

5-1-2012

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

Abigail Moncrieff

*Boston University School of Law*

Follow this and additional works at: [https://scholarship.law.bu.edu/faculty\\_scholarship](https://scholarship.law.bu.edu/faculty_scholarship)

 Part of the [Health Law and Policy Commons](#)

---

## Recommended Citation

Abigail Moncrieff, *Safeguarding the Safeguards: The ACA Litigation and the Extension of Structural Protection to Non-Fundamental Liberties*, 64 *Florida Law Review* 639 (2012).

Available at: [https://scholarship.law.bu.edu/faculty\\_scholarship/246](https://scholarship.law.bu.edu/faculty_scholarship/246)

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact [lawlessa@bu.edu](mailto:lawlessa@bu.edu).



SAFEGUARDING THE SAFEGUARDS: THE ACA LITIGATION  
AND THE EXTENSION OF INDIRECT PROTECTION TO  
NONFUNDAMENTAL LIBERTIES

*Abigail R. Moncrieff\**

Abstract

As the lawsuits challenging the Patient Protection and Affordable Care Act (ACA) have evolved, one feature of the litigation has proven especially rankling to the legal academy: the courts' incorporation of substantive libertarian concerns into their structural federalism analyses. The breadth and depth of scholarly criticism is surprising, especially given that judges frequently choose indirect methods, including the structural and process-based methods at issue in the ACA litigation, for protecting substantive constitutional values. Indeed, indirect protection of constitutional liberties is a well-known and well-theorized strategy, which one scholar recently termed "semisubstantive review" and another theorized as "judicial manipulation of legislative enactment costs."

This Article situates the Commerce Clause and taxing power arguments that form the basis of the ACA litigation within the broader contexts of semisubstantive review and enactment cost manipulation, arguing that the application of these structural theories is an ordinary and effectual means of raising the political cost of libertarian infringements. The Article then considers three possible distinctions between the ACA case and the ordinary case of semisubstantive review and concludes that the only viable descriptive distinction is that the ACA case involves nonfundamental rather than fundamental liberty interests—the freedom of health and the freedom of contract. The Article argues that this distinction should not make a normative difference. If anything, the case for structural invalidation should be stronger when nonfundamental liberty interests are at stake because those are, by definition, the interests that the American legal system leaves to structural protection. If the Supreme Court invalidates the ACA on structural grounds, it can argue that it is merely safeguarding the safeguards of liberty.

INTRODUCTION..... 640

I. SEMISUBSTANTIVE CONSTITUTIONAL REVIEW AND THE  
ACA CASES..... 648

A. *Semisubstantive Review and Enactment Cost*

---

\* Peter Paul Career Development Professor and Associate Professor of Law, Boston University School of Law. I would like to thank Gary Lawson and Nancy Moore for their helpful comments and suggestions. Many thanks to David Slade and Elizabeth Phelps for excellent research assistance.

	<i>Manipulation</i> .....	650
B.	<i>The ACA Cases as Semisubstantive Cases</i> .....	653
1.	Taxing.....	653
a.	The ACA Judges' Analyses .....	653
b.	The Tax Holdings as Enactment Cost Manipulation .....	656
2.	Commerce.....	657
a.	The ACA Judges' Analyses .....	658
b.	The Commerce Clause Holding as Enactment Cost Manipulation.....	660
II.	THREE OBJECTIONS TO SEMISUBSTANTIVE REVIEW IN THE ACA CASE .....	664
A.	<i>Whether the ACA Involves Any Constitutional Liberty Interest</i> .....	665
B.	<i>Whether the Individual Mandate Violates the Asserted Liberty Interests</i> .....	667
1.	The Freedom of Contract.....	668
2.	The Freedom of Health.....	671
C.	<i>Whether Nonfundamental Liberties Get Indirect Protection</i> .....	674
III.	EXTENDING INDIRECT PROTECTION TO NONFUNDAMENTAL LIBERTIES .....	675
A.	<i>Value Uncertainty and Enactment Cost Manipulation</i> .....	676
B.	<i>Safeguarding the Safeguards</i> .....	679
IV.	SAFEGUARDING OR DISTORTING THE SAFEGUARDS .....	681
A.	<i>Taxing</i> .....	682
B.	<i>Commerce Clause</i> .....	684
	CONCLUSION.....	685

## INTRODUCTION

Recent populist objections to the Patient Protection and Affordable Care Act (ACA)<sup>1</sup> undoubtedly center on concerns for individual liberty, not concerns about governmental divisions of labor.<sup>2</sup> As many legal

1. Pub. L. No. 111-148, 124 Stat. 119 (2010).

2. See Kevin Sack, *Tea Party Shadows Health Care Ruling*, N.Y. TIMES, Feb. 2, 2011, at A16, available at [www.nytimes.com/2011/02/02/health/policy/02notebook.html](http://www.nytimes.com/2011/02/02/health/policy/02notebook.html) (quoting the Florida Attorney General as saying, "It's about our liberty. It's about more than health care"); David G. Savage & Kathleen Hennessey, *Ruling Against Health Insurance Mandate Is a 'Tea Party' Milestone*, L.A. TIMES (Feb. 10, 2011), <http://articles.latimes.com/2011/feb/10/nation/la-na-tea->

scholars have noted, the Tea Party's objections to the ACA arise from the perceived antilibertarian *substance* of the law, not the federalist *structure* of the law.<sup>3</sup> Tea Party leaders have objected most strongly to the statute's intrusions on healthcare autonomy and economic liberty, not to its intrusions on states' rights. Nevertheless, the litigation that has flowed from the populist movement is focused entirely on structural rather than substantive constitutional doctrines.<sup>4</sup> The litigants have challenged the individual mandate only on the ground that it exceeds Congress's Article I powers,<sup>5</sup> rather than on the ground that it violates substantive due process norms, such as the freedom of health<sup>6</sup> or the freedom of contract.<sup>7</sup> There is therefore a tension between the concerns that motivate the ACA litigation and the doctrines that are central to it, and that tension is provoking strong reactions among legal academics.<sup>8</sup>

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

---

party-healthcare-20110211 (noting that Judge Roger Vinson's ruling against the ACA centered on limiting intrusions of the federal government into people's lives).

3. See *The Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 4 (2011) (statement of Charles Fried, Professor of Law, Harvard Law School) ("[T]he objection [to the individual mandate], while serious, is not at all about the scope of Congress's power under the Commerce Clause. It is about an imposition on our personal liberty, a liberty guaranteed by the 5th and 14th Amendments, and guaranteed against invasion not only against federal but also against state power."); Mark A. Hall, *Individual Versus State Constitutional Rights Under Health Care Reform*, 42 ARIZ. ST. L.J. 1233, 1235 (2011) (noting the tension between the individual rights rhetoric underlying the ACA litigation and the states' rights doctrines actually argued); Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 22 (2011) (noting that concerns for individual liberty are driving the litigation); Peter J. Smith, *Federalism, Lochner, and the Individual Mandate*, 91 B.U.L. REV. 1723, 1742 (2011) (characterizing the "basic objection to the individual mandate" as "libertarian"). Others have noted the critiques against Judge Vinson's ruling. See Aziz Huq, *In Healthcare Ruling, Libertarianism by Judicial Diktat*, THE NATION (Feb. 9, 2011), <http://www.thenation.com/article/158427/healthcare-ruling-libertarianism-judicial-diktat>.

4. See Appellants' Brief at 29–30, *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. 2011) (No. 10-2388) [hereinafter TMLC Brief]; Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss at 23, *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011) (No. 3:10-cv-91-RV/EMT) [hereinafter Bondi Memo]; Plaintiff's Memorandum in Opposition to the Secretary's Motion for Summary Judgment at 11–12, *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010) (No. 3:10cv188) [hereinafter Cuccinelli Memo].

5. TMLC Brief, *supra* note 4, at 20; Bondi Memo, *supra* note 4, at 23–24, 36; Cuccinelli Memo, *supra* note 4, at 28.

6. See Abigail R. Moncrieff, *The Freedom of Health*, 159 U. PA. L. REV. 2209, 2210 (2011); *cf.* *Florida ex rel. McCollum v. U.S. Dep't Health & Human Servs.*, 716 F. Supp. 2d 1120, 1161–62 (N.D. Fla. 2010) (rejecting a handful of plaintiffs' substantive due process arguments, including a freedom of health argument).

7. See, e.g., *Lochner v. New York*, 198 U.S. 45, 57–58 (1905).

8. See *supra* note 3.

Appeals for the Ninth Circuit;<sup>9</sup> *Lochner*-style freedom of contract has been a dead letter for generations;<sup>10</sup> and the current members of the U.S. Supreme Court, who will be the final arbiters in the litigation,<sup>11</sup> are generally hostile to assertions of implied fundamental rights but sympathetic to structural federalism.<sup>12</sup> The ACA plaintiffs' decision to argue structural rather than substantive doctrines, thus, is probably nothing more than a strategic decision to focus on the arguments that are most likely to succeed.

Five federal judges' acceptance of those structural arguments, however, starts to look more interesting (or, some would say, more nefarious). The plaintiffs' structural arguments have convinced primarily those judges and academics who share the Tea Party's substantive inclinations, and the judges who have deemed the mandate structurally invalid have applied a kind of hybrid substantive–structural analysis to reach their conclusions.<sup>13</sup> They have argued that the mandate is not a permissible regulation of interstate commerce because it seems *substantively* problematic for the government to force people to buy things. That is, although Article I,

---

9. See *Raich v. Gonzales*, 500 F.3d 850, 864–66 (9th Cir. 2007) (rejecting a freedom of health challenge to federal restrictions on medicinal marijuana); see also *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 713 (D.C. Cir. 2007) (en banc) (holding that plaintiffs do not have a fundamental liberty interest in accessing experimental drugs).

