouragement from coercion’ . . . in the way it has structured the funding: Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States’ existing Medicaid funds . . . . Given the nature of the threat and the programs at issue here, we must agree.”).

50 See, John Valauri, Regulate/Mandate: Two Perspectives (Feb. 14, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2217883 (“What motivates [Professor Somin and the Chief Justice’s] complaint of a constitutional problem here, from the perspective that they both share, is more the compulsion involved in the individual mandate than it is the existence or timing of the economic activity concerned . . . . ‘Mandate,’ at least, does a better job of conveying the compulsion aspect which mandate opponents find constitutionally objectionable in the individual mandate.”).

51 Elhauge, supra note 38, at 18 (“But not only is there precedent for this, there is also clear support for it in the Constitution. For decades, Americans have been subject to a mandate to buy a health insurance plan—Medicare.”).

52 Id. at 19 (“Many opponents dismiss this argument because Medicare (unlike the new mandate) requires the purchase of health insurance as a condition of entering into a voluntary commercial relationship, namely employment, which Congress can regulate under the commerce clause.”).

53 Id.

54 Id.

55 NFIB, 132 S. Ct. at 2589 (“Accepting the Government’s theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.”); Id. at 2646 (Scalia, Kennedy, Thomas and Alito, JJ., dissenting) (quoting The Federalist No. 33, p. 202) (C. Rossiter ed. 1961) (“If Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power, or in Hamilton’s words, ‘the hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor sacred nor profane.’”).
Elhauge’s definition reduces the jurisdictional hook required for the exercise of Congress’ commerce power to the vanishing point. Everyone has engaged in commerce at some point in their lives. Elhauge’s test would effectively give Congress a general police power, something five justices in *NFIB* and elsewhere say it cannot constitutionally possess. The challengers would only have to admit the constitutionality of Elhauge’s hypothetical statute if they accepted his constitutional assumptions, which they do not. Quite the contrary, they explicitly reject the assumptions that lead Elhauge to his constitutional conclusions.

A similar difficulty afflicts Elhauge’s attempt to employ the commerce power’s substantial effects test in service of his argument for the constitutionality of purchase mandates. Citing *Wickard v. Filburn*, he claims that, “[A] statute saying, ‘anyone who has engaged in any activity that affects commerce must buy health insurance’ would clearly be constitutional and cover everyone, just like the new mandate.” He thinks that this would, then, be the functional equivalent of the individual mandate. But, the above refutation of Elhauge’s “anyone who has ever engaged in economic activity” applies here, too. If anything, this claim grants Congress even broader, unconstrained power and departs even further from statements that other participants, on the bench and in the academy, have made during the individual mandate debate. The fact that even those who agree with Elhauge about the clear constitutionality of economic purchase mandates in general and of the individual mandate in particular hesitate to make the sort of sweeping “anyone who has engaged” claims indicates an uncertainty about the constitutional correctness of such assertions. In addition, functional equivalence does not mean like constitutionality.

56 See, *Id.* at 2590-91 (“Everyone will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize Congress to direct them to purchase particular products in those or other markets today. The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.”); *See.* United States v. Lopez, 514 U.S. 549, 567 (1995) (“To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated.”) (internal citations omitted).

57 *See.* *Wickard v. Filburn*, 317 U.S. 111, 129 (1942) (applying the substantial effects test and holding that “wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.”).

58 *Id.*

If one examines the assertions made by participants in the individual mandate debate, both on the bench and in the academy, one finds that Elhauge’s “anyone” here includes few, if any, writers other than him. The fact that even those who agree with Elhauge on the constitutionality of economic purchase mandates in general and the individual mandate in particular hesitate to make the sort of “anyone who has engaged” statements he does (even though they may agree that these mandates are clearly constitutional\textsuperscript{60}) indicates an uncertainty on their part of constitutional correctness of such assertions and such doctrines.

Moreover, even if one means to a particular end is constitutional, it may well not be the case that a different means to the same end is likewise constitutional. As the NFIB joint dissenters note, the Constitution grants Congress only enumerated powers, not enumerated ends.\textsuperscript{61} What we have here is a question of whether or not certain means to an end are proper, which is a different and independent question from whether or not that end is legitimate.\textsuperscript{62} This point is realized even by those who would reduce to a bare minimum the jurisdictional hook Congress needs in order to constitutionally exercise its commerce power. Elhauge’s “anyone who” arguments do more than minimize the jurisdictional hook requirement; they reduce it to the vanishing point. But his honest statement of this view at least has the virtue of making clear the true views of mandate defenders as well as the width of the gulf that doctrinally separates mandate defenders from mandate opponents.

Clarification of the differences between the two sides here (a prerequisite to the resolution of those issues) is hampered by the ambiguity of the word “mandate.” The case that opponents wish to make against the “unprecedented” individual mandate appears to be undercut by seemingly plausible assertions, like Elhauge’s, that the framers themselves approved of and enacted purchase mandates. It may not seem that both sides can be right, but, in fact, they are in

\textsuperscript{60} See, Hall, supra note 15, at 1826; see also, Jack M. Balkin, \textit{Commerce}, 109 Mich. L. Rev. 1, 46-47 (2010) (“People who do not buy health insurance are actually self-insuring . . . . These practices involve borrowing, purchasing, and consuming goods and services; their cumulative economic effect is substantial, and they impose significant economic costs on the rest of the country. Because uninsured persons contribute to a national problem, Congress may regulate them as part of a national solution.”).

\textsuperscript{61} NFIB, 132 S. Ct., at 2646 (“The lesson of these cases is that the Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not carte blanche for doing whatever will help achieve the ends Congress seeks by the regulation of commerce.”).

\textsuperscript{62} See, McCulloch v. Maryland, 17 U.S. 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).
this case because there are two senses of the word “mandate,” one constitutional and the other unconstitutional.

Just what is a mandate? Is there only one kind of legal mandate or are there several? Chief Justice Roberts says that a mandate is a command. The nineteenth century English legal philosopher John Austin asserted that all laws are commands, although later legal philosophers, notably H.L.A. Hart, convincingly argued that such a view oversimplifies and distorts the nature of law, overlooking, for example, power-conferring rules, which do not fit into a command-based theory of law. Not all laws are mandates and not all mandates are commands. This is because laws that can be called mandates are not all of the same sort. Some mandates are conditional, that is, they apply as a governmentally imposed condition only if you voluntarily engage in the activity to which the mandate is attached. The so-called “contraception mandate” of the ACA, for example, applies only to employers. If you do not employ workers, you are not required to pay for the employee contraception coverage required by the contraception mandate. Linguistically, it is a stretch to call such a legal rule a command because it does not apply unconditionally. All of Elhauge’s examples are conditional mandates, that is, they apply only to those who voluntarily engage in an economic activity (e.g., working as a seaman or working for an employer who has signed a union contract) to which the mandate is legally

63 See, NFIB, 132 S. Ct., at 2593 (“The most straightforward reading of the mandate is that it commands individuals to purchase insurance. After all, it states that individuals ‘shall’ maintain health insurance. 26 U.S.C. § 5000A(a).”).
64 See, John Austin, The Province of Jurisprudence, 21 (Wilfrid E. Rumble ed., Cambridge University Press 1995) (1832) (“Every law or rule . . . . is a command. Or, rather, laws or rules, properly so called, are a species of commands.”) (emphasis in original).
66 See, id. at 35-38.
67 The Affordable Care Act requires an employer's group health plan to cover women's “preventive care,” which includes contraception. 42 U.S.C.A. § 300gg-13(a)(4) (West 2013); See, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1124-25 (10th Cir. 2013) cert. granted, 134 S. Ct. 678 (2013) (“The Greens run the Hobby Lobby health plan, a self-insured plan, which provides insurance to both Hobby Lobby and Mardel employees . . . . Because the Greens believe that human life begins at conception, they also believe that they would be facilitating harms against human beings if the Hobby Lobby health plan provided coverage for the four FDA-approved contraceptive methods that prevent uterine implantation . . . .”): but See, Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius, 134 S. Ct. 1022 (2014) (acknowledging ACA’s non-profit exemption that, “If the employer applicants inform the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicants the challenged provisions of the . . . Affordable Care Act.”).
68 See, 26 U.S.C.A. § 5000A(f) (2013); see also, Conestoga, 724 F.3d at 381 (3d Cir. 2013) (“The ACA requires employers with fifty or more employees to provide their employees with a minimum level of health insurance.”).
attached. One can avoid the mandate simply by not engaging in the predicate activity to which it is attached.

The individual mandate is different from these conditional mandates just discussed. It is an unconditional mandate, not tied to some activity voluntarily engaged in. Instead, it attaches to an individual based upon their status or, more dramatically, merely because of their legal presence in the United States. For this reason, Chief Justice Roberts is correct to call it a command, while it is not correct to call conditional mandates commands. But what constitutional difference should this make? Elhauge, for example, is aware of this distinction based upon voluntary engaged in a predicate activity, but sees no particular constitutional significance to the point. After all, there is no clear textual basis or record in precedent for making the distinction between conditional and unconditional mandates, let alone endowing it with an important constitutional importance. The distinction may help sort out and explain the reason for the confusing argument concerning the unprecedented nature of the individual mandate, but it does not, without more, resolve that debate. Standing alone, it is at best of interest only to legal academics.

So far, the debate over the constitutionality of the individual mandate has been conducted largely in terms of commerce power, federalism, and limited and enumerated powers grounds. Mandate terminology finds two homes in these doctrines. The first is in the meaning of

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69 See, NFIB, 132 S. Ct., at 2594 (“[The shared responsibility payment] does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code. For taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status.”) (internal citations omitted).

70 See, Ilya Somin, A Mandate for Mandates: Is the Individual Health Insurance Case A Slippery Slope? 75 LAW & CONTEMP. PROBS., 75, 100 (2012) (predicting prior to the NFIB opinion that, “If the Supreme Court strikes down the mandate, it will most likely do so because the mandate is a regulation of ‘inactivity,’ forcing people to purchase products based merely on the fact of their presence within the United States.”).

71 See, Elhauge, supra note 13 (“True, one could try to distinguish these other federal mandates from the Affordable Care Act mandate. One could argue that the laws for seamen and ship owners mandated purchases from people who were already engaged in some commerce.”).

72 See, Id. (“. . . But that is no less true of everyone subject to the health-insurance mandate: Indeed, virtually all of us get some health care every five years, and the few exceptions could hardly justify invalidating all applications of the statute.”).

73 By “commerce power,” I mean to include both the Commerce Clause and the Necessary and Proper Clause.
“regulate” in the Commerce Clause. The second is in the meaning of “proper” in the Necessary and Proper Clause.

The word “mandate” does not appear in the Constitution, but the power to mandate action, some think, is included in the meaning of a word that does—the word “regulate” in the Commerce Clause. This meaning—and its opposing denial—has been expressed in three ways during the course of the individual mandate controversy. The first expression involves the definition of the word “regulate.” The argument here is that “regulate” means to make regular or subject to a rule, a meaning which may include mandates. The contrary definition is that “regulate” means only adjust or limit, but not mandate. The second expression asks whether the meaning of “regulate” is symmetrical, that is, if it includes the power to prohibit commerce, why should it not include the symmetrical power to mandate commerce? The third, related expression asks whether “regulate” presumes the existence of some underlying, already existing activity to be regulated or not?

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74 U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.") (emphasis added).
75 U.S. Const. art. I, § 8 cl. 18 ("To make all laws which shall be necessary and proper for carrying into Execution, the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.") (emphasis added).
76 See, generally, Hall, supra note 15.
77 See, Jack Balkin, Can Congress “Regulate” Inactivity? Sure, Balkinization (Friday, May 13, 2011), http://balkin.blogspot.com/2011/05/can-congress-regulate-inactivity-sure.html. (“The power to regulate, as Chief Justice John Marshall said in Gibbons v. Ogden, is ‘to prescribe the rule by which commerce is to be governed.’ That is to say, under the original meaning of the Constitution, ‘regulate’ simply means ‘prescribe a rule for.’”); see also, Randy E. Barnett, The Original Meaning of the Commerce Clause, 68 U. CHI. L. REV. 101, 112 (2001) ("To regulate’ might be limited to ‘make regular,’ which would subject a particular type of commerce to a rule and would exclude, for example, any prohibition on trade as an end in itself . . .”).
78 See, Gibbons v. Ogden, 22 U.S. 1, 227 (1824) (Johnson, J., concurring) (“The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom, necessarily implies the power to determine what shall remain unrestrained, it follows, that the power must be exclusive.”); See, also John Valauri, Baffled by Inactivity: The Individual Mandate and the Commerce Power, 10 GEO. J.L. & PUB. POL'Y 51, 61 (2012) (“This ‘limit and restrain’ definition of the power to regulate commerce even more clearly refers to and assumes already existing commercial activity and not a power to mandate that activity into existence.”).
79 See, Hall, supra note 15, at 1834 (“Based on plausible meanings of ‘regulate,’ there is no reason why a mandate to engage in commerce could not be considered the regulation of commerce just as much as a prohibition of commerce. A mandate may be a strong form of regulation, but it is no stronger, in the abstract, than a prohibition.”); but See, Barry Friedman, & Genevieve Lakier, “to Regulate,” Not “To Prohibit”: Limiting the Commerce Power, 2012 SUP. CT. REV. 255, 320 (2012) (“Congress's power ‘to regulate’ interstate commerce does not include the power to prohibit commerce . . . . This interpretation of the Commerce Clause is supported by history, and by the structure and theory of the Constitution.”).
A glance reveals that these three expressions of the meaning of “regulate” are related to one another, rather than being free-standing independent arguments. They present, in slightly different ways, a contrast between narrow and broad definitions of “regulate.” The narrow definition, in all three expressions, excludes the power to mandate from the power to regulate commerce, while the broad definition, in all three expressions, includes the power to mandate in the power to regulate commerce. Unsurprisingly, the narrow view is taken by opponents of the individual mandate and defenders of the doctrine of limited and enumerated powers (who constitute much the same group), while the broad view is taken by defenders of the individual mandate and expansive federal powers (also much the same group).

