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I come here today not as a partisan supporter of the Obama Administration's health care legislation. I am not an expert in health care economics or policy, and I am sure there are many arguments for and against the wisdom and feasibility of this legislation. I do not enter into that debate. I am an expert on constitutional law, which I have been teaching and practicing for many years and on which I have written books and articles, most to the point my 2004 book, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT. I also am not one who believes that Article I, Section 8 of the Constitution is in effect a grant of power to Congress to regulate anything it wishes in any way it pleases. There are limits to what may plausibly be called commerce. I agree entirely with the decision in *United States v. Morrison*[1] that section 13981 of the Violence Against Women Act cannot be brought within Congress's power to regulate commerce. Indeed I sat at counsel table with Michael Rosman when he successfully argued that case. Though gender-motivated violence is despicable, cowardly, and in every state in the union criminal, a man beating up his wife or girlfriend is not commerce. Neither is carrying a gun in or near a school, as the Court correctly held in *United States v. Lopez*.[2] The arguments to the contrary required torturing not only constitutional law but the English language. But the business of insurance is commerce. That's what the Supreme Court decided in 1944 in *United States v. South-Eastern Underwriters Ass'n*,[3] and the law has not departed from that conclusion for a moment since then. One need only think of the massive regulation of insurance that is represented by ERISA to see how deep and unquestioned is that conclusion.

If insurance is commerce, then of course the business of health insurance is commerce. It insures an activity that represents nearly 18% of the United States economy.[4] (In this connection recall *Perez v. United States*,[5] which held that a very local loan sharking operation was within Congress's power to regulate commerce.) And if health insurance is commerce, then the health

[1] 529 U.S. 598 (2000) (Rehnquist, C.J.).
[2] 514 U.S. 549 (1995) (Rehnquist, C.J.).
[3] 322 U.S. 533 (1944) (Black, J.).
[4] Anne Martin et al., *Recession Contributes to Slowest Annual Rate of Increase in Health Spending in Five Decades*, 20 HEALTH AFF. 11, 11 (2011) (reporting that 17.6% of U.S. GDP in 2009 was devoted to health care).
[5] 402 U.S. 146 (1971) (Douglas, J.).

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care mandate is a regulation of commerce, explicitly authorized by Article I, Section 8 of the Constitution.

There is the argument, which I believe is entirely wrong and even worse quite confused, that the health care mandate is not a regulation of commerce because it requires an economic act—entering the health insurance market—rather than prohibiting or limiting an economic activity. This is what Chief Justice Marshall, who had been an active member of the Virginia legislature at the time the Constitution was adopted, wrote in 1824 in *Gibbons v. Ogden*[6] regarding Congress's commerce power:

> What is this power?
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> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse.[7]

To my mind that is sufficient to provide the constitutional basis for the mandate. The mandate is a rule (more accurately, part of a system of rules) "by which commerce is to be governed." Neither the Constitution nor the great Chief Justice said anything about limiting such rules to those that prohibit or limit commerce. But to those who may argue that, for some reason not disclosed in any constitutional text or known constitutional doctrine, this is not sufficient, there are these words of Marshall in 1819 in *M'Culloch v. Maryland*,[8] often invoked, most recently in *United States v. Comstock*,[9] in an opinion joined by Chief Justice Roberts, and in *Gonzales v. Raich*,[10] in an opinion by Justice Scalia:

> [T]he powers given to the government imply the ordinary means of execution. . . . The government which has a right to do an act, and has

[6] 22 U.S. (9 Wheat.) 1 (1824).
[7] *Id.* at 196–97.
[8] 17 U.S. 316 (1819).
[9] 130 S. Ct. 1949, 1956, 1965 (2010) (Breyer, J.).
[10] 545 U.S. 1, 39 (2005) (Scalia, J., concurring in the judgment).

imposed on it, the duty of performing that act, must, according to the dictates of reason, be allowed to select the means . . . .