10. See generally David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373 (2003) (explaining the failures of the *Lochner*-era decisions concerning freedom of contract).

11. There is now a circuit split on the constitutionality of the ACA's individual mandate. See *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1328 (11th Cir. 2011) (holding portions of the ACA unconstitutional); *Liberty Univ., Inc. v. Geithner*, No. 10-2347, 2011 WL 3962915, at \*52 (4th Cir. Sept. 8, 2011) (finding the ACA constitutional in its entirety). At the time of writing, the Supreme Court had granted certiorari to the U.S. Court of Appeals for the Eleventh Circuit to resolve the split but had not yet decided the case. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 603 (U.S. Nov. 14, 2011) (No. 11-393); *Dep't of Health & Human Servs. v. Florida*, 132 S. Ct. 604 (U.S. Nov. 14, 2011) (No. 11-398); *Florida v. Dep't of Health & Human Servs.*, 132 S. Ct. 604 (U.S. Nov. 14, 2011) (No. 11-400).

12. See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (denying Congress's constitutional authority for providing a federal civil remedy for gender-motivated violence); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (holding that the Gun-Free School Zones Act of 1990 exceeds Congress's Commerce Clause authority); *New York v. United States*, 505 U.S. 144, 188 (1992) (limiting Congress's authority to control "radioactive waste disposal" among the states); see also Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 430 (2002) (acknowledging the modern Court's commitment "to enforcing limits on national power and to protecting the integrity of the states"); Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 2–3 (2003) (same); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 115–16 (2004) (arguing that a "process-based approach to federalism jurisprudence may have significant advantages over a more substantive model").

13. See, e.g., *Liberty Univ. v. Geithner*, No. 10-2347, 2011 WL 3962915, at \*9–10 (4th Cir. Sept. 8, 2011); *Florida ex rel. Atty. Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1314 (11th Cir. 2011); *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 1256, 1286 (N.D. Fla. 2011).

Section 8 has provided the doctrinal basis for all of the litigation holdings so far, the five invalidating judges have all incorporated libertarian concerns into their analyses. Absent that libertarian inflection, though, the judges' structural arguments would be extremely weak. The Commerce Clause and taxing power objections to the individual mandate, thus, seem not only to incorporate liberty-based concerns but, in fact, to hinge on them.

This hybridization—the importation of libertarian norms into structural analyses—is the feature of the ACA litigation that has proven most rankling to the legal academy.<sup>14</sup> One scholar, for example, has accused the ACA plaintiffs and invalidating judges of “[s]muggling a libertarian-based limitation into constitutional law by concealing it in the garb of federalism.”<sup>15</sup> Others have simply observed that, because the plaintiffs' structural arguments seem at odds with their true (substantive) concerns, even success in the litigation will fail to accomplish their actual agenda.<sup>16</sup> As these scholars have noted, the prevailing judicial analysis would leave state governments free to encroach on the substantive liberties that Tea Party leaders want to protect.<sup>17</sup> Indeed, that analysis would also allow Congress to reenact the ACA's mandate, albeit in slightly altered form. There is therefore a solid consensus among legal scholars—with very few detractors<sup>18</sup>—that structural invalidation of the ACA would be an inappropriate and ineffective way to protect the substantive liberties at the heart of populist objections.<sup>19</sup>

But the breadth and vehemence of this academic consensus is quite surprising. The invalidating judges' strategy of hybridizing substance and structure is not novel or even unusual; it is a strategy that has been

---

14. See sources cited *supra* note 3.

15. See Smith, *supra* note 3, at 1746.

16. See, e.g., Hall, *supra* note 3, at 1234–35; Koppelman, *supra* note 3, at 22.

17. See Koppelman, *supra* note 3, at 15–16, 23 (noting that Massachusetts has already enacted health insurance legislation comparable to that of the federal government); Smith, *supra* note 3, at 1742–44.

18. For critiques claiming that the individual mandate is outright unconstitutional, see Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 586 (2010) [hereinafter *Commandeering the People*]; Randy E. Barnett, *Jack Balkin's Interaction Theory of "Commerce,"* U. ILL. L. REV. (forthcoming 2011) (manuscript at 26–27) [hereinafter *Interaction Theory*]; Kenneth T. Cuccinelli, II, E. Duncan Getchell, Jr. & Wesley G. Russell, Jr., *Why the Debate over the Constitutionality of the Federal Health Care Law Is About Much More than Health Care*, 15 TEX. REV. L. & POL. 293, 295 (2011). For other detractors' opinions, see Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267, 268 (2011) (arguing that “the Necessary and Proper Clause does not authorize the individual mandate”); David B. Rivkin, Jr. & Lee A. Casey, *Debate, A Healthy Debate: The Constitutionality of an Individual Mandate*, 158 U. PA. L. REV. PENNUMBRA 93, 100 (2009) (noting the unconstitutionality of the individual mandate).

19. See sources cited *supra* note 3.

identified and defended in the legal literature for decades.<sup>20</sup> Indeed, as a significant and still-growing body of scholarship has recognized, the Rehnquist Court systematized and thereby largely legitimized the use of structural and other process-based doctrines to protect substantive values<sup>21</sup>—an approach that Professor Dan Coenen, in an extensive survey of Rehnquist Court doctrine, termed “semisubstantive constitutional review”<sup>22</sup> and that Professor Matthew Stephenson more recently theorized and defended as “judicial manipulation of legislative enactment costs.”<sup>23</sup> The puzzle, then, is why this common and well-theorized judicial strategy of hybridization is arousing such strong scholarly objections when applied in the ACA case.

The predominant answer seems to be that, in most scholars’ view, the individual mandate simply does not infringe upon liberty—at least not in any constitutionally meaningful way—and therefore does not deserve invalidation at all, whether through substantive *or* structural doctrines.<sup>24</sup> It

20. See, e.g., Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 206–07 (1976) (“[A] rule must make sense not only as a criterion for judicial review but as a theory for the constitutional conduct of government antecedent to judicial review.”); Henry P. Monaghan, *Forward: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975); Laurence A. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 269 (1975) (suggesting the hybrid of substance and structure as “a third category of constitutional limitation”).

21. See, e.g., Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1284 (2002) [hereinafter *Semisubstantive Constitutional Review*] (discussing the use of semisubstantive doctrines in the Rehnquist Court); Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1583 (2001) [hereinafter *Constitution of Collaboration*] (discussing Supreme Court doctrines that serve as “structural safeguards of substantive rights”); Richard H. Fallon, Jr., *The Supreme Court 1996 Term—Forward: Implementing the Constitution*, 111 HARV. L. REV. 54, 105 (1997) (discussing the drawbacks of various doctrines used in substantive constitutional analysis); Roderick M. Hills, Jr., *Federalism as Westphalian Liberalism*, 75 FORDHAM L. REV. 769, 797 (2006) [hereinafter *Westphalian Liberalism*] (arguing that federalism is a good way to deal with deep and intense disagreements over individual liberty); Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888, 903 (2006) [hereinafter *Individual Right to Federalism*] (making the case for state elaboration of substantive rights, at least as a way of evolving national consensus prior to federal judicial enforcement); John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 419 (2010) (discussing the values emphasized by the Rehnquist Court); Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 6, 39 (2008) (noting the Court’s protection of substantive values through the open interpretation of ambiguous statutes); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1613 (2000) (discussing the structural doctrines).

22. See generally Coenen, *Semisubstantive Constitutional Review*, *supra* note 21.

23. Stephenson, *supra* note 21, at 2.

24. See Rick Hills, *Comment to Healthcare and Federalism: Should Courts Strictly Scrutinize Federal Regulation of Medical Services?*, PRAWFSBLAWG (Aug. 14, 2011, 3:40 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/08/healthcare-and-federalism-should-courts-strictly->

is worth considering, however, what the basis for that view is and whether it should matter in the context of semisubstantive review. Although largely implicit, the scholarly critique has taken three different dimensions. First, some scholars have implied that there is no relevant liberty interest at stake at all, dispensing with the substantive arguments simply by noting that the *Lochner* era is dead.<sup>25</sup> For these scholars, the motivating objection to the ACA litigation seems to be a view that the freedom of health and the freedom of contract have no continuing constitutional relevance.<sup>26</sup> Second, some scholars have urged that the identified liberty interests have not been breached in this particular case, arguing that there is no individual right to be uninsured.<sup>27</sup> Their motivating objection is that the individual mandate does not violate the freedom of health or the freedom of contract—and would not even if those freedoms received robust substantive due process protection.<sup>28</sup> Finally, some scholars have implied that the liberty interests at issue should not garner any judicial protection at all, whether direct or indirect. The motivating objection here seems to be that neither the freedom of health nor the freedom of contract is a “fundamental liberty interest” that receives strict scrutiny when enforced directly<sup>29</sup> and that such liberties should not be enforced indirectly at all.

Although each of these objections rests on plausible premises, only the third presents a potentially viable distinction between ordinary semisubstantive review and the ACA judges’ hybrid decisions. As for the first objection, although the freedom of health and freedom of contract are rarely used to invalidate state action, there can be no doubt that both of these substantive values have continuing constitutional relevance. As for

---

scrutinize-federal-regulation-of-medical-services-.html#comments (“[U]ntil I have some account of why [the Act’s] burden is different from run-of-the-mill social welfare legislation that Congress routinely enacts . . . , I am not inclined to invoke constitutional limits on Congress’ power to preserve the liberty of waiting until one is sick before purchasing insurance.”) [hereinafter *Healthcare and Federalism*]; see also Smith, *supra* note 3, at 1745–46; Michael C. Dorf, *The Constitutionality of Health Insurance Reform, Part I: The Misguided Libertarian Objection*, FINDLAW.COM (Oct. 21, 2009), <http://writ.news.findlaw.com/dorf/20091021.html>.