The fact that both sides in the individual mandate controversy can find not one, but three, ways of expressing their positions on the constitutionality of purchase mandates like the individual mandate greatly reduces the usefulness of the notion of mandates in resolving the controversy over the individual. Neither side can get much traction in the argument because the other side has its own notions about the meanings of “mandate” and “regulate,” notions emanating from more comprehensive views and theories of the basis and scope of federal powers.

(Barnett discusses the third expression by incorporating Judge Motz’ inquiries and assertions during NFIB oral arguments in the Fourth Circuit: “just bear with me that this is not an activity, what do we do with the word ‘regulation’? Because, you know, that — although it has not been pressed with any great concern here — in the research that we’ve done and apparently has now been done in other cases that you’re going to face so you’re going to have to deal with the question, that has always assumed that there’s a predicate that’s going to be regulated, an activity, if you will, and the regulation is right — the power that Congress has is ‘to regulate,’ and that’s right in the Constitution.”); but See, Elhauge, supra notes 71 and 72.

81 See, Jonathan Adler, What does the mandate regulate?, SCOTUSBLOG (Aug. 10, 2011, 10:52 AM), http://www.scotusblog.com/2011/08/what-does-the-mandate-regulate/ (“...[U]like the law in Raich, the mandate is not conditional upon anyone having taken an affirmative step. Angel Raich was only subject to prosecution because she chose to obtain marijuana, just as Roscoe Filburn was only subject to the Agricultural Adjustment Act because he chose to produce wheat for his dairy cows. The mandate, on the other hands, does not require a similar predicate.”); see also, Randy E. Barnett, The Original Meaning of the Commerce Clause, 68 U. CHI. L. REV. 101, 146 (2001) (quoting US Const Art I, § 8, cl 3) (“The most persuasive evidence of original meaning--statements made during the drafting and ratification of the Constitution as well as dictionary definitions and The Federalist Papers--strongly supports Justice Thomas's and the Progressive Era Supreme Court's narrow interpretation of Congress's power 'To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . the term “To regulate” means “to make regular”--that is, to specify how an activity may be transacted--when applied to domestic commerce, but also includes the power to make “prohibitory regulations” when applied to foreign trade.”).

82 See, Hall, supra note 15, at 1828 (“In brief, plausible arguments can be constructed on both sides of the first issue. The more persuasive positions are that a mandate to obtain insurance constitutes a regulation of commerce and the Commerce Clause's fundamental purposes do not compel limiting congressional authority to regulate inactivity simply for the sake of setting some limit.”).
We next turn to another argument advanced by individual mandate opponents, one based upon the distinction between activity and inactivity, to see if it can do what the assertion of unprecedented mandates has failed to do, that is, to provide a clear, useful distinction which can be employed to clarify, if not settle, the debate over the constitutionality of the individual mandate. Encouragingly, even some mandate supporters have found the argument based on this distinction to be the mandate opponent’s strongest argument. Here, once again, the main goal of the mandate opponents is to show that the individual mandate is unprecedented, gives Congress unlimited power and is, therefore, unconstitutional. To help achieve this aim, an important purpose of the activity/inactivity distinction is to demonstrate and emphasize the fact that the Supreme Court’s prior descriptions and definitions of the commerce power are all explicitly premised on the regulation of commercial activity, while the individual mandate is, instead, based upon the regulation of inactivity (i.e., a failure to act). Mandate opponents can then go on to argue the mandate is unprecedented and threatens to give Congress unlimited police power, allowing it to regulate not only what we do, but also what we do not do. From this, they once again infer the unconstitutionality of the mandate.

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83 See, Randy E. Barnett, Is health care reform Constitutional? THE WASHINGTON POST (Sunday, March 21, 2010), available at http://www.washingtonpost.com/wp-dyn/content/article/2010/03/19/AR2010031901470.html (“... The Supreme Court has long allowed Congress to regulate and prohibit all sorts of ‘economic’ activities that are not, strictly speaking, commerce . . . . But the individual mandate extends the commerce clause's power beyond economic activity, to economic inactivity. That is unprecedented.”).

84 See, Hall, supra note 15, at 1855 (“The strongest argument for a categorical exclusion of mandatory purchases is simply that Congress has never before regulated inactivity in its purest form under the Commerce Clause.”).

85 See, United States v. Lopez 514 U.S. 549 (1995) and United States v. Morrison, 529 U.S. 598 (2000) (In both cases, the Court held that Congress lacked power under the Commerce Clause to regulate non-economic local activity on the theory that such activity, in the aggregate, has a substantial effect on interstate commerce.).

86 See, Barnett, supra note 10, at 582 (“The mandate also fails to satisfy an alternative to the substantial effects doctrine that was proposed by Justice Scalia in a concurring opinion in Gonzales v. Raich because it extends beyond the regulation of intrastate activity to reach inactivity.”).

87 See, id.; see also, Gonzales v. Raich 125 S.Ct. 2195, 2217 (2005) (quoting United States v. Lopez, 115 S.Ct. 1624, 1634 (2004)) (internal citations omitted) (“Thus, although Congress's authority to regulate intrastate activity that substantially affects interstate commerce is broad, it does not permit the Court to ‘pile inference upon inference,’ in order to establish that noneconomic activity has a substantial effect on interstate commerce.”).
activity/inactivity distinction requires only the striking down of the individual mandate, rather than the invalidation of large portions of the administrative state. 88

The predictable, and equally true, reply from mandate supporters is that the activity/inactivity distinction lacks any textual, historical or precedential basis, 89 but is instead a distinction recently invented by mandate opponents solely for litigation purposes in opposing the individual mandate. 90 From these conclusions, it is easy for them to find the individual mandate to be constitutional. 91 They also invoke a parade of horribles in which the unconstitutionality of the individual mandate might lead to the undermining of the New Deal Settlement. 92

Emphasizing doctrinal symmetry, they argue that if the regulation of commerce includes the prohibition of commerce, then it must also encompass mandating commerce. 93

The negative first part of the mandate defenders’ response to the activity/inactivity distinction contends federal regulation of inactivity is not unprecedented; on the contrary, it is quite common and ordinary. One law professor, Corey Rayburn Young, has, in fact, written a law review article listing and classifying the multitudinous ways in which the federal government regulates and penalizes inactivity. His contention is regulation, even criminalization, of inactivity by the federal government is not unprecedented—on the contrary, it is incredibly

88 See, Barnett, supra note 10, at 582 (“In the 1990s, the Supreme Court developed a judicially administrable test for whether it is ‘necessary’ for Congress to reach intrastate activity that substantially affects interstate commerce: the distinction between economic and noneconomic intrastate activity.”).
89 See, Andrew Koppelman, The Tough Luck Constitution 62 (2013)) (Koppelman is pointing out that this activity/inactivity distinction has so little presidential support that even Raich, a case which came closest to the distinction, never expressly clarified why this distinction mattered, and therefore this new limit requiring activity is without any support. As stated in the text “[t]he ACA’s supporters thought that the case for the mandate was so compelling that, even if it was in tension with some of the language in Raich, there was no sense in constructing this as a new limit on the commerce power—a limit that Raich had not expressly declared.”); but see, Barnett, supra note 10, at 606 (Barnett points out that the distinction is without precedent because Congress has never before asserted an individual mandate and therefore the Supreme Court has never had to validate or clarify the activity/inactivity distinction before).
90 See, Barnett, supra note 10, at 72 (“No one could have anticipated the constitutional limits that the ACA supposedly transgressed. Those limits did not exist while the bill was being written. They were first devised only in the fall of 2009, quite late in the legislative process.”).
91 See, id. at 73 (before 2009, an analysis of health care reform proposals showed “a bipartisan consensus to have individual mandates,” with no politician or attorney citing any support to the contrary).
92 See, Koppelman, supra note 89, at 58 (mocking mandate opponents saying “[i]f you care about the actual liberty of human beings, rather than just constraining Congress, the New Deal reforms look like a pretty good deal.” Koppelman then lists some of the accepted benefits of New Deal legislation, such as the dependence on Social Security by both indigent and middle class seniors.).
93 See, Hall, supra note 15, at 1834 (comparing the individual mandate with the doctrine in Wickard, stating that “[a] mandate may be a strong form of regulation, but it is no stronger, in the abstract, than a prohibition.”).
ordinary. It occurs so frequently that he needs ten different categories to encompass it all—common law duty omission crimes, registration crimes, record keeping crimes, possession crimes, receipt crimes, preventive regulation and punishment, nondisclosure crimes, organizational crimes, misprision crimes and obstruction crimes. None of these crimes punish acts, but rather some form of inactivity or failure to act. They appear, then, to be counterexamples to refute the mandate opponents’ assertion of the unprecedented nature of the individual mandate.

But, as with the asserted framers’ mandates proffered by Professor Elhauge in the last section, these purported inactivity crimes are distinguishable from the individual mandate and for much the same reasons. Many of them apply to the alleged inaction of individuals who were previously or are already involved in some predicate activity. Registration, record keeping, preventive regulation, organizational and obstruction crimes all involve omissions related to or arising out of prior action(s). It is true, as Yung correctly notes, that the punishment in these cases may be for the omission and not for the prior act. Or, to put the point another, more technical, way, the omission, rather than the prior action, may constitute the actus reus of the crime. For example, failure of a sex offender to register is a punishment for that failure to register, rather than for the earlier sex offense, lest the punishment otherwise be ex post facto. Nevertheless, it is also true that, but for the earlier act, the current omission would not be culpable, simply because the duty to register arises out of that earlier criminal conduct. It is not a freestanding duty. Conceptually, there is a distinction and a difference between the conduct or omission criminalized and the constitutional basis empowering Congress to criminalize that conduct or omission. They are two different things, having two different bases, elements and rules. Professor Yung and I, then, are making two different points and his argument, though true, does not help him in the argument he seeks to make in favor of the individual mandate and against the arguments of mandate opponents. Why this distinction should make a constitutional

94 See, Corey Rayburn Yung, The Incredible Ordinariness of Federal Penalties for Inactivity, 2012 WIS. L. REV. 841. Professor Yung serves the same role here that Professor Elhauge served in the prior section of this paper. Both writers reject the attack arguments of mandate opponents and respond by offering legal, constitutional and historical counterexamples to the assertion of the unprecedented nature of the mandate (Elhauge as to purchase mandates and Yung as to regulation of inactivity). I cite Yung’s article here, not because his examples are widely repeated by other individual mandate defenders, but more because his analysis makes explicit an attitude implicit in the views of many mandate defenders. Making it explicit more readily permits analysis and critique.
95 See, Elhauge, supra notes 39–41.
96 See, Yung, supra note 94, at 848.
difference as well as a conceptual difference is quite a different question, one which will be treated later in this article.97

This but-for connection is also typically found in the facts surrounding possession, receipt and obstruction crimes. The possession, receipt and obstruction involved relate back to prior conduct which, in order to be criminally culpable, must occur knowingly. Constructive possession cases may be the strongest examples in support of Yung’s argument since the prior related conduct involved may not even be that of the defendant. But even there, as the main case he cites requires, the defendant must also “knowingly hold the power and ability to exercise dominion and control over it.”98

Civic duties may also be argued to be the bases of some of these crimes, such as misprision and obstruction, as Yung, for example, himself quotes the Supreme Court on the civic duty basis of misprision crimes.99 Individual mandate opponents do not argue that Congress can never regulate inactivity, only that their ability to do so is the exception rather than the rule. And these exceptions arise in cases where individuals have civic duties to do certain things such as serve in the armed forces when drafted, pay their taxes or serve on juries (all examples offered by mandate supporters as evidence of the supposed power of Congress to mandate individual conduct100). Randy Barnett, the inventor of the activity/inactivity distinction, responds that these mandates are all founded upon recognized civic duties citizens owe government.101 But this is not the case with the individual mandate and the commerce power.102 Neither is there a general power possessed by Congress to mandate conduct by citizens. Citizens are not subjects and Congress is their servant, not their master.103

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97 See, infra notes 161-63 and accompanying text.
98 Yung, supra note 94, at 852 (quoting United States v. Lopez, 372 F.3d 1207, 1211 (10th Cir, 2004)) (internal citations omitted).
99 See, id. at 858 (quoting Roberts v. United States, 445 U.S. 522 (1980)) (“[G]ross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship.”).
100 See, NFIB, 132 S. Ct. at 2627 n. 10 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).
101 See, Barnett, supra note 10, at 630 (“Each of these duties can be considered essential to the very existence of the government, not merely convenient to the regulation of commerce.”).
102 See, id. at 637 (“unlike the type of preexisting fundamental duties that have traditionally been recognized, such as the duties to defend one's country and provide the revenue needed to maintain its governance, there is no fundamental duty of citizenship to enter into contracts with private parties when Congress deems it convenient to the regulation of interstate commerce.”).
103 See, id.
The observer of this conflict, at this point, may well be tempted to suspect that, once again, both sides here are just talking past each other because, although they are using the same words, they seem to be talking about different things. For one thing, they lack a shared definition of “activity” or agreement on its boundaries. For example, does a decision not to do something qualify as an act for constitutional purposes and, if so, when? Further, if an act can be redescribed as inactivity, as some argue it can, which description should control in determining the constitutionality of the individual mandate and why? Is it, perhaps, sometimes an act, sometimes not? Further, how wide or narrow a time frame should be employed to define the purported activity (and who gets to decide—Congress or the Court)? As a result of these problems and others like these, the activity/inactivity distinction may well generate more heat than light in the individual mandate debate as difference of meaning is obscured by sameness of terminology.