But the Constitution of the United States has not left the right of congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added, that of making

> 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 thereof.

. . .

. . . The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. This could not be done, by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. . . .

We admit [as do I—see *United States v. Morrison*], as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers 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.*[11]

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[11] *M'Culloch*, 17 U.S. at 409–10, 411–12, 415, 421 (emphasis added).

Mandatory enrollment by all in the health insurance system seems close to absolutely necessary—though, as Marshall wrote, the necessity need not be absolute—to a scheme that requires private health insurers to accept virtually all applicants regardless of preexisting conditions and to retain them no matter how large the cost they impose on the system. To allow the young and well to wait until they are older and sicker to enroll is to design a system of private insurance that cannot work. Everyone knows that.

In a debate last November before the Federalist Society (of which I have been a member since its beginning), my good friend and former student Professor Randy Barnett, by way of peroration, said that it was not the America he knew if a person could be compelled to enter a market and purchase a product there he did not want. (As has been repeatedly asked, may Congress by way of regulating commerce force you to eat your veggies or visit the gym regularly? Surely not.) But the objection, while serious, is not at all about the scope of Congress's power under the Commerce Clause. It is about an imposition on our personal liberty, a liberty guaranteed by the 5th and 14th Amendments, and guaranteed against invasion not only against federal but also against state power.

Is the health care mandate an invasion of constitutionally protected liberty? That question was answered in 1905 by a unanimous Court in *Jacobson v. Commonwealth of Massachusetts*,[12] upholding against a liberty argument the imposition of a fine for refusing to submit to a state-mandated smallpox vaccination. By refusing vaccination, Jacobson was endangering not only himself but others whom he might infect. By refusing the much less intrusive and less intimate imposition of a requirement that one purchase health insurance if one can afford it, a person threatens to unravel—in the view of Congress and the health insurance industry, but Congress is enough—the whole scheme designed to protect by health insurance the largest part of the population.

As for the veggies, I suppose such forced feeding would indeed be an invasion of personal liberty, but making you pay for them would not, just as making you pay for a gym membership which you can afford but do not use would not.

To sum up:

Insurance is commerce.

Health insurance is undoubtedly commerce.

Congress has the power to regulate commerce, and that means that Congress may prescribe, in Chief Justice Marshall's words, a rule for commerce.

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[12] 197 U.S. 11 (1905) (Harlan, J.).

The health care mandate is a rule for commerce. And in any event it is a necessary and proper part of the particular regulation of health insurance that Congress chose to enact.

That the rule speaks to inactivity as much as activity—which may or may not be true—is in any event irrelevant. Nothing in constitutional text or doctrine limits Congress to the regulation of an activity, although many—maybe all—examples of past regulations may in fact be characterized as regulations of activity.

Even if the regulation of inactivity—if that is what it is—is a novelty, its novelty does not count against it. Many—maybe most—regulations of commerce have some aspect of novelty about them. The question is whether that novelty is in some sense fatal to the regulation being a regulation of commerce or necessary and proper to such a regulation.

The objection that the mandate is an imposition on the individual is an objection not to Congress's exceeding its power to lay down a rule for commerce, but to Congress's violating individual liberty as guaranteed by the 5th Amendment. But the *Jacobson* case, which has been settled precedent for more than one hundred years, shows conclusively that the mandate is not an unconstitutional imposition on individual liberty.

A different route to the same conclusion would conceptualize the healthcare mandate as a part of a scheme regulating not just the market for health insurance but also the market for health care itself, how it is obtained and how it is paid for. Though an individual may claim—though not very plausibly—that he would never voluntarily enter the health *insurance* market, no one can plausibly claim he will never get sick or suffer injury and so will never need health care and never need to pay for health care. This healthcare mandate is part of the regulation of the market everyone must at some time enter –whether that person will need care tomorrow or ten years from now, whether it will be to seek help for himself or for some dependent.