25. See, e.g., Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825, 1858–64 (2011) (rejecting Professor Randy Barnett’s idea that the Tenth Amendment’s reservation of powers to the people could support an anticommandeering doctrine to protect individual economic liberty); Koppelman, *supra* note 3, at 22–23 (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905) (proposing that the freedom of health does not exist at all)).

26. See sources cited *supra* note 25.

27. See, e.g., Hall, *supra* note 3, at 1235 (“[T]here is no constitutional basis for an individually-protected liberty interest to avoid buying health insurance.”).

28. See Moncrieff, *supra* note 6, at 2247–51 (analyzing the individual mandate under a generously robust version of the freedom of health and concluding that it ought to be upheld against a substantive due process challenge).

29. See, e.g., Hall, *supra* note 3, at 1236 (“In the modern era, substantive due process is invoked only to protect individual rights that are ‘fundamental’ to ‘ordered liberty,’ but the proposition that people have a fundamentally protected right to be uninsured is almost laughable.” (quoting *Palko v. Connecticut*, 302 U.S. 319, 325–28 (1937))).

the second, although it is almost certainly true that the individual mandate would not violate the freedom of health or the freedom of contract if those doctrines applied directly, the mandate presents a serious enough challenge to the asserted liberties that it could provoke structural invalidation under ordinary semisubstantive review.<sup>30</sup>

As for the third, however, there is a plausible descriptive distinction. The scholarship on semisubstantive review has argued that the practice is usually limited to the protection of fundamental constitutional values,<sup>31</sup> and the freedom of health and freedom of contract are not fundamental. To the extent that these two liberty interests are subject to direct judicial protection today, they receive something far less stringent than strict scrutiny.

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

This Article argues that it is, for two reasons. First, the plausible arguments for excluding nonfundamental liberties from indirect protection would rest on a flawed assumption that liberty interests are statically catalogued as either fundamental or not. But liberties regularly shift in or out of “fundamental” status as social norms change (as the death of the *Lochner* era and the emergence of privacy-based rights amply demonstrate).<sup>32</sup> Indirect review can be a useful testing ground to determine whether a particular liberty interest should move between the two categories, allowing courts to gain information about the depth and breadth of popular preferences. Second, even for those liberties that ought to remain nonfundamental, the case for using structural doctrines to protect those liberties should be *stronger*, not weaker, than the case for using structural doctrines to protect fundamental liberties. Nonfundamental

---

30. See Manning, *supra* note 21, at 401 (noting that the Court uses hybrid rules to invalidate statutes even though the norms of such rules “derive from constitutional inspiration, and not constitutional compulsion”); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1960–61 (1997) (cataloguing cases in which “avoided” interpretations of statutes were later held to be constitutionally permissible on the merits).

31. See Coenen, *Semisubstantive Constitutional Review*, *supra* note 21, at 1283, 1314–27 (highlighting the ways in which the Court has employed semisubstantive review in the contexts of the First Amendment and federalism).

32. See generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009) (explaining *Lochner*’s use of freedom of contract as fundamental).

liberties are, by definition, those that we have left to political protection through structural safeguards.<sup>33</sup> If there is ever a time that judges justifiably could use structural rather than substantive doctrines to protect individual liberty, it ought to be when the judges are simply safeguarding the safeguards—bolstering or enforcing these structural constitutional norms to ensure that infringements on liberty really are politically preferred.

Of course, this latter view demands that the structural holdings be defensible as *safeguarding* rather than *distorting* political safeguards. This point has formed a separate basis for scholarly criticism of the ACA holdings. These critics have objected strongly to the ACA cases' new rules—the action–inaction distinction for the commerce power<sup>34</sup> and the “t-word rule” for the taxing power<sup>35</sup>—on the ground that they are constitutionally and structurally indefensible.<sup>36</sup> As a critique of the invalidating opinions in the ACA litigation so far, I agree. I will argue, however, that a better-crafted and openly semisubstantive holding in the ACA litigation could rest on sound structural principles, obviating this critique.

It is important to note that my purpose here is neither to argue in favor of invalidating the ACA nor to propose that it is unconstitutional; to the contrary, I believe that the ACA represents good policy as well as good federalism.<sup>37</sup> Rather, my purpose is to illuminate a different understanding of the ACA holdings—one with strong footing in the legal literature—in

---

33. *Id.*

34. Most of the Commerce Clause holdings rest on a distinction between economic activity, which Congress may regulate, and economic *inactivity*, which Congress may not regulate. *See infra* Part I.B.2.a.

35. In the litigation, several courts have insisted that the individual mandate imposes a penalty rather than a tax because Congress refused to call it a tax during its deliberations. *See infra* Part I.B.1.a. Professor Akhil Amar termed this decision the “t-word rule” because it requires the members to use the word “tax” if they want to exercise their taxing power. *See* Akhil Amar, *The Lawfulness of Health-Care Reform* 8–9 (Yale Law School, Public Law Working Paper No. 228, 2011), available at <http://ssrn.com/abstract=1856506>.

36. *See* Jack M. Balkin, *supra* note 18, at 102–08; Hall, *supra* note 3, at 1235 (critiquing the courts' Commerce Clause analysis); Smith, *supra* note 3, at 1745–46; Amar, *supra* note 35, at 8–9; Rick Hills, *Federalism & Healthcare: The Dangers & Benefits of Confusing Individual Rights with Federalism*, PRAWFSBLAWG (Dec. 14, 2010, 10:07 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2010/12/federalism-healthcare-the-dangers-benefits-of-confusing-individual-rights-with-federalism.html> (describing Judge Henry Hudson's hybrid analysis as “structurally otiose”).

37. *See generally* Abigail R. Moncrieff, *Cost-Benefit Federalism: Reconciling Collective Action Federalism and Libertarian Federalism in the Obamacare Litigation and Beyond*, 37 AM. J.L. & MED. (forthcoming 2012) (arguing that the ACA strikes a rational federalist balance that deserves the Supreme Court's deference); Abigail R. Moncrieff & Eric Lee, *The Positive Case for Centralization in Health Care Regulation: The Federalism Failures of the ACA*, 20 KAN. J.L. & PUB. POL'Y 266, 269 (2011) (arguing that the ACA's greatest federalism failures lie in its maintenance of state authority over some things, not in its centralization of authority over many things).

the hope of shifting the debate to firmer ground. In my view, the substantive libertarian arguments in the ACA discourse deserve more serious consideration than the legal academy has given them so far; they are relevant and important, even in the context of the Tea Party plaintiffs' structural attack. Furthermore, there might be very good reasons for denying semisubstantive invalidation of the ACA—including general critiques of semisubstantive review as well as critiques of the plaintiffs' specific semisubstantive arguments. In a literature that fails to recognize the cases as ordinary semisubstantive cases, though, those arguments will never appear. This Article therefore seeks to spark debate on those untouched questions.

Part I summarizes the literature on semisubstantive review and enactment cost manipulation and situates the ACA holdings' hybrid substantive—structural analysis within the broader context of indirect review. Part II considers the three possible distinctions between the ACA case and ordinary semisubstantive review and concludes that the only viable distinction is the doctrinal status of the asserted liberty interests as nonfundamental. Part III argues that this distinction should not make a normative difference on the enactment cost theory of semisubstantive review or, if anything, that it should lend greater rather than lesser justification to the strategy of semisubstantive review. Part IV addresses objections to the ACA courts' structural analyses and asserts that a more skillfully crafted judicial opinion could rest on defensible and generalizable structural principles. The Article concludes that the invalidating judges have pursued a recognizable strategy in the ACA litigation, attempting to raise the individual mandate's political enactment cost without prohibiting legislative infringements of the freedom of health or freedom of contract. Their opinions might not reach the right result, but their blending of substance and structure is neither unusual nor unwarranted.

#### I. SEMISUBSTANTIVE CONSTITUTIONAL REVIEW AND THE ACA CASES

So far, five federal judges have opined that the ACA's individual mandate ought to be invalidated.<sup>38</sup> All five have argued that Congress lacks power to penalize individuals for failure to carry health insurance for two reasons: first, they argue that Congress must regulate activity—rather than inactivity—when it exercises its Commerce Clause power, and second, they argue that Congress must openly identify exactions as taxes in order to

---

38. Florida *ex rel.* Atty. Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1310–11 (11th Cir. 2011); Thomas More Law Ctr. v. Obama, 651 F.3d 529, 569 (6th Cir. 2011) (Graham, J., concurring in part and dissenting in part) (“In no other instance has Congress before attempted to force a non-participant into a market.”); Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1286 (N.D. Fla. 2011) (“It would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause.”); Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 781 (E.D. Va. 2010).

exercise its taxing power.<sup>39</sup> Notably, the relevant opinions hinge largely, if not entirely, on substantive libertarian norms rather than structural federalism norms.<sup>40</sup> Yet the holdings center on structural doctrines that would leave states free to breach the relevant liberties and would, in fact, leave Congress free to reenact the mandate in only slightly altered form.<sup>41</sup>

The scholarly reaction to these opinions has been almost uniformly critical. In addition to questioning the relevance, usefulness, and administrability of the action–inaction distinction and questioning the logic behind the “t-word rule”<sup>42</sup> for the taxing power, several scholars have also criticized, more generally, the incorporation of libertarian norms into structural doctrines. That latter critique, however, is puzzling given the pervasiveness of judicial indirection in the protection of constitutional liberties. This Part will summarize the literature that describes and defends indirect protection of substantive constitutional norms through structural and process-based doctrines, a complex judicial habit that the Article encompasses under the borrowed term “semisubstantive review”<sup>43</sup> and discusses in the borrowed terms of “judicial manipulation of legislative enactment costs.”<sup>44</sup> This Part will then demonstrate that both the tax and

---

39. See *supra* note 38.

40. See *Virginia*, 728 F. Supp. 2d at 788 (“At its core, this dispute is not simply about regulating the business of insurance—or crafting a scheme of universal health insurance coverage—it’s about an individual’s right to choose to participate.”); see also *TMLC*, 651 F.3d at 572:

In the absence of the mandate, individuals have the right to decide how to finance medical expenses. The mandate extinguishes that right. Congress may of course provide incentives . . . to steer behavior, and it may impose certain requirements or prohibitions once an individual decides to engage in a commercial activity. . . . It is a different matter entirely to force an individual to engage in commercial activity that he would not otherwise undertake of his own volition.