Mandate defenders are correct in saying that the activity/inactivity distinction is of recent provenance. It cannot be traced back through constitutional history, let alone to the founding itself. On the other hand, mandate opponents accurately assert that the commerce power is almost always described in terms of the regulation of some sort of commercial activity, even if it is not explicitly so limited. From this they go on to argue that the distinction is at least implicit in the Constitution and its spirit. In response, mandate defenders contend that, since the distinction is novel, constitutional text and history do not, in so many words, rule out the regulation of inactivity, so there is room within a Constitution intended to endure for the ages for this power, even if it was not explicitly stated or even contemplated by the framers. The debate then becomes one over the meaning of constitutional silence, that is, making silence

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104 See, e.g., Balkin, supra note 77.
105 See, Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2d 611, 633 (W.D. Va. 2010) (“Far from ‘inactivity,’ by choosing to forgo insurance, Plaintiffs are making an economic decision to try to pay for health care services later, out of pocket, rather than now, through the purchase of insurance”).
106 See, Thomas More Law Ctr. v. Obama, 651 F.3d 529, 560 (6th Cir. 2011) (“Does this test apply to individuals who have purchased medical insurance before?”).
107 Brief for Cato Institute as Amici Curiae Supporting Appellants at 11, Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882 (E.D. Mich. 2010) (No. 10-2388) (“[A] doctrinal line between activity and inactivity ... has heretofore escaped articulation because no precedent has presented the distinction as sharply as this case.”).
108 See, NFIB, 132 S. Ct. at 2644 (Scalia, Kennedy, Thomas and Alito, JJ., dissenting).
109 See, id. at 2646-47.
110 See, NFIB, 132 S.Ct. at 2615-16 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting part) (Justice Ginsburg argues that the constitution is more of an outline and less of a detailed blue print, and was intended to endure for ages and to be openly adapted to a variety of human affairs. ).
speak. This is a debate more difficult and puzzling than even the admittedly difficult and puzzling debate over the meaning of explicit constitutional text. Which side has the burden of persuasion here and why? There is no consensus or clear answer. This constitutional standoff appears to make the activity/inactivity distinction an unhelpful (because confusing) choice for the establishment of constitutional doctrine. This deadlock spurs the further search for constitutional tiebreakers.

One initially attractive way of breaking the argumentative deadlock and overcoming the constitutional silence here might be to look at the terms that are in the Constitution to determine what they say to us about activity, inactivity and the meaning of the commerce power. Perhaps the most obvious candidate for such a conceptual exploration is the word “regulate” in the Commerce Clause, since the debate over the activity/inactivity distinction is a debate about what can be regulated by Congress. Here, mandate opponents argue that all regulation is of activity, that is, that regulation, by its very nature, presumes and concerns preexisting voluntary activity, so that Congress cannot regulate inactivity. The individual mandate does not meet this requirement because the action regulated—the purchase of health insurance—is neither preexisting nor voluntarily entered into, but instead mandated by the Affordable Care Act. The mandate, in this way, exceeds congressional regulatory power under the Commerce Clause.

There are two ways of understanding the meaning of “cannot” in the last sentence, but the difference between them ultimately has little effect on the outcome of our debate. One way of understanding it is to hold that it is logically or grammatically impossible to regulate inactivity, because, for instance, the concept of regulation assumes the preexistence of some underlying activity or activities to be the subject(s) of regulation. This point is argued by individual mandate opponents on the bench and in the academy. These opponents deny that mandating is a form

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111 See, U.S. CONST., art I, § 8, cl. 3 ("The Congress shall have the power...to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.").
112 Barnett, supra note 80 ("the power that Congress has is "to regulate," and that’s right in the Constitution. That is a constitutional provision. The "activity" isn’t to be sure, but "regulation" would seem to think by John Marshall and others to imply a predicate to be regulated. If you don’t have this activity predicate, what do you do?") (This quotation was transcribed by Professor Barnett from a recording on the Fourth Circuit website. For this reason, I assume that the emphasis is in the original.).
114 See, NFIB, 132 S. Ct. at 2644 (Scalia, Kennedy, Thomas and Alito, JJ., dissenting) ("[regulate] can mean to direct the manner of something but not to direct that something come into being.").
115 See, Barnett, supra note 10, at 605 (“all these cases involve activity, not inactivity. In none of these cases did the government mandate that citizens engage in economic activity by entering into a contract with a private company.”).
of regulation, but is, rather, something altogether different from regulation. From this, they argue that mandates do not fall within Congress’ power to regulate commerce. This argument is largely limited to commercial mandates because it turns on the meaning of “regulate” and, so, does not directly relate to other sorts of mandates, such as the duties to answer a military draft, pay taxes or serve on a jury, which are often cited by mandate supporters as counterexamples to this argument made by mandate opponents.

The second way of understanding the meaning of “cannot” here is the view that Congress lacks the constitutional authorization to regulate inactivity, whether or not there is a logical or grammatical possibility of regulating inactivity. It is not always easy to separate and distinguish these two views in the cases or in academic writings dealing with the activity/inactivity distinction, but the grammatical understanding comes across more strongly in these sources. Both are reflected, for example, in the opinions of Chief Justice Roberts and of the four joint dissenter in NFIB, as well as some judges on lower courts who faced the question. Further, if one looks back through precedent, one also finds Justice Johnson’s statement in Gibbons v. Ogden that “The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure.” Under this view, the power to regulate commerce applies only to voluntarily conducted commerce already entered into; it does not allow Congress to first compel commerce and then proceed to regulate it.

Although NFIB and the activity/inactivity distinction do not explicitly rely on or relate to the earlier New Federalism Lopez and Morrison cases, which established the economic activity

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116 See, NFIB, 132 S. Ct. at 2649 (Scalia, Kennedy, Thomas and Alito, JJ., dissenting).
117 See, Elhauge, supra note 71.
118 See, NFIB, 132 S. Ct. at 2586 n. 4 (Roberts arguing with Ginsburg’s use of more obscure definitions of “regulate,” having the use of different definitions turn on the essential nature of preexisting regulatable activities); See also, NFIB, 132 S. Ct. at 2644 n. 1 (Scalia, Kennedy, Thomas and Alito, JJ., dissenting) (quoting, Dyche & W. Purdon, A New General English Dictionary (16th ed. 1777)) (Arguing that the definition of regulation suggested is ordinary meaning to put or keep in order, and not an obscure legal meaning)).
119 See, Seven-Sky v. Holder, 661 F.3d 1, 16-17 (D.C. Cir. 2011) (Lower court using one definition of regulate which also meant “to require action.” … Further, earlier Commerce Clause cases “did not purport to limit Congress to reach only existing activities. They were merely identifying the relevant conduct in a descriptive way.”) (emphasis in original).
120 22 U.S. 1, 227 (Johnson, J., concurring).
121 See, Florida ex rel. Atty. Gen. v. U.S. Dept of Health and Human Services, 648 F.3d 1235, 1285 (11th Cir. 2011) (“[T]he Supreme Court has always described the commerce power as operating on already existing or ongoing activity.”).
limitation, they do complement the doctrine announced in those cases in this way—while *Lopez* and *Morrison* limit the scope of congressional power pursuant to the Commerce Clause to the regulation of *economic* activity, *NFIB* instead limits that power to *economic activity*. A main aim of both requirements is to deny Congress an unlimited police power and to restrict it to the powers enumerated in the Constitution, but this aim is carried out in two different ways in these cases. As a result, they combine to produce a two part economic Commerce Clause activity requirement, each part emphasizing different words in the phrase, thereby centering the commerce power on economic activity in two different ways. The individual mandate violates this economic activity requirement, then, by regulating inactivity, rather than economic activity.

The force of the activity/inactivity distinction is largely lost on mandate defenders, who, because they see the commerce power and the Constitution generally quite differently than do mandate opponents, have little trouble in conceiving of and permitting congressional regulation of inactivity in the individual mandate. First of all, they start with a broader view of the meaning of “regulate” in the Commerce Clause than do mandate opponents. They see the power to mandate as included in the power to regulate, not as a separate power (one not granted

122 *Lopez* 514 U.S. 549 and *Morrison*, 529 U.S. 598 (In both cases, the Court held that Congress lacked power under the Commerce Clause to regulate non-economic local activity on the theory that such activity, in the aggregate, has a substantial effect on interstate commerce.).

123 *Lopez*, 514 U.S. at 560-61 (holding that “a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise” and therefore is not supported by the Commerce Clause); *Morrison*, 529 U.S. at 613 (holding that “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity” and therefore not supported by the Commerce Clause.).

124 *NFIB*, 132 S. Ct. at 2590 (Majority clarifying that the cases cited invoking the authority of Contract to anticipate the effects on commerce of an economic activity “involved preexisting economic activity.”)

125 See, *Barnett*, *supra* note 10, at 606-607 (“Accepting this theory would open the door for an infinite variety of mandates in the future. Under this theory of ‘activity,’ Congress can mandate individuals do virtually anything at all on the grounds that the failure to engage in economic activity substantially affects interstate commerce. Therefore, it would effectively obliterate, once and for all, the enumerated powers scheme that even the New Deal Court did not abandon.”); see also, *NFIB*, 132 S. Ct. at 2646.

126 See, *Barnett*, *supra* note 10, at 604 (Barnett arguing that under current constitutional law the following two part test is required “(a) what is the ‘class of activity’ reached by the statute, and (b) is it economic or noneconomic?”)

127 See, *id.* at 605 (the individual mandate’s class of activity reached by the statute is regulating decisions only and consequently regulating an inactivity).

128 See, *Koppelman*, *supra* note 89, at 76-78 (rejecting Barnett’s ‘class of activities’ test, and finding that an existing activity requirement is an illusory restraint on Congress, because people cannot conceivably abstain from commercial activity, by living in the “woods and eating berries,” to protect themselves from federal regulation. Koppelman’s jokes and witty analysis Barnett’s ‘class of activities’ approach illustrates how vastly different mandate proponents and opponents read the Commerce Clause.).

129 See, *Hall*, *supra* note 15, at 1828-29 (“Longstanding precedent clearly allows Congress to regulate how health insurers design, market, price, and sell their products, and there is no substantial disagreement that PPACA’s
Congress by the Commerce Clause. They view the meaning of “regulate” as having a symmetry which comprises the power to mandate commerce as well as the power to prohibit commerce. They note that both meanings have, at different times, been doubted as within the power to regulate or adjust commerce. Mandate defenders take these doubts to express a woefully crabbed view of the scope of Congress’ commerce power. For this reason, they see NFIB as a repeat performance of the Lottery Cases, in which the Court upheld the power of Congress to prohibit commerce pursuant to its power under the Commerce Clause, rejecting the losing argument by the challengers in the Lottery Cases that the power to regulate includes only the power to adjust or set the rule for commerce. These mandate defenders contend instead that what they see as an analogous argument should also fail with respect to the individual mandate in NFIB. 

The Lottery Cases challengers’ argument, mandate defenders insist, unduly narrows and limits congressional power over commerce. Acceptance of this argument as constitutional
doctrine would, they feel, prevent Congress from solving important national problems which cannot be adequately dealt with by the states acting individually. These problems, some mandate defenders say, are collective action problems which, by their very nature, require national, rather than local, solutions. These problems occur when the states are “severally incompetent” to deal adequately with the situation because of the multiplicity of states and their relative inability to undertake and carry out effective coordinated action. Interstate and intrastate actions create collective action problems when they produce harmful or counterproductive results or spillover effects in other states from which it is difficult to escape, rather than productive solutions for all affected states, thereby causing downward cycles from which it is difficult to escape. Here, for example, a state adopting the equivalent of the ACA, collective action theorists would say, would attract ill out-of-staters (who would then be entitled it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.").

136 See, Robert D. Cooter & Neil S. Siegel, Collective Action Federalism: A General Theory of Article I, Section 8, 63 Stan. L. Rev. 115, 121 (“The structure of governance established by the Articles of Confederation often prevented the states from acting collectively to pursue their common interests. Solving these problems of collective action was a central reason for calling the Constitutional Convention.”); see also, NFIB, 132 S.Ct. at 2628 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting part) (“Far from trampling on States’ sovereignty, the ACA attempts a federal solution for the very reason that the States, acting separately, cannot meet the need.”).

137 See, Cooter & Siegel, supra note 136, at 121; see also, NFIB, 132 S.Ct. at 2609-10 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting part) (listing the collective nature of health care, such as the national spending of $2.5 trillion on it, the fact that all people inevitably participate in it, the universal reality of its high costs, the constant problems that come when people neglect routine care, etc.).

138 Cooter & Siegel, supra note 136, at 123, 129-30 (quoting The Records of the Federal Convention of 1787, at 131-32 (Max Farrand ed., rev. ed. 1966)) (quoting Carter v. Carter Coal, 298 U.S. 255, 291 (1936)) (Author begins to discuss the intentions of the constitutional convention to create a Congress “to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.” Author later connects the reluctance to take federal action when the states are severally incompetent to address the problem to Lochnerism by listing Lochner era decisions which categorically rejected the position that the federal government cannot act where ‘the states severally cannot deal or cannot adequately deal’ unless they already have Constitutional authority to act.”).

139 See id. at 138. (the example the authors used to demonstrate spillover effects was pollution. “Water and air circulate in regions formed by natural contours such as rivers and mountains, not political boundaries. Consequently, pollution spills over from one government jurisdiction to another. Spillovers create an incentive for each government to free ride on pollution abatement by others. To avoid free riding by localities, the government with primary responsibility for abatement should encompass the natural region affected by the pollution.”).