Another ACA case insisted there was a distinction between regulations that leave individuals with multiple compliance opportunities and mandates that require unique action, *Florida ex rel. Atty. Gen.*, 648 F.3d at 1291–92:

Although this distinction appears, at first blush, to implicate liberty concerns not at issue on appeal, in truth it strikes at the heart of whether Congress has acted within its enumerated power. Individuals subjected to this economic mandate have not made a voluntary choice to enter the stream of commerce, but instead are having that choice imposed upon them by the federal government. This suggests that they are removed from the traditional subjects of Congress’s commerce authority . . . .

*Id.*; see also *Florida ex rel. Bondi*, 780 F. Supp. 2d at 1286 (reasoning, in a now infamous allusion to the tax on tea that spurred the American Revolution, that the founders would not have “create[d] a government with the power to force people to buy tea in the first place”).

41. See *infra* notes 100–103 and accompanying text.

42. See *supra* note 36.

43. Coenen, *Semisubstantive Constitutional Review*, *supra* note 21, at 1282.

44. Stephenson, *supra* note 21, at 2.

commerce analyses in the ACA opinions can be understood as instances of this common judicial strategy, raising the enactment cost for a regulatory project that implicates substantive constitutional values.<sup>45</sup>

#### A. *Semisubstantive Review and Enactment Cost Manipulation*

Despite the fact that the term “semisubstantive review” is not widespread in the literature, the phenomenon of semisubstantive review is quite well-known and well-theorized. Indeed, three foundational papers were published in 1975 and 1976 discussing various kinds of semisubstantive review: former Oregon Supreme Court Justice Hans Linde termed the phenomenon “due process of lawmaking”; Professor Laurence Tribe termed it “structural due process”; and Professor Henry Monaghan termed it the “constitutional common law.”<sup>46</sup> The scholarship has grown significantly from there.<sup>47</sup>

What is semisubstantive review? As used here,<sup>48</sup> it encompasses the structural and process-based doctrines that judges use to make substantive constitutional infringements more difficult without making them impossible. Professor Matthew Stephenson provided an excellent synthesis of and justification for this general judicial habit in his recent article, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*.<sup>49</sup> Stephenson demonstrated that, as a descriptive matter, many judicially created constitutional rules serve to raise the enactment cost of regulations that intrude on substantive constitutional values, rather than putting judges in the position of weighing the substantive benefits of regulation against the substantive costs of liberty. For example, under current doctrine, Congress is allowed to pass a bill that restricts speech, but only under certain conditions: it must include explicit speech-restricting language in the statute (a “clear statement rule”),<sup>50</sup> tailor the regulatory approach narrowly to solve a particular and compelling problem (the “narrow tailoring requirement”),<sup>51</sup> explain its interest in the regulation during legislative debates, and use non-troubling rhetoric to sell the regulation to voters (two “legislative history” rules).<sup>52</sup> If Congress fails to satisfy these requirements, the courts will refuse to apply the statute in a way that restricts speech, often simply by reading it

---

45. *See id.* at 6–7.

46. Linde, *supra* note 20, at 199; Tribe, *supra* note 20, at 269; Monaghan, *supra* note 20, at 3.

47. For a detailed review of this scholarship, see *supra* note 18 and accompanying text.

48. Although Coenen never gave the term a precise definition, I am using it in a manner that resembles his usage. *See* Coenen, *supra* note 21, at 1282–83.

49. Stephenson, *supra* note 21, at 4.

50. *Id.* at 36–42.

51. *Id.* at 34–36.

52. *Id.* at 42–55 (discussing judicial rules that reward “good” legislative history and that penalize “bad” legislative history).

narrowly.

These requirements, then, are substantive in the sense that they apply only when substantive values are at stake, but they are only semisubstantive because they leave room for Congress to reenact the same substantive regulatory rule by following different drafting or debating procedures. Furthermore, they are different from direct review under substantive due process insofar as they leave the weighing of costs and benefits to politics rather than requiring judges to decide whether Congress's regulation is important enough to withstand constitutional scrutiny—to justify the infringement on liberty.

Many scholars have criticized these forms of constitutional doctrine—particularly clear statement rules—on the ground that they over-enforce substantive constitutional norms.<sup>53</sup> U.S. Court of Appeals for the Seventh Circuit Judge Richard Posner, for example, famously denounced the modern canon of constitutional avoidance for creating a “judge-made constitutional ‘penumbra’” around substantive constitutional limits, which allows judges to refuse statutory applications that would be constitutionally permissible on direct review.<sup>54</sup> And it is certainly true, as an empirical matter, that courts sometimes narrow or invalidate statutes in order to avoid constitutionally problematic applications that would be upheld under direct review. Indeed, courts have sometimes refused to apply statutes in ways that were later deemed constitutionally acceptable.<sup>55</sup>

Coenen, Stephenson, and a handful of others, however, have argued that critics like Posner simply misunderstand the nature of the substantive constitutional limits themselves.<sup>56</sup> All such limits, even when enforced directly, are subject to override in the face of sufficiently compelling government interests. Even under strict scrutiny, courts will allow restrictive legislation to stand if it “furthers a compelling interest and is narrowly tailored to achieve that interest.”<sup>57</sup> But judges are often bad at

---

53. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 619–29 (1992); Manning, *supra* note 21, at 418–19; Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983); Vermeule, *supra* note 30, at 1977.

54. Posner, *supra* note 53, at 816.

55. See Vermeule, *supra* note 30, at 1949 (describing the phenomenon of “modern avoidance”).

56. These scholars have responded to a broad range of different critiques on constitutional doctrine. See, e.g., Dan T. Coenen, *The Pros and Cons of Politically Reversible “Semisubstantive” Constitutional Rules*, 77 FORDHAM L. REV. 2835 (2008) (discussing semisubstantive decision making); see also Fallon, *supra* note 21, at 57 (discussing modern avoidance); Linde, *supra* note 20, at 206 (discussing modern avoidance); Stephenson, *supra* note 21, at 62 (discussing creation of barriers for constitutionally problematic congressional policies); Tribe, *supra* note 20, at 269 (discussing structural due process); Young, *supra* note 21, at 1550–51 (discussing modern avoidance).

57. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 898 (2010) (quoting *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)) (internal quotation marks

figuring out whether an *asserted* government interest, particularly a government interest asserted only in post hoc litigation, is sufficiently important to justify an infringement on individual liberty. The value of semisubstantive rules, as Stephenson argues, is that they force the political process to *demonstrate*, rather than merely assert, that the government's interest in a particular encroachment is strong enough.<sup>58</sup> By raising the cost of enactment, judges create a barrier—perhaps a constitutionally required barrier—for infringing legislation, but it is a barrier that the political process can overcome by itself, without requiring further judicial inquiry into the merits of an asserted regulatory interest.<sup>59</sup>

In short, semisubstantive rules are those that raise the cost of enacting legislation that implicates substantive constitutional norms. As previously noted, the most commonly discussed semisubstantive rules are drafting rules, which require Congress to speak clearly and narrowly if it wants to pass infringing statutes.<sup>60</sup> Another class of semisubstantive rules, though, simply allocates decisionmaking authority to costlier institutions—such as rules that prohibit administrative agencies from treading on constitutionally problematic ground even when Congress would be allowed to do so.<sup>61</sup> Because agencies can enact legislative rules more cheaply than Congress, judges force Congress rather than agencies to craft the rules that implicate substantive constitutional values. By requiring bicameralism and presentment, courts can be assured that liberty-restricting rules are politically important enough to be allowed.

The justification for all of these semisubstantive rules, then, is that they provide the courts with useful information about the true strength of the government's interest in a substantive constitutional infringement. If the political process can overcome a judicially manipulated higher cost of enactment, then the courts can be assured that the government's interest in the infringing legislation is strong enough to justify the infringement. If the political process cannot overcome that higher cost of enactment, then the courts should assume that the government's interest in infringement is too weak to justify the intrusion. In the ACA case, the question is whether the government's interests in combating adverse selection and cost-shifting in healthcare are strong enough to justify the individual mandate's libertarian infringement.

---

omitted).

58. Stephenson, *supra* note 20, at 4.

59. *Id.*

60. See *supra* notes 47–51 and accompanying text.

61. See Coenen, *Semisubstantive Constitutional Review*, *supra* note 21, at 1370–81 (describing such doctrines as “constitutional ‘who’ rules”).