140 See NFIB, 132 S.Ct. at 2638 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting part) (the example Ginsburg used of spillover effects was the decisions by States to exercise their option to withdrawal from the Social Security program, threatening the integrity of the program for the entire country, by both not providing the necessary funds and also by having states which provide Social Security attracting those without any retirement. Consequently, “Congress thereby changed Social Security from a program voluntary for the States to one from which they could not escape.”)
to free provision of costly health care procedures they could not have obtained at low or no cost in their home state) and would also at the same time, drive away healthy in-staters (who would be required to pay for health insurance they might not want in order to subsidize the insurance for and treatment of the ill out-of-staters who have now become in-staters). These two simultaneous occurrences would likely result in a cost death spiral as health insurance plan costs soar and revenues fall. This untoward result could only be avoided through the implementation of a national health insurance plan, such as the ACA, which could not be evaded by affected individuals merely by moving to another state.141

Collective action supporters find historical, originalist support for their theory in Resolution VI of the Virginia plan presented at the Constitutional Convention in 1787.142 This resolution, which appears on its face to propound a collective action federalism principle, was accepted by the convention and referred to the Committee of Detail for redrafting.143 The resulting product of the Committee of Detail was what then became the enumeration of congressional powers in Article I, § 8, a statement whose content is quite different than that of Resolution VI. Article I, § 8 is something which, on its face at least, does not put forward the collective action federalism principle. On its face, at least, Resolution VI expresses a philosophy diametrically opposed to the notion of limited and enumerated powers encapsulated in Article I, § 8. Getting back to the events of the constitutional convention, what became Article I, § 8 of the Constitution was, nevertheless, put forward by the Committee of Detail and then adopted by the Convention without discussion.144

141 See, NFIB, 132 S.Ct. at 2612 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting part) (quoting Helvering v. Davis, 301 U.S. 619, 644, (1937)) (“States cannot resolve the problem of the uninsured on their own. Like Social Security benefits, a universal health-care system, if adopted by an individual State, would be ‘bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose.’”).

142 See, Cooter & Siegel, supra note 136, at 122-23 (quoting Larry D. Kramer, Madison's Audience, 112 Harv. L. Rev. 611, 619 (1999)) (The problems of collective action confronting America in 1787 “necessitated a government with many more powers than were possessed by Congress under the Articles--including the great powers to tax, to raise and support armies, and to regulate commerce.”); see also, NFIB, 132 S.Ct. at 2615 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting part) quoting Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 9 Papers of James Madison 368, 370 (R. Rutland ed. 1975)) (“What was needed was a ‘national Government ... armed with a positive & compleat authority in all cases where uniform measures are necessary.’”).

143 See, Cooter & Siegel, supra note 136, at 122-24; see also, NFIB, 132 S.Ct. at 2615 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting part) (the Framer’s solution to the collective action problem was the Commerce Clause).

144 Cooter & Siegel, supra note 136, at 123.
The upshot of this puzzling sequence of events is that one’s view of the relation of Resolution VI to the meaning of Article I, § 8 is likely to be a function of one’s larger theory of the scope of congressional power, rather than of any historical or textual link between the two. This is because we do not have the historical evidence which would help explain the doctrinal and causal connections between these two dissimilar texts. As a result, the unexplained sequence of actions by the committee and the convention and the lack of explanation by either have created, needless to say, more confusion than clarity. To this day, the actions of the committee and the convention have been used, with equal plausibility, to argue both for and against the relevance of Resolution VI (and collective action federalism generally) to the meaning and interpretation of the list of enumerated powers in Article I, § 8.145 How one argues (and concludes) here is very likely to be a function of the underlying constitutional principles one posits in the Commerce Clause area, rather than some neutral rule or objective fact. And those arguments and conclusions are, in turn, likely to be a function of one’s choice of constitutional interpretive methodology, a factor that is at the base of most constitutional doctrinal and theoretical disagreements. Until the choice is made and justified, if that ever occurs, the question of the Resolution VI/Article I, § 8 relation must then get added to the list of problems to be resolved and not to the list of resolutions of such problems.

But this is not the end of questions concerning the activity/inactivity distinction. Mandate supporters have also argued that the individual mandate satisfies what Gerard Magliocca calls the “private action requirement” generated by the distinction between activity and inactivity because it regulates individual decisions not to purchase health insurance,146 that is, decisions to “go bare.”147 The question here, then, becomes this--if the Commerce Clause covers only the regulation of economic activity, do economic decisions qualify as economic actions? If they do, the activity/inactivity distinction becomes irrelevant to the debate over the constitutionality of the

145 See, Barnett, supra note 10, at 628 (Barnett uses the Committee of Detail to attack federal power over individual decisions, and consequently the individual mandate of the ACA, by quoting Justice James Wilson, a member of the committee, saying “‘The only reason, I believe, why a free man is bound by human laws, is, that he binds himself” and he thereby “becomes amenable to the Courts of Justice, which are formed and authorised by those laws.’”) (Chisolm v. Georgia, 2 U.S. 419, 456 (2 Dall.) (1793)); see also, Cooter & Siegel, supra note, 136 at 123 (using the intentions of the Committee of Detail to support collection action federalism).
147 See, Hall, supra note 15, at 1838 (arguing that the “passivity of decisions not to purchase does not rob them of their inherently economic nature, especially when considering the nonpurchase of insurance, which is a quintessentially economic product.” Here Hall is arguing that the decision to “go bare” is a private action of economic consequence.).
individual mandate, for the mandate is constitutional whether or not the Commerce Power contains a private activity requirement. The distinction, on this view, poses no constitutional threat to the constitutionality of the mandate even if Congress can only regulate economic activity pursuant to the Commerce Clause simply because individual decisions not to purchase health insurance are, in fact, forms of economic activity. 148

Let us put this question in context. The question of whether economic decisions qualify as activity matters here only if the Constitution applies a private activity requirement regarding regulation of commerce. This question, in turn, only arises if the word “regulate” requires some underlying, previously existing, voluntary activity which is the subject of the regulation in question (if it does not, mandates are simply a form of regulation of commerce and, thus, fall directly within congressional commercial regulatory power). But if some preexisting private activity is required as a predicate (i.e., as a jurisdictional hook) for congressional regulation, then, in the absence of any other alternative candidates, economic decisions must then fit the bill to provide that hook. This hook must be real and not merely assumed.

There are a number of reasons, however, that economic decisions fail to provide the needed predicate or jurisdictional hook for the individual mandate. These reasons are precedential, definitional/conceptual, textual and evidentiary, among others. Those characterizing bare economic decisions (i.e., mental activity unaccompanied by physical action) as economic activity can point to no prior precedent for such a legal or constitutional classification. Because demonstration of a jurisdictional hook is needed to establish the constitutionality of the mandate, the burden is on the mandate supporters to show that the hook exists and suffices. Now, as with other arguments in this individual mandate debate, 149 mere lack of precedent for a classification or assertion of authority does not settle the issue. On one hand, it can be argued that the lack of precedent here indicates lack of power or constitutional authorization for the measure sought. 150 But it can as well be maintained that the lack of

148 See, id.; see also, NFIB, 132 S.Ct. at 2622 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting part) (“An individual who opts not to purchase insurance from a private insurer can be seen as actively selecting another form of insurance: self-insurance.”).
149 Hall, supra note 15, at 1828 (admitting that the individual mandate constitutional issues are novel and without precedent).
150 Barnett, supra note 10, at 621 (follows the assertion that individual mandates are literally without precedent followed immediately by a discussion of when Congress violated the Commerce Clause by mandating state
precedent means only that the relevant power has not yet been exercised. In this case, though, the standoff counts against the constitutionality of the individual mandate because that is the side with the burden of proof here.

If we look beyond precedent and ask whether the definition and/or concept of activity include mental activity in general or economic decisions in particular, the results are likewise unclear. Of course, mental activity is, by definition, a type of activity. But if we focus our inquiry more narrowly on law or even more narrowly, on the commerce power itself, the answer is much less clear. Examine, for example, two contemporary constitutional definitions of “commerce.” The most common definition of “commerce” is as trade or exchange of goods, which is inherently a physical and not a mental activity. Even the broader, less common, definition of commerce as interaction requires the physical activity of two or more people. The answer to this question depends, it seems, on the level of generality or context within which it is asked, thus frustrating the call for a clear right answer.

This raises another problem for the economic decision/mental activity analysis of commerce. Economic decisions and mental activity may well involve only one person, but the notion of commerce (in both of its main versions) requires the physical activity or interaction of at least two individuals. Thus there is a double mismatch here, first regarding the nature of the activity involved and, secondly concerning the minimum number of individuals required. Economic decisions and mental activity are thus doubly disqualified from counting as economic activity. They are definitionally and conceptually wrong for the task of providing a jurisdictional hook for the constitutionality of the individual mandate.

Even without the precedential and conceptual difficulties just noted, there are simpler and more basic evidentiary and textual problems with using economic decisions and mental activity to meet the private activity requirement. Let us start with the textual difficulties. The ACA itself

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151 See, Hall, supra note 15, at 1839 (“No matter which view courts take, they lack binding precedent. The Supreme Court has never expressly validated or prohibited Commerce Clause regulation of pure inactivity.”).
152 Barnett, supra note 10, at 583.
153 Jack M. Balkin, Commerce, 109 Mich. L. Rev. 1 (2010) (“‘commerce’ did not have such narrowly economic connotations. Instead, ‘commerce’ meant ‘intercourse’ and it had a strongly social connotation. ‘Commerce’ was interaction and exchange between persons or peoples. To have commerce with someone meant to converse with them, meet with them, or interact with them.”).
does not require proof of mental deliberation and decision regarding the individual mandate.\textsuperscript{154} Instead, it merely penalizes those covered individuals who do not obtain health insurance.\textsuperscript{155} Now, it is true that a deliberate decision not to obtain health insurance and the mere failure to get health insurance are functionally equivalent in that they produce the same result—no health insurance, but that will not do here because the jurisdictional hook sought here must be an activity of some sort and the failure to do something is an omission rather than an act. Mere functional equivalence is insufficient. The act/omission distinction is, of course, a basic legal distinction, one found in many areas of law.\textsuperscript{156} Typically, an omission, i.e., a failure to perform a certain act, will result in liability only when there is a legal duty to perform the act in question, which duty is violated by the omission in question.\textsuperscript{157} As will be discussed in greater detail later in this article,\textsuperscript{158} no such duty is present regarding the individual mandate. We have no civic obligation enforceable by law to buy health insurance; no one claims the contrary. This is not to say that we have no duties owed to government. We do have various duties owed to government for reasons of civic duty or responsibility, but buying health insurance is not one of them.\textsuperscript{159} These duties, like Congress’ enumerated powers, are few in number and well-established.\textsuperscript{160} These civic duties are but exceptions to the rule of individual liberty.

Finally, even if the ACA explicitly required proof of deliberate decisions on the part of covered individuals not to buy health insurance, it would be difficult, if not impossible, short of mindreading, to prove the existence of such decisions (and the ACA does not even try to do so). Solving the textual problem would only lead to insuperable evidentiary problems. Affirmative decisions, i.e., decisions to do something, will normally have physical actions connected with and illuminating them. These physical actions will provide at least some evidence of the

\textsuperscript{154} See, 26 U.S.C. § 5000A(b)(1) (outlines the shared responsibility payment requirements, which imposes a tax penalty for more than one month of not maintaining essential coverage. Meaning there is no proof of deliberation concerning self-insurance or any activity, it is simply requires proof of maintaining essential coverage or not maintaining basic coverage.).
\textsuperscript{155} Id.
\textsuperscript{156} See, MODEL PENAL CODE § 1.13 (2014).
\textsuperscript{157} Id. at § 1.13(4).
\textsuperscript{158} See, infra notes 222-226 and accompanying text.
\textsuperscript{159} See, Barnett, supra note 10, at 630-31 (contrasts a duty to serve in military when drafted, for which citizens have a duty, with the individual mandate to buy health insurance, which there is no duty owed. The author thus uses this distinction to counter mandate proponents who point to duties such as the draft as a preexisting individual mandates).
\textsuperscript{160} See, THE FEDERALIST No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961)).
existence and nature of prior deliberation and decision to perform the physical action in question. But negative decisions, i.e., decisions not to do something, will not often have these related physical actions. As a result, there will usually exist no readily discoverable evidence from which to infer the deliberation and decision in question. The problem with this is that such evidence is essential here because non-performance of an action need not be the result of a deliberate negative decision. It might just as well result from no deliberation or decision at all. After all, there are innumerable actions that we are all not performing all the time. Most of these non-performances are not the results of deliberation and decision. And it is physically impossible for all our inactions to have been the results of deliberation and decision. They are just things that we have not done. The uncertainty and lack of evidence concerning underlying deliberation and decision not to perform an action is fatal when, as is the case here, it is needed to provide the jurisdictional hook for congressional regulatory authority. Ignoring this shortcoming, as mandate defenders seek to do, effectively gives Congress the power to regulate everything we do as well as everything we do not do.

The activity/inactivity distinction is doubtless the most thought provoking distinction that individual mandate opponents have crafted, but, as we have seen, it is not the most clarity inducing argument that they have made. That honor goes, instead, to the “commandeering the people” argument, which we turn to next.

III. COMMANDEERING THE PEOPLE

i) THE BASIS IN LAW AND LOGIC

If we look back at the two arguments and distinctions made by individual mandate opponents canvassed thus far in this article, the unconstitutionality of economic purchase mandates argument and the activity/inactivity distinction, we find that the mandate supporters’ general reply to these arguments is that they have no basis in law, but were instead invented specifically for the purpose of constitutional litigation opposing the individual mandate and, for
these reasons, are both insincere and unavailing. The supporters reply to the anti-mandate argument, for example, by pointing out that the founders knew of and supported economic purchase mandates and, from this they contend that such mandates could hardly then be unconstitutional today. The mandate supporters also answer the activity/inactivity distinction by pointing out that it is a novel distinction and has never been used by any court prior to the health care litigation to find a federal statute to be unconstitutional. Neither side in this debate can gain any argumentative traction here because, like the two sides in Lincoln’s observation on liberty, they disagree over the very definition of the word about which they argue. Clarity in this debate is in this way thwarted by lack of agreement on the meaning of the basic terms and, as a result, in lack of agreement on their proper application. Each side prevails only according its own views of meaning, definition and application here, but not under the other side’s views. Clarity is further frustrated by the fact that both sides use the same words to mean different things.