## B. *The ACA Cases as Semisubstantive Cases*

### 1. Taxing

In the first phases of the ACA litigation, the government argued that the individual mandate is constitutional as an exercise of Congress's taxing power. The plaintiffs, however, maintained that the mandate is not a tax at all,<sup>62</sup> and almost every court that has decided the case so far has agreed (with the exception of the U.S. Court of Appeals for the Fourth Circuit).<sup>63</sup> Nevertheless, the courts' analyses of the taxing power have taken a decidedly semisubstantive form, and it is therefore worth reviewing the arguments.

#### a. The ACA Judges' Analyses

Under current doctrine, Congress's taxing power is extremely broad. Congress may tax for revenue-raising or regulatory purposes,<sup>64</sup> and it may use taxation to accomplish results that it may not accomplish through direct regulation.<sup>65</sup> Under the Sixteenth Amendment,<sup>66</sup> Congress may tax any derived income, and it may use whatever rules it chooses for

---

62. They have argued in the alternative that the mandate is an unapportioned direct tax that violates Article I, Section 2 of the Constitution. U.S. CONST. art. I, § 2 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . ."). See generally Steven J. Willis & Nakku Chung, *Constitutional Decapitation and Healthcare*, 128 TAX NOTES 169, 170, 194–95 (2010) (arguing that the mandate is unconstitutional even if it is a tax because it is an unapportioned direct tax). All of the courts to have addressed the question so far, however, have found either that the mandate is not a tax or that it is a tax that falls under the Anti-Injunction Act's jurisdictional bar, and they have therefore failed to reach this alternative argument.

63. Compare *Liberty Univ. v. Geithner*, No. 10–2347, 2011 WL 3962915, at \*5–6 (4th Cir. Sept. 8, 2011) (concluding that the mandate does constitute a tax), with *Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1314 (11th Cir. 2011) (noting that "every . . . court that has addressed this claim" has been unpersuaded).

64. See *United States v. Sanchez*, 340 U.S. 42, 44 (1950) ("It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. . . . The principle applies even though the revenue obtained is obviously negligible . . . or the revenue purpose of the tax may be secondary . . ."); see also *Bob Jones Univ. v. Simon*, 416 U.S. 725, 741 n.12 (1974) (noting favorably the Court's abandonment of the distinction between revenue-raising and regulatory taxes).

65. See *Sanchez*, 340 U.S. at 44 ("Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate."); *id.* at 45 ("From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment." (quoting *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 47 (1934)) (internal quotation marks omitted)); cf. *Rivkin & Casey*, *supra* note 18, at 100 (citing *Child Labor Tax Case*, 259 U.S. 20, 38 (1922)) (proposing that Congress may not "evade all of the constitutional limits on its authority by simply imposing 'taxes,'" but failing to note the Supreme Court's later decisions to the contrary).

66. U.S. CONST. amend. XVI.

determining how much of that income it will tax.<sup>67</sup> Indeed, the Supreme Court has explicitly observed that “Congress’[s] power to tax is virtually without limitation . . . .”<sup>68</sup> There are, however, four constraints that might arise when Congress passes a tax; the first three are textually explicit constitutional constraints while the fourth is a judicially created constraint that takes a constitutional dimension. First, a tax and its resulting appropriations must serve the “general welfare.”<sup>69</sup> Second, duties, imposts, and excises must be uniform throughout the country.<sup>70</sup> Third, direct taxes must be apportioned among the states according to their populations.<sup>71</sup> Fourth, a regulatory tax must not actually be a penalty; it must act like a tax.<sup>72</sup>

This fourth (judicially created) constraint has been the central taxing argument in the ACA litigation. While the government argued that the mandate is an income tax or a uniform excise tax, the plaintiffs maintained that the provision is instead a regulatory penalty that must be sustained, if it can be, only under the Commerce Clause. The crux of the plaintiffs’ argument, however, was not that the mandate has functional characteristics of a penalty; instead, the plaintiffs asserted that Congress should not be allowed to defend a regulation as a tax post hoc if the members did not call the provision a “tax” in its initial passage.<sup>73</sup> The plaintiffs have thus asked the courts to add a new dimension to this implicit constraint on the taxing power: one that would require Congress to admit—during debates, in legislative findings, or in the statute itself—that it is levying a tax rather

---

67. See *Helvering v. Indep. Life Ins. Co.*, 54 S. Ct. 758, 760 (1934).

68. *United States v. Ptasynski*, 462 U.S. 74, 79 (1983); see also *United States v. Kahriger*, 345 U.S. 22, 31 (1953) (noting that courts are generally “without authority to limit the exercise of the taxing power”).

69. See *Steward Mach. Co. v. Davis*, 301 U.S. 548, 558, 589–90 (1937) (rejecting the constraint that appropriations must pursue enumerated regulatory purposes); *United States v. Butler*, 297 U.S. 1, 65–66 (1936) (interpreting the taxing power and General Welfare Clause to cover any regulatory end, not just those that are separately enumerated).

Courts, however, defer to Congress’s assessment of the “general welfare,” leaving that constraint with little, if any, bite. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (noting that “courts should defer substantially to the judgment of Congress” on whether a tax furthers the general welfare); *Helvering v. Davis*, 301 U.S. 619, 640–42 (1937) (holding that Congress has unreviewable discretion in deciding what constitutes the “general welfare”).

70. U.S. CONST. art. I, § 8 (“[A]ll Duties, Imposts[,] and Excises shall be uniform throughout the United States[.]”); see also *Ptasynski*, 462 U.S. at 84–86 (applying the uniformity constraint).

71. U.S. CONST. art. I, § 2 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . .”); see also *Eisner v. Macomber*, 252 U.S. 189, 205, 219 (1920) (invalidating a tax on stock dividends as an unapportioned direct tax).

72. See *Child Labor Tax Case*, 259 U.S. 20, 38 (1922) (considering the distinction between a tax and a penalty).

73. See Opening/Response Brief of Appellee/Cross-Appellant States at 44–46, *Florida v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (Nos. 11-11021 & 11-11067), 2011 WL 1944170, at \*44.

than imposing a penalty.<sup>74</sup> Although this dimension of the tax–penalty distinction has never been recognized by the Supreme Court, much less applied to invalidate an exaction, it does have some support in Supreme Court dicta: the Court has said that legislative intent is the touchstone for determining whether an exaction is a tax or a penalty,<sup>75</sup> and the legislators’ references to a provision as a penalty—and active refusal to call it a tax—give some indication of legislative intent (though, of course, the legislators’ true intent may have been to impose a new tax without suffering political blowback from raising taxes).

Every court but one that has decided an ACA challenge has adopted this constraint, holding that the mandate must be a penalty because the bill’s proponents said it was a penalty. For support, the courts have cited the following facts: the mandate is labeled a penalty in all of the statutory headings; the mandate is not included in the statute’s list of revenue-raising provisions; the legislative findings center on the mandate’s effects on interstate commerce; and President Barack Obama and his congressional allies repeatedly insisted that the mandate was not a tax.<sup>76</sup>

Notably, these arguments render the distinction between penalties and taxes purely semantic and process-based, rather than structural or functional.<sup>77</sup> Indeed, unlike the *Child Labor Tax Case*,<sup>78</sup> on which the plaintiffs largely rely, the ACA cases have not rested on *any* functional aspects of the individual mandate. The plaintiffs have not argued that the exaction is so hefty as to be penal,<sup>79</sup> that it contains a scienter requirement,<sup>80</sup> that it is triggered by a violation of other regulatory statutes,<sup>81</sup> or that its disincentive effect will render the revenue effects

---

74. See Amar, *supra* note 36, at 8–12 (criticizing the taxing analysis for being purely semantic).

75. See *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 46–47. The Court reasoned:

The statute here under review is in form plainly a taxing act, with nothing in its terms to suggest that it was intended to be anything else. It must be construed, and the intent and meaning of the legislature ascertained, from the language of the act, and the words used therein are to be given their ordinary meaning unless the context shows that they are differently used.

*Id.* But see *Child Labor Tax Case*, 259 U.S. at 37–38 (treating an exaction as a penalty even though Congress labeled it a tax).

76. See *Liberty Univ. v. Geithner*, No. 10–2347, 2011 WL 3962915, at \*9–10 (4th Cir. Sept. 8, 2011); *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1314 (11th Cir. 2011).

77. Amar, *supra* note 36, at 10 (“No structural purpose would be served by a judicially fabricated Simon Says rule that taxes must always say ‘taxes.’”).

78. 259 U.S. at 20.

79. See *Child Labor Tax Case*, 259 U.S. at 36, 38.

80. *Id.* at 37.

81. See *United States v. Constantine*, 296 U.S. 287, 294 (1935) (holding that an exaction was a penalty because it was triggered only by a violation of state law).

trivial.<sup>82</sup> They have argued only that pro-ACA legislators and President Obama called the exaction a penalty in all relevant sources.

b. The Tax Holdings as Enactment Cost Manipulation

Despite the formalism of the ACA cases' analyses, the rule they set fits comfortably with other semisubstantive rules intended to increase enactment costs, and there is little doubt that a semantic "t-word rule" would, in fact, make economic impositions harder to pass. Congress's taxing power is significantly broader than its commerce power. Congress therefore has a strong incentive to use its taxing power to accomplish regulatory ends because taxes will be more likely than penalties to survive judicial scrutiny. But taxes are much harder to pass than penalties. As an emerging body of psychology literature formally demonstrates, voters are significantly more averse to exactions when they are labeled "taxes" than when they are labeled "fees" or "payments," even when the exactions are substantively and functionally identical.<sup>83</sup> A rule that requires Congress to label an exaction a "tax" in order to invoke its taxing power, therefore, will reduce the number of economic impositions that Congress can enact, and it will force members of Congress to allocate their political capital carefully, passing only those taxes that are truly valuable to the legislators.

This general "magic words" strategy for increasing enactment costs—with all its formalism—is quite common. Coenen provided several examples of the strategy under the moniker "form-over-substance rules" in his survey of semisubstantive doctrines in the Rehnquist Court.<sup>84</sup> Along similar lines, Stephenson observed that courts often hold Congress to its legislative history, rewarding "good" debate while punishing "bad" debate.<sup>85</sup> Stephenson theorized that such rules are useful in forcing Congress to engage in more politically difficult enactment deliberations when it wants to pass constitutionally troubling legislation.<sup>86</sup> A requirement that Congress use the word "tax" in legislative debates fits

---

82. This is an argument that the Supreme Court has rejected in dicta, but the argument would at least center on some functional characteristic of the law. *See* *United States v. Sanchez*, 340 U.S. 42, 44 (1950) (noting that a tax will be valid even if it "definitely deters" the taxed activity although "the revenue obtained is obviously negligible").

83. *See* Edward J. McCaffery & Jonathan Baron, *Thinking About Tax*, 12 PSYCHOL. PUB. POL'Y & L. 106, 117–19 (2006) (reporting results of a cognitive study that showed general "tax aversion" whereby individual reacted more negatively to an exaction labeled as a "tax" than to an identical exaction labeled as a "fee" or a "payment"); Joshua D. Rosenberg, *The Psychology of Taxes: Why They Drive Us Crazy, and How We Can Make Them Sane*, 16 VA. TAX REV. 155, 161–201 (1996) (considering various reasons that people dislike taxes); Deborah H. Schenk, *Exploiting the Salience Bias in Designing Taxes*, 28 YALE J. ON REG. 253, 299–310 (2011) (considering political and institutional barriers to raising taxes directly).

84. Coenen, *Semisubstantive Constitutional Review*, *supra* note 21, at 1329–35.

85. Stephenson, *supra* note 21, at 43–45.

86. *Id.* at 42–55.

comfortably with these legislative history rules. If the courts will refuse to uphold an exaction under the taxing power unless the word “tax” appears in the legislative history, then judges will raise the enactment cost of economic impositions. Finally, because the judges involved in the ACA litigation looked to the words of the statute itself as well as the legislative history, the ACA rule also has much in common with ordinary clear statement rules, some of which require Congress to use “magic words” in order to invoke certain constitutional powers.<sup>87</sup> In the end, then, the ACA courts’ analyses of Congress’s taxing power align comfortably with ordinary tactics of semisubstantive review and enactment cost manipulation.

## 2. Commerce

The primary question in the ACA litigation—and the question that has aroused the most scholarly debate—has been whether the mandate can be sustained under Congress’s power to regulate interstate commerce. The government has argued that the decision to buy healthcare at the point of service rather than through insurance—to pay out of pocket on each visit to the doctor rather than paying a monthly fee for access to healthcare—is an economic decision that Congress may regulate.<sup>88</sup> The plaintiffs have maintained that failure to buy insurance is not regulable economic activity because it is not activity at all; it is inactivity.<sup>89</sup> Several judges have agreed with the plaintiffs, basing their decisions largely on libertarian rather than federalism norms. My goal here is not to defend the action–inaction distinction or the ACA judges’ opinions generally. Rather, my goal is simply to demonstrate that the Commerce Clause holdings can be situated as semisubstantive holdings intended to increase the enactment cost of a national insurance mandate. I will address the action–inaction distinction’s problems of judicial inadministrability and “structural otiosity”<sup>90</sup> in Part IV.

---

87. See generally William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 619–29 (1992) (discussing “super-strong clear statement rules,” which are basically magic words requirements, in the Rehnquist Court’s federalism cases prior to *United States v. Lopez*, 514 U.S. 549 (1995)); Manning, *supra* note 21, at 406–14 (providing examples).

88. See, e.g., Brief for Appellees at 38–39, *Liberty Univ. v. Geithner*, No. 10–2347, 2011 WL 3962915 (4th Cir. Feb. 18, 2011).

89. See, e.g., Opening Brief of Appellants at 20–21, *Liberty Univ. v. Geithner*, No. 10–2347, 2011 WL 3962915 (4th Cir. Jan. 18, 2011).

90. See Hills, *supra* note 36 (calling the Commerce Clause arguments in the ACA litigation “structurally otiose”).

### a. The ACA Judges' Analyses

Under modern doctrine, there is no doubt that Congress's authority to regulate interstate commerce extends to decisions that are both individual and intrastate. That is, a given decision need not involve more than one state nor even more than one person for the federal government to have jurisdiction over it, so long as repeated instances of that decision will, in the aggregate, either *constitute* interstate commerce<sup>91</sup> or have a close connection to interstate commerce.<sup>92</sup> These powers might exist under the Commerce Clause or under the Necessary and Proper Clause, which allows Congress to use any appropriate means to effect the end of regulating interstate commerce.<sup>93</sup>

In the New Federalism era,<sup>94</sup> the Supreme Court has clearly limited the reach of the "close connection" test, but it has chosen not to limit Congress's authority to regulate individual decisions that *constitute* commerce when aggregated. The lesson from *Lopez* and *Morrison*, the two Commerce Clause cases of the New Federalism movement, was that noneconomic activities—decisions that are not themselves commercial—cannot be regulated if their economic impacts occur through long causal chains. Although the Supreme Court did not openly doubt that individual decisions to carry a gun near a school<sup>95</sup> or to assault a woman<sup>96</sup> would, when aggregated, have real effects on the American economy, it held that the effects were too distant from the regulated decisions for the statutes to be considered *commercial* regulations.<sup>97</sup>

These cases stand in stark contrast to *Raich*, in which the Supreme Court upheld a prohibition on intrastate manufacture, sale, and possession of marijuana—actions that the Court treated as economic in nature, which, when aggregated, would constitute commerce.<sup>98</sup> The Court thus held that

---

91. See *Gonzales v. Raich*, 545 U.S. 1, 17 (2005); *Wickard v. Filburn*, 317 U.S. 111, 127–29 (1942).

92. See *United States v. Morrison*, 529 U.S. 598, 609 (2000); *United States v. Lopez*, 514 U.S. 549, 561 (1995).

93. See *United States v. Comstock*, 130 S. Ct. 1949, 1956–57 (2010) (discussing the "means-ends rationality" standard for Necessary and Proper Clause determinations); see also *Raich*, 545 U.S. at 34–40 (Scalia, J., concurring) (arguing that the *Raich* holding ought to have been a Necessary and Proper Clause holding rather than a Commerce Clause holding).

94. See generally Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 618–26 (1995) (tracing the origins of "the new federalism"—the Court's renewed assertions of authority to enforce federalism norms—from the 1970s through the Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), which reasserted Commerce Clause limitations for the first time in decades).

95. *Lopez*, 514 U.S. at 563–64.

96. *Morrison*, 529 U.S. at 612.

97. See *id.* at 612, 615; *Lopez*, 514 U.S. at 563–64.

98. *Raich*, 545 U.S. at 25 ("Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the [Controlled Substances Act] are quintessentially economic.").

the ban on marijuana production and distribution was, at its heart, a commercial regulation and thus a rational approach to controlling the interstate marijuana market.<sup>99</sup> As the law currently stands, then, the controlling distinction is between statutes targeting economic actions that constitute commerce and those targeting noneconomic actions that (eventually) affect commerce.

Under the distinction as drawn, the individual mandate is a permissible regulation. The decision not to buy health insurance is an economic act that, when aggregated, will constitute commerce. Of course, aggregated individual decisions *not* to buy insurance will not constitute commerce in health insurance. They do, though, constitute commerce in uninsured healthcare—in healthcare financed at the point of service. That is, aggregated individual decisions to forego insurance will sustain a commercial market in uninsured care that would be less likely to exist if no one made that decision, just as aggregated individual decisions to grow medicinal marijuana in California will sustain an interstate black market in recreational marijuana that would be less likely to exist if no one made that decision. Indeed, the regulatory connection in the healthcare context is even closer than in the marijuana context: health insurance and point-of-service payments are exclusive economic substitutes. While the maintenance of the recreational marijuana market depends on both the growing of medicinal marijuana and the nonenforcement of marijuana distribution, the maintenance of the market for uninsured care depends only on the aggregated decision not to carry insurance.

While admitting that the decision to forego health insurance is economic, the ACA plaintiffs urge that the legal distinction should also depend on whether a given economic decision is a decision to do something or a decision not to do something.<sup>100</sup> Congress should be allowed to regulate economic activity, they argue, but not economic inactivity. Like the semantic tax–penalty distinction, this dimension of the economic–noneconomic distinction has no doctrinal basis but some support in Supreme Court dicta: the Commerce Clause cases consistently refer to the regulable class as economic “activities” rather than economic “decisions.”<sup>101</sup>

Of course, as any economist knows, the decision not to do something is an active decision to do something else. That’s just opportunity cost. But it is conceivable that either the Commerce Clause or the Necessary and

---

99. *Id.* at 26 (“Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.”).

100. *See, e.g.*, Opening Brief of Appellants at 20–21, *Liberty Univ. v. Geithner*, No. 10–2347, 2011 WL 3962915 (4th Cir. 2011).

101. *See Florida v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1292–95 (N.D. Fla. 2011) (holding that Congress must regulate economic “activities,” not economic “decisions”).