My contention here is that the “commandeering the people argument” advanced by Randy Barnett and others, in contrast to the other two anti-mandate moves, largely escapes these difficulties and is, for this reason, the most forceful and cogent anti-individual mandate argument. I make this argument despite the opinion of people like Orin Kerr that the commandeering the people argument is a weak, unconvincing argument. In fact, I will make my argument mainly by responding to the anti-commandeering points made by Kerr and others.

Recall that one difficulty with the activity/inactivity distinction is, as Justice Ginsburg points out in NFIB, anything called activity can always be redescribed as inactivity (thus,
paradoxically, making it simultaneously constitutional and unconstitutional). This, combined with the constitutional novelty of the distinction, makes it difficult to see exactly what inactivity is (and is not) and, therefore, why it cannot be constitutionally regulated. An argument or distinction that is not clear cannot be convincing and the activity/inactivity distinction is neither clear nor convincing. Those taken in by its appeal have not thus far been able to clearly and cogently state it\textsuperscript{168} and, as result, have failed to draw in and convince those who fail to appreciate the distinction’s intuitive appeal.

The basic notion of commandeering, in contrast, is clear to all. To paraphrase Holmes’ famous aphorism that “even a dog distinguishes between being stumbled over and being kicked,”\textsuperscript{169} everyone knows the difference between having their already existing activity regulated and being commandeered. In both cases there is a contrast between two possible actions and intents of an active party and the impingement on and reaction of a passive party. A regulated activity, by its very nature, has already been voluntarily commenced by the actor prior to and independent of the imposition of the regulation, so that the regulation can generally be escaped by the person or persons whose activity is being regulated by ceasing to perform the activity which is being regulated. This is not, however, the case with commandeering. Here there is no underlying voluntary activity, but rather a situation in which the active party conscripts the party commandeered to obey his will. The party commandeered cannot escape by ceasing the underlying activity because there is no underlying voluntary activity to cease performing. Commandeering is for these reasons, then, a far greater interference with individual will and freedom than simple regulation.

This point can also be made in terms of the way we use the words discussed here. When one talks of regulating something, that something is always an activity of some sort. In contrast, when one talks of commandeering something, that something is a person or thing, not merely an activity. There is a logical and grammatical distinction between the concepts of regulation and commandeering. They are not synonyms for each other and one is not a subclass of the other.

\textsuperscript{168} See, e.g., supra notes 42-45 and accompanying text (mandate opponents struggle to define how mandates are constitutionally impermissible, instead they list ways in which historical individual mandates were not an exercise of commerce power, but an exercise of other powers, such as military powers.).

They both involve control of persons and actions, but in different ways and to different degrees. The scope and nature of the control exercised is much greater, for example, when commandeering is involved than it is with mere regulation.

The concept of commandeering seems clear even to those who deny that it is constitutionally impermissible. For example, in the state anti-commandeering cases, New York\textsuperscript{170} and Printz,\textsuperscript{171} although the dissenters deny that commandeering a state is unconstitutional, they understand what commandeering is.\textsuperscript{172} The fact that the anti-commandeering argument against the individual mandate is clearer than the mandate and activity/inactivity arguments combined with the fact that it involves a larger and more serious interference with individual liberty than the other two strengthens it as an anti-mandate weapon.

This can also be seen if one contrasts the prohibition/mandate distinction with the prohibition/commandeering distinction. Recall that individual mandate defenders see a conceptual and constitutional symmetry between prohibitions and mandates and, so, see the question of commercial mandate constitutionality as having been settled by the Court’s decision concerning the prohibition of interstate commerce in the Lottery Cases.\textsuperscript{173} Contrast this with the Court’s quite different treatment of the prohibition/commandeering distinction in Reno v. Condon.\textsuperscript{174} The Reno case involves a challenge by South Carolina to the Driver’s Privacy Protection Act (hereinafter the DPPA).\textsuperscript{175} As the Court explains, “The DPPA regulates the disclosure of personal information contained in the records of state DMVs.”\textsuperscript{176} The DPPA was enacted in response to the practice by South Carolina and other states of selling personal information provided to state DMVs by drivers to private vendors,\textsuperscript{177} who would presumably

\textsuperscript{172} See, New York, 505 U.S. at 201-02 (quoting Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 101 S.Ct., 2352, 2366 (1981)) (White, Blackmun, and Stevens concurring in part and dissenting in part) (Agreeing with the majority’s definition of commandeering, but arguing that a finding that the anti-commandeering principle does not spring from tenth amendment Supreme Court precedent); see also, Printz, 521 U.S. at 963 (Stevens, Souter, Ginsburg, Breyer dissenting) (the dissenters and majority rely on the same language defining commandeering as in Hodel which prohibits an Act which “commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program”).
\textsuperscript{173} Ames, 23 S.Ct 321, 363 (1903) (Validating a statutory prohibition against importing lottery tickets, establishing that commerce power includes the power to prohibit commerce and not only regulate existing commerce).
\textsuperscript{174} 528 U.S. 141 (2000).
\textsuperscript{175} Id. at 143.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
then use it for marketing purposes. In Reno the state argues that DPPA violates the Tenth and Eleventh Amendments in general\textsuperscript{178} and the anti-commandeering rule of New York and Printz in particular because it “‘thrusts upon the states all of the day-to-day responsibility for administering its complex provisions’…and thereby makes ‘state officials the unwilling implementors of federal policy[.]’”\textsuperscript{179}

However, the Reno Court rejects South Carolina’s claim that the case is controlled by the anti-commandeering doctrine of New York and Printz, insisting instead that “this case is governed by our decision in South Carolina v. Baker\textsuperscript{180}-\textsuperscript{181} In contrast to New York and Printz, Baker involves a Tenth Amendment challenge, again by South Carolina, to the constitutionality of the Tax Equity and Fiscal Responsibility Act of 1982,\textsuperscript{182} which in the words of the Court in Reno, “prohibited States from issuing unregistered bonds[.]”\textsuperscript{183} The Court in Reno, then, sharply distinguishes between prohibiting state conduct (as in Baker) and conscripting or commandeering state officials and institutions (as in New York and Printz),\textsuperscript{184} reaffirming the proposition that the former power is granted to Congress, but that the latter power is not. The prohibition/mandate distinction, on the other hand, does not make this difference clear and is also not reflected in relevant Supreme Court case law and doctrine. Before rejecting mandate opponents’ arguments, defenders of the individual mandate and of an expansive, if not unlimited, view of the federal commerce power ought to address the distinctions and arguments which present the positions they oppose in the strongest and clearest manner possible,\textsuperscript{185} rather than reply only to weak and unclear arguments and distinctions before dismissing those positions and doctrines.\textsuperscript{186}

Another distinction and a further set of arguments should also be addressed here. Some critics of the Court’s state commandeering decisions in New York and Printz have attacked that

\textsuperscript{178} Id. at 147.
\textsuperscript{179} Id. at 149-50 (quoting Brief for Respondents at 10, 11).
\textsuperscript{180} 485 U.S. 505 (1988).
\textsuperscript{181} Reno, 528 U.S. at 150.
\textsuperscript{182} 485 U.S. 505.
\textsuperscript{183} Reno, 528 U.S. at 150.
\textsuperscript{184} Id. (“The DPPA regulates the States as the owners of data bases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.”).
\textsuperscript{185} This duty is reciprocal, applying as well to mandate opponents and their arguments.
\textsuperscript{186} See, infra note 190.
doctrine by proffering the distinction between preemption and commandeering in order to make two claims. The first claim is that commandeering is no greater a restriction on the states than is preemption. The second claim, which no one denies, is that Congress may preempt state regulation of interstate commerce. The conclusion the critics seek to draw from these premises is that congressional commandeering of the states is no more constitutionally questionable than standard, unobjectionable congressional preemption of state regulation. In addition, as one writer summarizes the situation, “According to most commentators, the anti-commandeering rule is ill-defined, ineffective, and arbitrary.” Now, if these critics of commandeering doctrine are correct in their assertions, then the attempt by me and others to demonstrate the unconstitutionality of the commandeering of either states or persons will be in great danger, both doctrinally and conceptually.

However, the critics’ claims can be answered. Arguments must do more than draw distinctions, for as Heather Gerken notes, “[T]he key to drawing distinctions is not to argue that they exist, but to explain why they matter.” This article seeks to do both things. State commandeering doctrine doubters Adler and Kreimer, for example, seek to undercut the doctrine by claiming that commandeering is no worse a restriction on state action than is preemption (a federal power no one in this debate doubts). They start by “construing the preemption/commandeering distinction as a distinction between action and inaction.” I will not repeat my earlier critique of the activity/in activity distinction or the instant argument in favor of the superiority of the notion of commandeering in illuminating the issues of this article. Suffice it to say that defining and explaining commandeering in terms of activity and inactivity, as Adler and Kreimer do, needlessly imports avoidable weaknesses and problems into the

188 Brown v. Hotel Employees, 468 U.S. 491, 500–501 (1984) (the basic interpretation of the Supremacy Clause is that Congress has the power to pre-empt state law).
189 See, Adler & Kreimer, supra note 187, at 101.
190 Cox, supra note 187, at 1312.
192 See, Adler & Kreimer, supra note 187 and accompanying text.
193 Id. at 95.
194 See, supra notes 83-160 and accompanying text.
discussion. Since they seek to criticize, rather than support, commandeering doctrine, this makes their task artificially easier than it should be.\textsuperscript{195}

Yet, even within their own narrative, there are two admitted problems with their position which they unfortunately dismiss, rather than answer. The first is that “certain actions are morally worse than parallel inaction.”\textsuperscript{196} The second is that “affirmative duties are more ‘demanding’—they interfere more with a person’s own life plan—than negative duties.”\textsuperscript{197} After noting these two difficulties, they respond only to the second, saying, “We doubt, however, that this latter justification applies to governmental actors as well as to private individuals.”\textsuperscript{198} But this assertion is contradicted by the very case they are discussing. Recall that the main factual claim of the chief law enforcement officer plaintiffs in Printz (who are surely “governmental actors”) is that the time and action demands of the federal statute unduly interfere with their performance of their state law enforcement duties.\textsuperscript{199} This points up another important difference between commandeering, on the one hand, and prohibition or preemption, on the other hand—the latter two take no time at all for those whose activity is preempted or prohibited (they can do anything else while not doing the now off-limits activity), while commandeering occupies some or all of a party’s time as long as the affirmative duty imposed by commandeering lasts.

Let us now turn more directly to the basis in constitutional precedent and doctrine for the “no commandeering of the people” argument. This argument has two parts. The first part is the statement of the state anti-commandeering rule developed by the Court in the New York and Printz cases.\textsuperscript{200} This statement defines the nature of commandeering and locates its constitutional home in the Tenth Amendment in particular and in federalism doctrine generally. The second

\textsuperscript{195} In fairness to Adler and Kreimer, it should be noted that their article was published in 1998, not long after the state commandeering cases were decided and years before the activity/inactivity distinction became a central issue in the health care litigation.

\textsuperscript{196} Adler & Kreimer, supra note 187, at 101 n. 90.

\textsuperscript{197} Id.

\textsuperscript{198} Id.

\textsuperscript{199} 521 U.S. at 927-928 (the time demands of performing the vast volume of the required background checks under the Brady Bill were unreasonable, and would interfere with their state duties).

\textsuperscript{200} New York, 505 U.S. at 202 (quoting Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288 (1981)) (“Congress may not simply ‘commandeer[s] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”); Printz, 521 U.S. at 935 (“We held in New York that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly”).
part derives from the argument of the Bond case\footnote{131 S.Ct. at 2355.} that the Tenth Amendment protects not only the states, but also the rights of individuals,\footnote{See id. at 2359 (holding that individuals, as well as states, can bring Tenth Amendment challenges to the constitutionality of federal statutes).} from federal interference. All that remains, then, is to put the two parts together to hold that among the individual rights protected by the Tenth Amendment is the right of individuals not to be conscripted or commandeered by the federal government.

The New York and Printz cases deal with federal statutes which respectively compel state legislatures and executive officials to implement federal statutory policy.\footnote{New York 505 U.S. at 161; Printz 521 U.S. at 935.} Although the two cases concern different branches of state government, they raise the same general sort of claim—that the federal statutes in question unconstitutionally commandeer the states to do the federal government’s bidding.\footnote{New York 505 U.S. at 161; Printz 521 U.S. at 935.} These cases involve statutes which do not, the plaintiffs claim, merely regulate state commercial activity; they go farther yet to commandeer the states and state officials. These cases are, for this reason, logically and constitutionally distinguishable from Garcia v. San Antonio Metropolitan Transit Authority,\footnote{469 U.S. 528 (1985).} for example, which upholds application of the wage and hours provisions of the Fair Labor Standards Act to a municipal transit system.\footnote{See id. at 555-56 (“Congress' action in affording SAMTA employees the protections of the wage and hour provisions of the FLSA contravened no affirmative limit on Congress' power under the Commerce Clause.”).} The statute in Garcia merely regulates commercial activity, but the statutes in New York and Printz do more than that—they commandeer states and state officials. For purposes of my argument here, the two most important aspects of these state commandeering cases are the nature of the line between mere regulation and commandeering as well as the explanation of why that line is constitutionally significant.