Proper Clause limits the federal government to regulating the taken opportunity rather than the foregone one. That is, the federal government might be allowed to penalize individuals only for taking an opportunity that the government dislikes, not for rejecting an opportunity that the government prefers. In this case, that would mean that Congress would need to penalize individuals for consuming uninsured healthcare rather than penalizing them for failing to buy insurance.<sup>102</sup> Such a regime is easily imaginable; Congress could impose an annual penalty on anyone who obtained healthcare without insurance during the course of the year, triggered upon an uninsured visit to the doctor.<sup>103</sup> The penalty in that case might need to be higher than the ACA penalty in order to keep the decisional calculus the same (because individuals can avoid healthcare visits for one or two years, thereby triggering the penalty less frequently), but Congress could conceivably create an identical incentive to acquire health insurance by regulating the “action” (obtaining healthcare without insurance) rather than the “inaction” (failing to buy insurance).

b. The Commerce Clause Holding as Enactment Cost Manipulation

Both as a general matter of federalism and as a particular feature of the action–inaction distinction, the ACA cases’ Commerce Clause analyses can be understood as enactment cost manipulation. Admittedly, scholarly theories of semisubstantive review have generally treated federalism as a substantive value that can receive indirect protection rather than as a tool for providing indirect protection.<sup>104</sup> Nevertheless, a few scholars have argued, as both a descriptive and normative matter, that delegation to states is a good way to protect individual liberty;<sup>105</sup> the Supreme Court has repeatedly argued that federalism is a means of protecting liberty rather than an end in itself;<sup>106</sup> and there can be little doubt that delegations to

---

102. *Id.* at 1291–92 (embracing the “formalism” of holding that Congress may penalize the purchase of uninsured healthcare but not the failure to purchase health insurance).

103. This is essentially identical to the regime at issue in *Wickard v. Filburn*, 317 U.S. 111 (1942). Although the regulatory goal was to decrease supply of and increase demand for traded wheat, Congress did not punish farmers for failing to buy wheat on the general market. Instead, it punished them for growing too much untraded wheat of their own. *Id.* at 115–16, 118–19.

104. See generally Coenen, *Semisubstantive Constitutional Review*, *supra* note 21, at 1282 n.11; Manning, *supra* note 21, at 407. But see Hills, *Individual Right to Federalism*, *supra* note 21, at 891, 904–05 (“The Rehnquist Court’s federalism jurisprudence, however, might be regarded as an indirect effort to vindicate . . . traditional [Fourteenth Amendment] entitlements . . .”).

105. See, e.g., Randy Barnett, *Liberty and Enumerated Powers*, VOLOKH CONSPIRACY (June 7, 2011, 10:50 AM), <http://volokh.com/2011/06/07/liberty-and-enumerated-powers/>; see also Hills, *Westphalian Liberalism*, *supra* note 21, at 795 (“[A] commitment to the protection of federalism implies a commitment to protection for private liberty.”); Earl M. Maltz, *Individual Rights and State Autonomy*, 12 HARV. J.L. & PUB. POL’Y 163, 184 (1989); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 309–10 (2009).

106. See *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (discussing at length federalism’s goal of “secur[ing] the freedom of the individual”); *New York v. United States*, 505

states will raise the enactment cost of a national regulatory project. Furthermore, because federalism holdings allocate decisional responsibility to costlier actors, they are quite similar to the semisubstantive doctrines that require Congress rather than agencies to enact constitutionally troubling regulations. It is therefore not at all implausible that Commerce Clause limitations can and do function as semisubstantive rules, increasing enactment costs for regulations that implicate substantive constitutional norms.<sup>107</sup> That said, my argument here does not at all depend on downplaying the substantive value of federalism; my goal is only to demonstrate that federalism has the additional feature of increasing enactment costs.

As a general matter, delegations to states will raise the enactment cost of a national regulatory project. Assuming that the members of Congress and the stakeholders who motivate them want a uniform national policy, a rule that they must accomplish their goal through state regulation will require them to use horizontal rather than vertical federalization—a strategy with significantly higher transaction costs.<sup>108</sup> For obvious reasons, getting fifty state statutes passed is harder than getting one federal statute passed. Even if all of the states were willing to attempt coordinated regulation, herding the cats of fifty state legislatures would be quite difficult. Of course, Congress can pass conditional grants to incentivize state cooperation,<sup>109</sup> but that strategy not only requires some kind of unpopular revenue increase to fund the grants but also allows for individual state holdouts.<sup>110</sup> Commerce Clause holdings, thus, are capable of raising enactment costs if they effectively require state legislatures to consent to a national regulatory project.

That said, not all Commerce Clause holdings have the effect of prohibiting federal regulation and delegating the decision to the states, but

---

U.S. 144, 181 (1992) (noting that the purpose of federalism is to protect individuals, not “States or state governments as abstract political entities”); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (noting that the purpose of federalism was “to ensure the protection of ‘our fundamental liberties’” (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting))).

107. Within Coenen’s typology, federalism limits are species of “who” rules, shifting authority to the states. See Coenen, *Semisubstantive Constitutional Review*, *supra* note 21, at 1370–81.

108. See generally Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 139–44 (2010) (discussing transaction costs that arise when states try to coordinate for regulation).

109. See Brian Galle, *Federal Grants, State Decisions*, 88 B.U. L. REV. 875 *passim* (2008) (discussing conditional spending).

110. For instance, Arizona refused to join Medicaid until 1982. See Abbe R. Gluck, *Room for Debate: Is the Health Care Law Unconstitutional?: The Tenth Amendment Question*, N.Y. TIMES (Mar. 28, 2010, 7:00 PM), <http://roomfordebate.blogs.nytimes.com/2010/03/28/is-the-health-care-law-unconstitutional/#abbe>.

a semisubstantive Commerce Clause holding could. In *Lopez*, for example, the Court invalidated the Gun-Free School Zones Act (GFSZA) on Commerce Clause grounds, but the majority issued a narrow holding with no substantive dicta and with two easy options for congressional reenactment. The opinion implied that the statute would have been constitutional if it had included either a jurisdictional element<sup>111</sup> or congressional findings of a general impact on commerce.<sup>112</sup> In response, Congress reenacted the provision the next year, including both of the suggested provisions,<sup>113</sup> and nobody since has successfully challenged the statute.<sup>114</sup> The reenactment had slightly higher costs than the initial enactment because it included legislative findings and the textual jurisdictional limitation (which are not free to produce or include), but the difference was likely minimal. The GFSZA has thus been in nearly continuous effect since its initial passage in 1990, notwithstanding the Supreme Court's holding.

If, instead of issuing this narrow holding, the Court had treated the Commerce Clause challenge as a semisubstantive argument with Second Amendment implications,<sup>115</sup> it could have made a bigger difference to the statute's enactment costs. The Supreme Court could have incorporated broad Second Amendment principles into its Commerce Clause analysis<sup>116</sup> in typical semisubstantive form. For example, it could have held that individual decisions about where to carry or how to use a legally owned gun are beyond Congress's power to regulate (perhaps unless the discrete actions themselves cross state lines). A semisubstantive holding, then, could have made it impossible for Congress to regulate guns near schools

---

111. *United States v. Lopez*, 514 U.S. 549, 551, 561–62 (1995) (noting that the GFSZA “contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce”).

112. *Id.* at 562–63.

113. *See* Pub. L. No. 104-208, § 657, 110 Stat. 3009-369–3009-371 (1996).

114. *See, e.g.*, *United States v. Dorsey*, 418 F.3d 1038, 1045–46 (9th Cir. 2005).

115. A direct Second Amendment challenge would have been sure to fail at the time, but it might succeed today. *See, e.g.*, Brief for Academics for the Second Amendment et al. as Amici Curiae Supporting Neither Party, *United States v. Lopez*, 514 U.S. 549 (1995) (No. 93-1260) (arguing that the Second Amendment proscribed the GFSZA, even though respondent Lopez had not raised a Second Amendment challenge); *cf. McDonald v. Chicago*, 130 S. Ct. 3020, 3050 (2010) (incorporating the Second Amendment's individual right into the Fourteenth Amendment so that it also binds the states); *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (holding, for the first time, that the Second Amendment protects individual rights as well as states' rights).

116. Professor Roderick M. Hills, Jr. has argued that *Lopez* constitutes semisubstantive protection for Fourteenth Amendment rights in education. Hills, *Individual Right to Federalism*, *supra* note 21, at 889–91 (situating *Lopez* alongside Fourteenth Amendment education cases by treating it as a case about “school safety and discipline”). I find this argument far less persuasive than the Second Amendment possibility; there is no plausible argument that individuals, whether parents, students, or teachers, should have a right to carry a gun to school in order to improve their educations.

without either relying on state implementation through conditional grants or, say, criminalizing all concealable weapons (thereby targeting the economic market instead of the individual behavior). Both of those approaches would have had higher enactment costs. A conditional-grants approach might have required revenue increases and certainly would have allowed state holdouts, and the strategy of eliminating the market for concealable weapons would have been politically much harder (if not impossible).

This view suggests either that *Lopez* was not a semisubstantive holding at all or that the *Lopez* Court was more cautious about semisubstantive analysis given that the Second Amendment interest was not “fundamental” at the time, a point that this Article returns to below.<sup>117</sup> The point for now, though, is that Commerce Clause holdings are capable of bearing all the usual characteristics of semisubstantive review and enactment cost manipulation.