The first issue, the nature of the line between regulation and commandeering is clearer and easier to explain.\footnote{Others have also noted the relative obviousness of commandeering as compared to other related notions discussed in this article. See, e.g., Cox, supra note 187, at 1340.} I have already argued that one knows when one is being commandeered and that one knows when one is commandeering others. The nature of the act can also be gleaned from the synonyms used for “commandeer” in the commandeering cases. Taking a look just at the Printz case, for example, commandeering is variously described as the power to “press… into
federal service,”208 “command,”209 “impress”210 and “directly to compel.”211 All these words and phrases connote more than the mere adjustment of activity already voluntarily entered into; they also involve control over and compulsion of not just the activity in question, but also of the person or entity involved itself. In the state anti-commandeering cases, this is described as a violation of state sovereignty.212 Analogously, in the “commandeering the people” situation this is best described as a violation of individual liberty.213

Despite (or perhaps because of) the forceful words the Court uses in Printz to describe commandeering, the preceding paragraph gives an exaggerated impression of the nature and baseline of the compulsion (if it can be called that) actually required for a finding of commandeering. This mistaken impression can be cured by looking at the facts of the commandeering cases themselves. Printz, for example, involves the provisions of the Brady Act214 concerning background checks related to gun sales to be performed temporarily by state “chief law enforcement officers” (hereinafter CLEOs).215 The duties required of CLEOs by the Brady Act are mainly clerical in nature—filling out paperwork and doing background checks;216 they are far less dramatic than one might anticipate when first seeing the words the Court uses to refer to the commandeering. This is because “commandeering” and its cognates usually imply physical force or coercion, which is not present in the state commandeering cases or in NFIB.

This corrected impression, however, has the practical effect of lowering the coercive threshold for unconstitutional commandeering by setting a relatively low bar for what may count as compulsion here. This will be relevant, for example, when considering whether or not the fine/tax which is part of the individual mandate217 constitutes commandeering. What is called

208 Printz, 521 U.S. at 905.
209 Id. at 909.
210 Id. at 907, 922.
211 Id. at 924.
212 See, id. at 932.
213 See, Barnett, supra note 10, at 626-27 (Barnett connects the analogy of commandeering the states with violating individual liberty by using the plain language of the tenth amendment, which states that “powers not delegated by the Constitution to the United States… are reserved to the states respectively, or to the people”. The inclusion of the phase “or to the people” connects the anti-commandeering of states cases, which relied on the same amendment, to the violation of individual liberty.).
214 521 U.S. at 902.
215 Id. at 903.
216 Id.
217 Whether this payment is a tax or a fine is, of course, an issue on which the constitutionality of the entire ACA turned, but it is fortunately a question not to be answered in this article. See, e.g., NFIB, 132 S. Ct. at 2596 n. 9.
commandeering need not involve physical force, threat or even psychological pressure. Instead, what the Court calls commandeering is similar to what is called a penalty or an unconstitutional condition in other constitutional areas.\textsuperscript{218} Another factor lowers the bar of compulsion still further. The commandeering can be both partial (in terms of the range of activities covered) as well as temporary and, nevertheless, be unconstitutional. The commandeering of the entities and individuals involved in both New York and Printz is both temporary and partial in both cases, and yet is unconstitutional.

One complicating fact also deserving mention here is that certain forms of the commandeering of individuals, such as the military draft, jury service and filling out census forms (examples frequently mentioned by mandate defenders\textsuperscript{219}), are conceded to be constitutionally valid even by individual mandate opponents such as Randy Barnett,\textsuperscript{220} who must then explain why those duties are constitutionally permitted, while the individual mandate is not. Barnett argues that these other mandates arise from and are justified by civic duties owed by citizens to government.\textsuperscript{221} The Supreme Court has used the civic duty argument, for example, to uphold the constitutionality of a military draft against a Thirteenth Amendment challenge.\textsuperscript{222} What Barnett and I argue, however, is that there is no general civic duty owed by citizens to government to do its bidding, certainly not a commerce-based duty to obey federal economic purchase mandates like the individual mandate.\textsuperscript{223} The Constitution sets out no such general duty. The Supreme Court has never asserted the existence of such a duty. The wording used by the Court in upholding military conscription, for example, treats that duty as exceptional and not as one of a broad range of duties.\textsuperscript{224} Even defenders of the individual mandate do not argue for

\textsuperscript{218} See, e.g., Hall, supra note 15, at 1827 n. 11 (a brief overview from different districts not calling the individual mandate a commandeering of the people, but more of a penalty, or an “assessable payment,” that is appropriate under the taxing power.).

\textsuperscript{219} See, NFIB, 132 S. Ct. at 2627 n. 10 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

\textsuperscript{220} See, e.g., Barnett, supra note 10, at 630.

\textsuperscript{221} See, id. at 606 (“Historically, one is not responsible for omissions to act unless one has a preexisting duty to act.” Barnett then goes on to discuss each concededly constitutional mandate and trace them to such duties, e.g., the duty to serve in military. He then notes that the duty to purchase health care is not historically based.).

\textsuperscript{222} See, Selective Draft Law Cases, 245 U.S. 366, 390 (1918).

\textsuperscript{223} See, Barnett, supra note 10, at 631. (“What separates the United States from other countries is the minimal and fundamental nature of the duties its citizens owe to the state,” reinforcing the idea that there are only few and fundamental duties owed to the government by individuals, but no general duty owed to the government.).

\textsuperscript{224} See, Selective Draft Law Cases, 245 U.S. at 390 (The duty to enlist in a mandatory draft is so exceptional that the Court stated that they were unable to conceive upon any theory where the citizens could perform this supreme duty.
the mandate in terms of obedience to a civic duty which citizens owe to the federal government, but instead as simply falling within the federal commerce or taxing powers.\footnote{See, generally, Hall, supra note 15 (throughout his entire article Hall never implies that the individual mandate is supported by a general duty owed to the government, but always brings it back to the commerce and taxing powers.).}

Now, it is true that the restriction on individual liberty involved in the draft is greater than the interference involved in the individual mandate, but this is not a situation where the greater power to curtail freedom implies or includes the lesser power to curtail freedom.\footnote{See, Barnett, supra note 10, at 630-31 (Barnett in reading the Selective Draft cases pointed out from the court’s conclusion that unless they could find an affirmative duty from the citizens upon which to base the conscription, that would have indeed violated the Thirteenth Amendment. Barnett leads from there to narrow down on the argument from mandate supports relying on the duty to register for the draft, and points out that there must still be an affirmative duty upon which the mandate would be justified. And that the duty to register for the draft was so exceptional that it could not conceivably could have justified lesser requirements, such as mandatory purchases of insurance.).} The degree to which freedom is limited by government in a particular law is, doubtless, a factor (an important factor--but still only a factor) in determining its constitutional permissibility. The nature of the governmental justification for the curtailment is also an important countervailing factor which can sometimes outweigh the individual’s interest in freedom. This explains why a very significant liberty limitation, military conscription, for example, is constitutionally permissible while a much less significant liberty limitation, such as the individual mandate, is not.

The state anti-commandeering decisions do not, by themselves, establish that the doctrine also applies to individuals. But they do take several important steps in that direction. The first step is that of describing and defining commandeering in terms of compulsion.\footnote{See, Printz, 521 U.S. at 925 (the Supreme Court defined commandeering as a prohibition where “the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”).} The second step is that of explaining why the commandeering of state legislatures and executives is an unconstitutional violation of state sovereignty.\footnote{See, id. at 928 (quoting Brown v. EPA, 521 F.2d 827, 839 (1975) (citations omitted)) (Reasons against commandeering were the “Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields than (as Judge Sneed aptly described it over two decades ago) by ‘reduc[ing] [them] to puppets of a ventriloquist Congress.’ It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority.”).} And the third step is showing why challenged federal statutes may initially appear to be constitutional, in the sense of being necessary, they can nevertheless unconstitutional when they are not proper. According to these cases, the Necessary
and Proper Clause, used as a justification for implied federal powers, imposes two separate and different demands on federal legislation. The state commandeering in New York and Printz is unconstitutional, not because it is not in the relevant sense necessary, but because it is not a proper means for carrying into execution an enumerated power (here, the Commerce Clause).

The first Bond case takes another important step towards establishing the “no commandeering the people” doctrine. This step counters and qualifies statements in the state commandeering which note that it was the plan of the Constitution (in contrast to the plan of the Articles of Confederation) to have the national government operate directly upon individuals, rather than only indirectly through the states. I am not arguing that these statements are wrong, only that they do not, by themselves, deflect my argument. Yes, it is true that under the Constitution the federal government will operate directly on the people, rather than indirectly through the states. But this operation must still be constitutionally proper—and this is where the Bond case becomes relevant.

Bond’s important step is summarized in the doctrinal holding that the Tenth Amendment protects individual liberty directly and not only indirectly as a consequence of federal violations.

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229 See, id. at 923-24 (The Court separates the Necessary and Proper Clause, into 1) necessary, and 2) proper, stating that the background checks in the Brady Act may be “necessary” to bring about Congresses intentions, it must also be a proper exercise of an enumerated power. So being relevant to bring about Congresses intentions imposes one demand under the “necessary” requirement, but also connects that relevancy requirement to the execution of an enumerated power, which is another demand under the “proper” requirement.).

230 See, id.

231 See, id. (quoting The Federalist No. 33, at 204 (A. Hamilton)) (“What destroys the dissent's Necessary and Proper Clause argument, however, is not the Tenth Amendment but the Necessary and Proper Clause itself. When a “La [w] ... for carrying into Execution” the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions... it is not a “La[w] ... proper for carrying into Execution the Commerce Clause,” and is thus, in the words of The Federalist, “merely [an] ac[t] of usurpation” which “deserve[s] to be treated as such.”).

232 See, NFIB, 132 S. Ct. at 2573 (Analyzing the Necessary and Proper Clause arguments the court points out that “each of this Court's prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power” ... “The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power and draw within its regulatory scope those who would otherwise be outside of it. Even if the individual mandate is “necessary” to the Affordable Care Act's other reforms, such an expansion of federal power is not a “proper” means for making those reforms effective.”).

233 See, New York, 505 U.S. at 166 (“In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.”).
of state sovereignty. The Bond Court states this succinctly, “Federalism secures the freedom of the individual.” Now, Bond does not originate this notion, but it is the first Supreme Court decision to thematize and explain it. Going back to the beginning of our constitutional history, we understand that an important purpose of the Constitution is to “secure the Blessings of Liberty to ourselves and our Posterity.” Bond holds these liberty guarantees spring in part from federalism generally and the Tenth Amendment in particular and that the claims arising therefrom are justiciable.

Prior to Bond, it was not clear that the Tenth Amendment afforded individuals direct protection of their liberties on federalism grounds from otherwise constitutional federal legislation, just as it was not clear prior to New York and Printz that the Tenth Amendment similarly protected the states from federal commandeering. After all, the Darby case famously dismissed the Tenth Amendment as a mere truism, rather than an independent source of rights protection. But, once the Court established the anti-commandeering rule with regard to the states, one might say that it was fated, if only by the wording of the Tenth Amendment, to be called upon to answer whether the same doctrine applied also to individuals. It took an important step in this direction in the Bond case, holding the Tenth Amendment protected the rights of individuals as well as those of states.

One last step is needed, however, to get from existing case law and doctrine to the “no commandeering of the people” doctrine. That step is the demonstration that this directly protected liberty is among the individual liberties protected by the Tenth Amendment. One might start here by citing the constitutional preamble or analogizing to state commandeering doctrine,

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234 See, Bond, 131 S. Ct. at 2363-64 (“The individual, in a proper case, can assert injury from government action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to the state.”).
235 Id.
236 The state commandeering cases made the assertion well before Bond. See, e.g., New York, 505 U.S. at 181 (“[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.”) (internal citation omitted).
237 U. S. Const. pmbl.
238 See, 131 S. Ct. at 2365 (“If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object.”).
239 United States v. Darby, 312 U.S. 100, 124 (1941) (“The amendment states but a truism that all is retained which has not been surrendered.”).
240 See, Barnett, supra note 10, at 626-27 (Relying heavily upon the “or to the people” phrase in the tenth amendment to argue out that anti-commandeering was extended to individuals by the tenth amendment.).
241 Bond, 131 S.Ct. at 2364 (“Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions.”).
but it would be helpful to have something further, some argument based on underlying first principles in support of this proposed doctrine. It is to this task that we now turn.

ii) SERVANTS AND SOVEREIGNS

In his *NFIB* opinion Chief Justice Roberts, after discussing the provisions of the ACA and the arguments of its proponents, says, “This is not the country the Framers of our Constitution envisioned,” then adding, “Accepting the Government’s theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.” Unfortunately, he does not then go on to elaborate on these comments and neither do the other justices. A few commentators do cite his statements, but provide little further additional analysis or explanation either. Yet, I believe that these seemingly cryptic statements are highly relevant to the theme of this article and their elaboration will help complete the last step to the “no commandeering of the people” doctrine. For these statements involve the very foundational underpinnings of our constitutional system as the framers established them. They raise questions of sovereignty, what it is, who possesses it and how it functions. And they indicate the way in which individual mandate proponents overturn and reverse those foundations.

The most relevant and important question here is who is sovereign and who is servant under our constitutional system? In the statements quoted above, the Chief Justice suggests, without explicitly stating, the notion that the founders saw the people as sovereign and the government as the servant and also that the constitutional mindset and assumptions behind the individual mandate would deconstruct and reverse this hierarchy. Let me explain why I say “deconstruct.” At the beginning of one of his important papers on deconstruction and law, Jack Balkin quotes a famous biblical passage on the subject of hierarchy reversal, “The stone that the builders rejected has become the chief cornerstone.” Deconstructive theory postulates that

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242 *NFIB*, 132 S. Ct. at 2589.
243 See, e.g., Gerkin, *supra* note 191, at 97 n.75.
245 *Id.* (quoting *Psalms* 118:22).
many concepts exist in unstable, nested oppositions,\textsuperscript{246} paired with complementary concepts in a hierarchical, but reversible, manner. Like the Bible, deconstruction preaches the reversal or inversion of these hierarchies.\textsuperscript{247} When it comes to legal nested oppositions and hierarchies, this reversal is not simply an intellectual process, but also facilitates ideological critique in law.\textsuperscript{248} In the American Legal theory of a generation ago, the deconstructive move of hierarchy reversal was a technique used by Critical Legal Studies members and others to critique and reorient established legal theory and practice.\textsuperscript{249}

Now, the concept of the sovereign is a notion basic to federalism theory.\textsuperscript{250} It does not exist in isolation, but is paired, as deconstructionists would say, in nested opposition with the concept of the servant.\textsuperscript{251} The debate in contemporary federalism theory, however, is not directly over the reversal of the hierarchy in the sovereign/subject opposition as such, but instead over who is sovereign and who is subject. Underlying Chief Justice Robert’s objection to the individual mandate is a defense of the traditional notion of popular sovereignty, i.e., the sovereignty of the people. Within this hierarchy, the governments, both state and federal, are servants, or agents, of the people.\textsuperscript{252} This understanding is reflected in the common practice of referring to government officials as public servants, for example. In the larger federalism debate which has arisen as a result of the health care case, this notion of popular sovereignty has been introduced and defended mainly by Randy Barnett, who explains the Chief Justice’s complaint by saying that defenders of the individual mandate seek to turn citizens into subjects, by allowing

\textsuperscript{246} Balkin defines a nested opposition as “a conceptual opposition each of whose terms contains the other, or each of whose terms shares something with the other.” J.M. Balkin, Nested Oppositions, 99 YALE L. J. 1669, 1676 (1990) (book review).

\textsuperscript{247} See, Balkin, supra note 244, at 746-67 (describing this inversion using deconstructive concepts including the metaphysics of presence, diffé\’ance and trace, arguments that undo themselves and the logic of the supplement).

\textsuperscript{248} See, e.g., Jack M. Balkin, Deconstruction’s Legal Career, 27 CARDOZO L. REV. 719, 725 (2005) (“Deconstruction has proved particularly useful for ideological critique because ideologies often work through forms of privileging and suppression.”).

\textsuperscript{249} See, e.g., Balkin, supra note 246, at 1669 (“Deconstruction has become a prominent force in legal theory in the last few years, especially through its use by feminist scholars and members of the Critical Legal Studies movement.”).

\textsuperscript{250} For an important exposition of the relation between sovereignty and federalism, See, Akhil Reed Amar, Of Sovereignty and Federalism, 96 YALE L. J. 1425 (1987).

\textsuperscript{251} For a leading presentation of this view, See, Heather R. Gerkin, Of Sovereigns and Servants, 115 YALE L. J. 2633 (2006).

\textsuperscript{252} See, Barnett, supra note 10, at 629 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)) (“in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.”).
the federal government to commandeer them,\textsuperscript{253} thus reversing the hierarchy established by the framers\textsuperscript{254} and denying citizens the blessings of liberty the Constitution promises them.\textsuperscript{255} Although he would not, of course, phrase it in this way, the Chief Justice is here objecting to the constitutional deconstruction to the structure of popular sovereignty established in the Constitution by the founders.

It is true that the sovereignty/servant nested opposition does not currently play a significant, explicit role in the health care debate and litigation. This is simply because that debate so far has been neither argued nor decided on an anti-commandeering basis. This opposition is instead relegated to a few cryptic judicial comments and a few constitutional commentaries. It is a main purpose of this article to remedy this absence. This opposition does, however, loom larger in the earlier round of the commandeering debate in the state commandeering New York and Printz cases and the associated academic commentary. We can look there for relevant argument and doctrine to apply to the commandeering of the people. The Court in both those cases invokes the anti-commandeering rule to safeguard the sovereignty of the states,\textsuperscript{256} protecting them from federal compulsion and control.\textsuperscript{257} Critics of these holdings and of the related constitutional doctrine reply that such measures were neither called for nor needed. These critics feel that “the political safeguards of federalism,” earlier invoked in the Garcia case to strike down formalistic limitations on the power of Congress to regulate the states\textsuperscript{258} are sufficient and appropriate protection for the states.\textsuperscript{259}

Furthermore, as Justice Breyer notes in his Printz dissent, other countries with federal systems sometimes administer federal laws in ways quite contrary to American anti-commandeering doctrine. In these systems, constituent states “will themselves implement many of the laws, rules, regulations, or decrees enacted by the central ‘federal’ body.”\textsuperscript{260} Countries with this sort of federal system do this because they think that this approach interferes less with both state independence and authority and with individual liberty less than anti-commandeering

\textsuperscript{253} See, \textit{id.} at 634-37 (Barnett dedicates his entire concluding section of his article to this principle, titling his final section “Conclusion: From Citizens to Subjects.”)
\textsuperscript{254} See, \textit{id.} at 629-30.
\textsuperscript{255} See, \textit{id.}
\textsuperscript{256} See, New York, 505 U.S. at 175; see also, Printz, 521 U.S. at 963.
\textsuperscript{257} See, New York, 505 U.S. at 188; see also, Printz, 521 U.S. at 900.
\textsuperscript{258} See, 469 U.S. at 588.
\textsuperscript{259} See, New York, 505 U.S. at 205-06; see also, Printz 521 U.S. at 956.
\textsuperscript{260} Printz 521 U.S. at 976 (Breyer, J., dissenting) (citations omitted).
doctrine would. For these reasons, Justice Breyer concludes that, “[T]here is neither need nor reason to find in the Constitution an absolute principle, the inflexibility of which poses a surprising and technical obstacle to the enactment of a law that Congress believed necessary to solve an important national problem.”

Note that the Justice’s argument here is functional, rather than historical or textual, and assumes that the Court has the freedom to interpret and implement basic structural constitutional concepts such as federalism in a functional manner free of limitations imposed by history, text or precedent. Disagreement concerning this assumption, however, pervades debate on this topic.

Justice Breyer’s argument is taken up and extended in the academy by federalism scholars like Heather Gerken, who argues for “the power of the servant” in the federalism context. This power involves the ability of “an institutional actor placed somewhere down the chain of command to influence the decision-maker who is nominally the boss.” For Gerken here, the decision-maker is the federal government, the chain of command is the federal/state relation and the servant is the state. This model of federalism assumes complete federal supremacy and denies state sovereignty, at least as it has been traditionally understood. She does not, however, completely deny state power in this area, but says that it comes instead through “the powerful role states play as servants,” rather than through the exercise of the states’ own sovereign power.

Now, it is not my purpose in this article to reprise the sovereignty debates which attended and followed the Court’s state commandeering cases. Although this article is concerned with federalism, the focus here is its relation to individual liberty, rather than its relation to state sovereignty. I bring up the statements of Justice Breyer and Professor Gerken only to argue that, whatever the merits of their views are on the topic of state sovereignty, they do not and should not determine the power of Congress to commandeer persons pursuant to its commerce power or to set the scope of individual liberty protection under the Tenth Amendment. I am here opposing, not the argument that states are servants (powerful or otherwise) of the sovereign federal

261 See, id. at 976-77.
262 Id. at 978.
263 See, Gerken, supra note 251, at 2635.
264 Id.
265 Gerken elsewhere dismisses the notion of state sovereignty in the federal/state relation as “a campfire story.” Gerken, supra note 191, at 123.
266 Id. at 120.
government, but instead the analogous argument that citizens are servants of the sovereign federal government.

But who is making these sorts of arguments I oppose here—Isn’t “government of the people, by the people, for the people”267 a civic platitude accepted by all? One answer to this question is, “Who isn’t, at least implicitly, assuming the validity of these arguments?” After all, anyone asserting that the individual mandate is a mandate (as opposed to merely being a garden variety regulation of commerce) and also that the individual mandate is constitutional is making this sort of argument, whether they realize it or not. Another important question is why and how are the state and individual commandeering arguments in important ways disanalogous? The answers to both questions can be illuminated by examining what I shall call the “bad news” series of articles on the individual mandate. These articles are illustrative of important underlying issues here, not because they mirror what others are saying in the health care debate, but for the opposite reason—because they on both sides express, in a forceful manner, what others are not saying, but only assuming, in their arguments. They convey, then, important but largely unexpressed underlying assumptions and orientations of both sides in the debate.

Andrew Koppelman’s Bad News for Mail Robbers268 begins the series. In this article Koppelman argues for “the obvious constitutionality” of the ACA in general and of the individual mandate in particular, dismissing constitutional objections to this position as silly269 and asserting that the doctrine of mandate critics would, if applied, “randomly blow up large parts of the U.S. Code.”270 The second piece in the series comes from Gary Lawson and David B. Kopel, who argue against Koppelman that the individual mandate does not pass constitutional muster under the Necessary and Proper Clause because it is not an exercise of Congress’ incidental powers under that clause.271 They, in turn, base their argument upon the claim that the Necessary and Proper Clause incorporates the doctrine of principals and incidents found in the agency, administrative and corporate law of England and the United States in the eighteenth

269 See, id. at 2.
270 Id. at 11.
The incidental powers account of congressional power pursuant to the Necessary and Proper Clause more narrowly limits the scope of congressional legislative power than does the account Koppelman gives of that power in the first “bad news” article. This is so because there seem for be few, if any, limits on that power for Koppelman. In that article, for example, he cites the Comstock test of “whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power,” as expressing the proper description of the scope of congressional power under the Necessary and Proper Clause. Lawson and Kopel, in turn, reply to Koppelman by contending that the doctrine of principals and incidents “must be satisfied before one inquires whether a law is important or customary (“necessary”) or within fiduciary boundaries (“proper”).” More specifically, they find the individual mandate to be unconstitutional because “the power to order someone to purchase a product is not a power subordinate or inferior to other powers” and is, therefore, not an incidental power.

In his reply to Lawson and Kopel in the third article in this series, Koppelman does not attack the historical bona fides of the research of Lawson, Kopel and others; in fact, he praises them. What he does, however, do is to deny the relevance, let alone the controlling effect, of these eighteenth century legal notions on contemporary Necessary and Proper Clause doctrine. Once again Koppelman claims that Lawson and Kopel’s eighteenth century rules, if adopted today, would “randomly blow up large parts of the U.S. Code.” In the fourth and (thankfully) last article in this series, Lawson and Kopel make two arguments which are relevant here. The first is that Chief Justice John Marshall in McCulloch v. Maryland also accepted their incidental powers argument, a contention which Koppelman concedes, to a point. This is important because of the centrality of Marshall’s McCulloch opinion to all contemporary

272 See, id. at 270.
274 Lawson and Kopel, supra note 271, at 270 (emphasis in original).
275 Id. at 271.
278 See, Koppelman, supra note 276, at 516.
279 See, id. at 517.
280 Id. at 522.
283 See, Lawson & Kopel, supra note 281, at 533.
284 See, Koppelman, supra note 276, at 518.
understandings of the Necessary and Proper Clause. A doctrine, like that of principals and incidents, which forms an important feature of that opinion, cannot be quite so easily dismissed; it must, instead, be answered or accommodated by those who would appeal to *McCulloch* as controlling authority here.

The second and more relevant argument made by Lawson and Kopel in this fourth article is that their incidental powers argument does not “randomly blow up large parts of the U.S. Code,” but instead only one small part of that code—the individual mandate. They find these assertions by Koppelman and others to be utterly hyperbolic. The reason that the incidental powers doctrine “blows up” only the individual mandate and not “large parts of the U.S. Code” is that, among existing federal statutes, it is only the individual mandate which reduces citizens from sovereigns to servants, thereby reversing the hierarchy assumed by the framers and reflected in the Constitution itself. The doctrines of popular sovereignty and “no commandeering the people” act to block this reduction and reversal and the denial of these doctrines serves to bring about this reduction and reversal.

Let me sum up some seemingly disparate topics and arguments of this section of this article in order to clarify and summarize my argument. If, for example, we translate the statement from Chief Justice Roberts’ *NFIB* opinion which began this article section into deconstructionist terminology, we get the accusation that individual mandate backers are reversing a basic hierarchy involving the nested opposition of sovereign and subject assumed by the constitutional text and structure, thereby changing the basic legal and political relations in our form of government. According to both the Chief Justice and to the four *NFIB* joint dissenters this change is not proper in a constitutional sense. Here I add the complementary charge that it also violates the rights of the people under the Tenth Amendment by violating individual rights and popular sovereignty. The general power of the federal government to


286 See, Lawson & Kopel, supra note 281, at 537-38.

287 See, id. at 538 (“It is interesting to see, how often the advocates of the individual mandate, including Professor Koppelman, keep insisting that, if the Supreme Court strikes down a single, novel and utterly unprecedented congressional usurpation of power, then more than a century’s worth of federal law on other subjects will come crashing down with it.”) (citation omitted).

288 See, supra note 242 and accompanying text.

289 The protections and limits placed upon the federal government by the enumeration of powers and the Tenth Amendment are complementary in this and other ways.
compel citizens to involuntarily actions is simply not in the Constitution,\(^\text{290}\) a point mandate defenders seek to avoid rather than to answer. If the people are sovereign, then they are not servants or subjects of government. If the people are sovereign, then the government, state or federal, is not sovereign, but rather agent or servant of the people.

One might counter my argument here by saying that we cannot find the notion of popular sovereignty in the Constitution, either. But the document does, of course, begin with the words, “We the people of the United States,” and later continues that they “do ordain and establish this Constitution for the United States of America.”\(^\text{291}\) Who else, then, would possess the power to “ordain and establish the Constitution” other than the people of the United States? My hypothetical objector might still be unsatisfied with this response and might then ask why the document does not more explicitly establish or recognize popular sovereignty. This is because popular sovereignty is an underlying constitutional principle, assumed but not further stated in the text. Many statements, for example, can be culled from the framing and early constitutional periods asserting or assuming the doctrine popular sovereignty.

An indicative example can be found in the case of *Chisholm v. Georgia*,\(^\text{292}\) which contains an early examination by the Court of the concept of sovereignty, of both the state and popular varieties. In this case, Justice Wilson tells us that a claim of popular sovereignty in the Constitution would be proper, although such an assertion is not explicitly made there.\(^\text{293}\) He also refers to a free man as “an original sovereign.”\(^\text{294}\) Later in that case Justice Jay proclaims “this great and glorious principle, that the people are the sovereign of this country.”\(^\text{295}\) Other examples can be gleaned from later cases and the text of the Constitution itself.\(^\text{296}\) *Chisholm* also contains

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\(^{291}\) U.S. CONST. pmbl.

\(^{292}\) 2 U.S. (2 Dall.) 419 (1793) (allowing a state to be sued by a citizen of another state without its consent—a result soon reversed by the Eleventh Amendment).

\(^{293}\) See, id. at 454 (Wilson, J.) (“To the Constitution of the United States the term SOVEREIGN is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comport with the delicacy of those, who ordained and established that Constitution. They might have announced themselves ‘SOVEREIGN’ people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration.”) (emphasis in original).

\(^{294}\) Id. at 456.

\(^{295}\) Id. at 479 (Jay, J.).

\(^{296}\) See, e.g., Barnett, *supra* note 290, at 608 (collecting examples).
assertions that the protection of individual liberty is the underlying purpose of government. Popular sovereignty and individual rights are, of course, not the same things, but they are closely related and mutually reinforcing. Each of these notions supports and helps justify the other in describing and constituting the republican form of government.

It is true that these examples are not case holdings, but rather only dicta (and old dicta, at that). But, are they sufficient to demonstrate that popular sovereignty and individual liberty are underlying constitutional principles? The answer to this question depends on what underlying principles are and how they come into being. The argument is stronger if one believes that underlying constitutional principles derive from the original understanding of the Constitution held by the founders. But not everyone today holds such a belief. Living Originalists like Jack Balkin, for example, believe that underlying principles are current constitutional constructions and are not limited to those principles actually held by the framers and the ratifiers, but may be revised and reformulated anew today. However, no new “commandeering the people” constructions have not yet been explicitly created. While defenders of broad federal power may debunk traditional formulations of federalism, they have not made these moves with popular sovereignty and “no commandeering the people.” Justice Wilson may have hesitated to make such assertions because he found them ostentatious, but it is not a desire to avoid ostentation that moves modern day progressives to avoid these claims.

So, even though there is perhaps no knockdown argument to be had here because of the different assumptions of different starting points, my position draws some support from the unwillingness of mandate supporters to publicly deny that popular sovereignty and individual liberty are basic underlying constitutional principles. This is, in part, because it is rhetorically more difficult today to deny the existence and importance of these principles than it is to deny the “campfire story” of state sovereignty. There is an important reason that one denial is more difficult and uncomfortable than the other. Millions of Americans, including judges and legislators, believe this campfire story. In addition, the notion of “no commandeering the

297 See, e.g., Chisholm, 2 U.S. (2 Dall.) at 468 (“The rights of individuals and the justice due to them, are as dear and precious as those of the States. Indeed the latter are founded upon the former, and the great end and object of them must be to secure and support the rights of individuals, or else vain is Government.”).

298 See, JACK M. BALKING, LIVING 259-60 (2011)

299 See, id. at 260.

300 See, Gerken, supra note 265.
people,” as I have argued above, is established in current case law, framers’ understanding and popular sentiment.

IV. THE GHOST OF LOCHNER

One last topic requires discussion here, not so much because of the express content of the individual mandate debate, but rather due to what is not said (at least in so many words) in that debate. This unsaid matter has several substantial effects on the explicit content of the debate. Please recall that I began this article by saying that it presents the missing individual liberty portion of Chief Justice Roberts’ NFIB opinion. This missing portion underlies the Chief Justice’s remark that, “This is not the country that the framers of the Constitution envisioned.”

This absence can also be seen in what mandate defenders say in response to the Chief Justice and other mandate opponents. In this dispute, mandate opponents almost exclusively cast their arguments in terms of federalism and enumerated powers, while mandate defenders nevertheless accuse those opponents of having a hidden economic liberty agenda of bringing back the economic substantive due process arguments of Lochner and its ilk, even though neither the Chief Justice nor most other mandate critics positively cite Lochner or explicitly advance economic substantive due process arguments against the mandate.

This situation calls for an explanation as much it calls for a reply, an explanation of why mandate defenders make charges concerning arguments that mandate critics have not been made. These charges are based on the assertion that beneath the commerce and federalism arguments mandate critics actually make hides an unstated agenda relating to Lochner and its dreaded revival. This is why I use the phrase, “the ghost of Lochner” here. Although Lochner does not actually appear anywhere in the substantive constitutional argument against the mandate, its presence is nevertheless feared, if not claimed, almost everywhere by mandate defenders.

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301 See supra note 242 and accompanying text.
302 See, e.g., supra notes 20-25 and accompanying text.
303 For examples of such a hidden agenda assertion, see Peter J. Smith, Federalism, Lochner, and the Individual Mandate, 91 B. U. L. Rev. 1723, 1726, 1745 (20110).
about ghosts are more often based upon fears than upon facts. So, to, it is with the ghost of *Lochner*.

To these ends, my aim here will be threefold: to explore what “*Lochner*” means and stands for in the individual mandate debate, to relate this issue to the larger debate over the scope and content of the New Deal Settlement, and finally to show how the “no commandeering the people” doctrine can protect constitutional economic liberty under the Tenth Amendment without reviving *Lochner* and economic substantive due process and, thus, to banish the ghost of *Lochner*. These aims are not fully distinct and independent; they are, instead, highly interrelated.

*Lochner* is a complicated and freighted notion; it stands for many things and has different meanings for different groups of people. Among other things, it has been employed as a metonym, a symbol and a rhetorical club. As a metonym, it stands for a group of overruled cases in the constitutional anticanon sometimes referred to as the Constitution-in-Exile, a phrase coined by Douglas Ginsburg. This phrase is a catchall for the constitutional provisions and doctrines banished from mainstream constitutional discourse since 1937. According to Ginsburg, these include, “the doctrines of enumerated powers, unconstitutional conditions, and substantive due process, and their textual cousins the necessary and proper, takings, and commerce clauses.” *Lochner* is now commonly used as a metonym for these exiled clauses and doctrines. Its metonymic nature helps explain why, although *Lochner* is a due process case involving a state statute, it can be brought up in argument over a federal statute’s constitutionality under the commerce power. The purpose it serves is symbolic rather than doctrinal. The use of the case name “*Lochner*” also serves to obscure the fact that these clauses and doctrines are covertly, yet effectively, being written out of the Constitution.

To further explain the meaning and role of *Lochner* here, let me add a note on the concept of a canon and an anti-canon in law. Balkin and Levinson, for example, tell us that, “Every discipline, because it is a discipline, has a canon, a set of standard texts, approaches, problems, examples, or stories that its members repeatedly employ or invoke, and which help define the

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306 Id.
discipline as a discipline. If the study of law is a discipline, it too must have its canons and its own sense of the canonical." In addition to possessing a canon or set of positive examples, a discipline may also have an anticanon, or set of negative role models. In constitutional law, each case in the anticanon “embodies a set of propositions that all legitimate constitutional decisions must be prepared to refute.” There is some dispute as to whether the anticanon is merely a negative canon or whether it is some different sort of entity altogether. Jamal Greene takes the latter position, as do I. On this view, there are several notable disimilarities between the canon and the anticanon. For one, “the anticanon differs from the canon in that it is both narrower and less contested.” Greene believes that the anticanon is so narrow that it may contain only three cases—Dred Scott, Plessy, and Lochner. Secondly, a case’s presence in the anticanon is not merely (or even) a function of its bad reasoning or doctrinal error, but is instead based “on the attitude the constitutional interpretive community takes toward the ethical propositions that the decision has come to represent, and the susceptibility of the decision to use as an antiprecedent.

This last sentence of Greene’s is dense and important, yet it is unclear, too. It is in need of some unpacking before we proceed further. On his model, the anticanon expresses the ethical attitude of the (current) constitutional interpretive community, rather than the original public meaning of the constitutional text, for example. This makes it controversial. But it is also ambiguous. That interpretive community might consist of the judiciary, the legal academy or the entire American citizenry, to mention only three possibilities. In Greene’s article, the quoted sentence is followed by a discussion of how a law professor might explain antcanonical decisions to law students. It is probably then safe to assume that Greene means the legal academy when he speaks of the constitutional interpretive community.

But this view becomes problematic when, as in NFIB, the legal academy “gets it wrong,” i.e., fails to predict or even to accept the basis of the Court’s decision (at least on the

307 J.M. Balkin and Sanford Levinson, Preface, in LEGAL CANONS ix (J.M. Balkin and Sanford Levinson eds., 2000).
309 See id. at 382-84.
310 Id. at 382.
311 See id. at 383.
312 Many cases possess these characteristics and are nevertheless not members of the anticanon.
313 Greene, supra note 308, at 381 (emphasis in original).
314 See id.
commerce/federalism issue). Randy Barnett explains that, “most law professors never properly understood the New Federalism of the Rehnquist Court” and the limits it imposes on congressional regulatory power. They instead attribute to Congress “a power to regulate the national economy at its discretion, subject only [to] the express prohibitions in the Constitution and perhaps some selected unenumerated rights.” From the law professors’ perspective, then, *Lochner* is wrong because that it exemplifies the exact opposite constitutional view, that there are numerous judicially enforceable unenumerated rights. In his treatise chapter on the *Lochner* Court, Lawrence Tribe calls this view “the model of implied limitations on government.”

Please note that the canon/anticanon model does not explain the differences and disagreements between the Chief Justice and the law professors here. Both sides accept the same canon and anticanon here, but disagree as to what they mean. They cite the same cases, but understand them differently. In particular, they differ over the nature and scope of their related underlying principles. Their disagreement over what these cases mean makes the so-called New Deal Settlement a settlement in name only. Yes, all parties to this debate reject the doctrines and cases of the *Lochner* era, but they disagree as to exactly what has taken its place. To explain the situation we are now in, we must also look beyond the constitutional canon and anticanon to the notion of competing constitutional gestalts (i.e., patterns or configurations) developed by Lawrence Solum. Solum sees two competing constitutional gestalts regarding the New deal Settlement. The first, which he calls “The Dynamic New Deal Settlement,” is essentially the view that Randy Barnett attributes to the law professors. The second, more conservative, view, which he calls “The Frozen New Deal Settlement,” is an alternative gestalt which “can be summarized as a slogan, ‘[t]his far, and no farther.’”

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316 See *id.* 1346.
317 *Id.*
320 See *id.* at 49.
321 See supra note 317 and accompanying text.
What we have here, then, is a contested constitutional gestalt. What then of the constitutional canon and anticanon? Are they contested, too? Their case membership is not contested, but their larger meaning is contested. This is where we see *Lochner* most frequently used as a “rhetorical club,” a club used by mandate defenders against mandate critics. It is used to accuse the New Federalism of the Rehnquist and Roberts Courts of *Lochnerism*, i.e. attempting to bring back the Constitution-in-Exile. This can readily be seen in the comparisons of *Lochner* and *NFIB*. The rhetorical club of *Lochner* is used as an enforcement device within the constitutional interpretive community, one used to bring dissenters back in line with the dominant law professors’ view of matters. Because of its membership in the anticanon, no community member wants to be accused of using *Lochnerian* arguments even “under a different guise.” But different groups within the interpretive community may disagree as to the scope of the *Lochner* taboo. They see the meaning of *Lochner* differently because they possess wider or narrower gestalts—dynamic or frozen. To supporters of the Dynamic New Deal Settlement, for example, all formal limitations on congressional power are *Lochnerian* because there is no place for such limitations in their constitutional worldview. On the other hand, the Frozen New Deal Settlement has space for constitutionally protected individual liberties which are not revivals of substantive due process.

The disagreement here is not readily susceptible to solution by argument because it arises from opposing visions and understandings of the same canon and anticanon rather than from adherence to different sets of constitutional propositions. Barnett says that the law professors do not understand the New Federalism, but I believe that it is more accurate to say that they do accept the New Federalism. They may not feel that they need to do so. After all, the Dynamic New Deal Settlement is but one vote away from constitutional recognition by a Supreme Court majority and “this far, but no farther” is a purely defensive position and not an affirmative constitutional theory. Current precedent supports an individual anti-commandeering liberty, I argue here, but time will tell whether or not this precedent is durable. Perhaps this is the ultimate teaching of the New Deal Settlement.

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325 See, e.g., Smith, *supra* note 303 (“But because the objections to the individual mandate, though couched in federalism terms, have very little to do with federalism at all, it is difficult to see them as anything other than *Lochner* under a different guise.”).
V. CONCLUSION

Constitutionality is in the eye of the beholder, but it lies in precedent, too. This article closes here with a few thoughts on the relation between the two in the context of the individual mandate debate. It attempts to link intuition and precedent through connections of canon, gestalt and underlying principle in search of the strongest, most plausible, multi-dimensional account of the unconstitutionality of the individual mandate in commerce power/federalism terms. In the course of this search, we have also sorted through doctrines and distinctions raised by the disputants (e.g., economic mandates, activity/inactivity and commandeering) to evaluate their clarity and cogency. The final result is an assertion of a Tenth Amendment “no commandeering the people” individual liberty which complements the commerce power and federalism arguments of Chief Justice Roberts and the four joint dissenters in NFIB and which does not fall prey to the ghost of Lochner.