Furthermore, the precise rule that the ACA courts have created—the action–inaction distinction—can be understood as an attempt to raise enactment costs for federal incentives related to personal financial management. Assume, for the time being, that the holding is really about taken versus foregone opportunities (rather than “action” versus “inaction”) and that its applicability is limited to individuals’ financial management decisions.<sup>118</sup> The rule, then, would be that congressionally created incentives for saving must be tax incentives, entitlement programs like Social Security and Medicare (which also exercise the taxing and spending power), or penalties that arise when individuals resort to bad opportunities because of their failures to save. Such incentives must not be regularized penalties that apply to the everyday business of failing to save. Understood this way, the rule has a clear substantive element insofar as it relates only to individuals’ freedom to manage their finances however they see fit—up until the point that they create social costs because of their bad choices.

This rule also has a relevant information-forcing feature of enactment cost manipulation. One concern that courts might have about the ACA is that the individual mandate is arguably overinclusive by requiring all individuals to carry insurance, including those who save enough to afford out-of-pocket healthcare.<sup>119</sup> The five invalidating judges might believe that the social costs of allowing some people not to participate in insurance pools—the social costs of free-riding and adverse selection—are not actually bad enough to justify the mandate’s infringement on individual liberty. A requirement that any federal penalty attach to a taken opportunity

---

117. See *infra* Part III.A.

118. See *infra* Part IV (discussing these two limitations more extensively).

119. See Stephenson, *supra* note 21, at 34–36 (discussing overinclusiveness as a reason for substantive review and narrow tailoring requirements).

rather than a foregone one would require Congress to show its hand in this regard. If the free-rider and adverse selection problems are bad enough in the legislature's view to justify the mandate, then Congress could pass a penalty that triggers on the consumption of any *uninsured* healthcare, even if the patient can afford to pay for that healthcare out-of-pocket. But if the consumption of *uncompensated* care (obtained in emergency rooms, for example) is the only cost sufficiently bad to justify the mandate, then Congress would need to pass a penalty that triggers only upon consumption of care that the patient cannot afford.<sup>120</sup>

The ACA cases so far undoubtedly represent extensions rather than mere applications of current doctrine, and they rest on shaky structural premises. Nevertheless, the cases' incorporation of libertarian norms into the structural doctrines is far from novel. Both the tax and the commerce analyses can be easily situated within the broader context of semisubstantive constitutional review. Both holdings will increase the enactment cost of a national insurance mandate, forcing Congress to decide and reveal whether the collective interest in requiring health insurance coverage is really important enough to justify the intrusion on individuals' healthcare autonomy and economic liberty.

## II. THREE OBJECTIONS TO SEMISUBSTANTIVE REVIEW IN THE ACA CASE

Given that semisubstantive review is so common, the scholarly outrage at the ACA judges' references to libertarian norms seems surprising. For most scholars, however, that outrage seems primarily directed at the asserted liberty interests themselves. The central scholarly objection is that the mandate poses no important threat to individual liberty, not that individual liberty must always be irrelevant to federalism analysis.<sup>121</sup> The question, then, is what makes a liberty interest important enough to garner indirect judicial protection.

---

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

121. Compare Hills, *Individual Right to Federalism*, *supra* note 21, at 891–97 (cataloguing and defending the Rehnquist Court's semisubstantive federalism holdings), with Hills, *supra* note 24 (arguing that semisubstantive review is inappropriate in the ACA case). Other scholars have less outwardly differentiated between the ACA case and others, but they have made their objections to the libertarian arguments known, particularly in their regular invocations of *Lochner*. Cf. Jack M. Balkin, *The Constitutionality of an Individual Mandate for Health Insurance*, 158 U. PA. L. REV. PENNUMBRA 102, 104 (2009) (stating that Rivkin and Casey, *supra* note 18, cite the *Child Labor Tax Case*, a *Lochner*-era decision, “[t]o avoid the force of several decades of precedents”); Peter J. Smith, *Federalism, Lochner, and the Individual Mandate*, 91 B.U. L. REV. 1723, 1726, 1737 (2011) (noting that federalism is “an inappropriate constitutional framework in which to consider” libertarian objections to the ACA).

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

#### A. *Whether the ACA Involves Any Constitutional Liberty Interest*

One possible objection to semisubstantive analysis in the ACA case—the one suggested in scholars’ assertions that there is no individual right to be uninsured—is that there is no constitutionally relevant liberty interest at stake.<sup>122</sup> The point here is not that the mandate does not infringe the constitutional liberty interests that the plaintiffs have raised (which is the point that I address next) but rather that the liberty interests themselves are not constitutionally relevant. A desire to be uninsured, the argument goes, is simply not a constitutional interest.

But the premise underlying this objection is clearly wrong. The ACA plaintiffs have raised broader liberty interests than a freedom to be uninsured, and those broader interests undoubtedly retain constitutional relevance. The plaintiffs have in fact raised two constitutional liberty interests, the freedom of health and the freedom of contract. Their arguments have centered on both the right to control their own medical care and the right to choose whether and when to enter into a contract with a private individual or corporation.<sup>123</sup>

Admittedly, the Supreme Court has never applied a bare freedom of health to invalidate state action,<sup>124</sup> and no court has applied the freedom of contract since the death of the *Lochner* era in 1937.<sup>125</sup> The rarity of judicial invalidation, however, does not establish that the liberty interests are constitutionally irrelevant. In the modern rights paradigm, there is a widely acknowledged “double standard” of judicial review, by which some constitutional rights garner strict judicial protection while others are left primarily to political safeguards.<sup>126</sup> Within this paradigm, economic

---

122. Smith, *supra* note 121, at 1726, 1737.

123. See Opening Brief of Appellants at 11–13, 20–21, *Liberty Univ. v. Geithner*, No. 10-2347, 2011 WL 3962915 (4th Cir. Jan. 18, 2011).

124. See Moncrieff, *supra* note 6, at 2215–27 (tracing the freedom of health through Supreme Court precedent and noting that it has been used to invalidate state action only when combined with reproductive freedoms).

125. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (ending the *Lochner* era).

126. See HENRY J. ABRAHAM, *FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES* 10 (4th ed. 1982) (noting that courts apply “a double standard of judicial attitude, whereby governmental economic experimentation is accorded all but *carte blanche* by the courts,

liberties are left almost entirely to politics,<sup>127</sup> and at least some parts of the freedom of health are likewise. The Supreme Court in *Washington v. Glucksberg*, for example, held that the freedom to obtain a physician's assistance in hastening death ought to be left to political elaboration in the states.<sup>128</sup> Importantly, however, the modern paradigm denies neither that healthcare autonomy and economic liberties exist nor that they should be protected.<sup>129</sup> If it did, then courts would not bother with rational basis review when litigants asserted those rights; they would simply dismiss all such arguments for failure to state a claim. Rather, the modern rights paradigm holds that the political process suffices to provide protection for those liberties.<sup>130</sup>

In one of the first and most influential statements of modern rights analysis—the *Carolene Products* footnote in which Justice Harlan F. Stone delineated the kinds of legislative encroachments that require strict judicial review<sup>131</sup>—the Court's justification for refusing scrutiny to economic liberties was not that they were unimportant or nonexistent. Rather, the rationale was that judicial protection is necessary and appropriate *only* when the political process fails to provide adequate protection of its

but alleged violations of individual civil rights are given meticulous judicial attention"); *see also* Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 77 & n.11 (2001) (quoting ABRAHAM, *supra*).

127. The judiciary will review deprivations of economic liberty, including those affected through regulation, under the Takings Clause. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123–24 (1978). However, the Supreme Court almost never invalidates regulations on this basis. *See generally* RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

128. 521 U.S. 702, 735 (1997) (“Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”); *see also* Hills, *Individual Right to Federalism*, *supra* note 21, at 894 (characterizing the *Glucksberg* holding as leaving a substantive due process question to political elaboration in the states). Interestingly, the Court doubled down on this view with its structural holding in *Gonzales v. Oregon*, 546 U.S. 243 (2006) (holding that the federal government may not prohibit the states from using federally controlled substances for physician-assisted suicide).

129. *See generally* Strauss, *supra* note 10, at 381–86 (defending the propriety and usefulness of recognizing a freedom of contract).

130. Justice Sandra Day O’Connor made this point explicit in her *Glucksberg* concurrence, writing:

Every one of us at some point may be affected by our own or a family member’s terminal illness. There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State’s interests in protecting those who might seek to end life mistakenly or under pressure.

*Glucksberg*, 521 U.S. at 737 (O’Connor, J., concurring).

131. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

own.<sup>132</sup> According to Justice Stone, judicial review is particularly important for legislation that arises from distortions in the political process (such as prejudice against “discrete and insular minorities”) and for legislation that creates new distortions in that process (such as restrictions on voting, speech, assembly, and association).<sup>133</sup>

This basic idea evolved into one of the most influential holistic theories of constitutionalism and judicial review with Dean John Hart Ely’s *Democracy and Distrust*, which argued that judges should intervene only to correct distortions in the representative process.<sup>134</sup> As a descriptive matter, Ely’s “representation reinforcing” theory does not explain why particular rights fall on one side or the other of the “double standard.” Courts often give heightened protection to fully represented rights and classes and sometimes deny heightened protection to underrepresented rights and classes.<sup>135</sup> But that is not the important point for present purposes. The point here is that, doctrinally speaking,<sup>136</sup> the justification for relegating some rights to political protection has never been that those rights are constitutionally unimportant or nonexistent. It has only ever been a notion about the proper judicial role in rights enforcement. Indeed, as previously mentioned, if economic liberty were entirely irrelevant to substantive constitutional rights, the judiciary would not even bother with rational basis review; it would simply dismiss all such arguments for failure to state a claim.

There can be no doubt, then, that the ACA plaintiffs have evoked constitutionally relevant (small-“l”) libertarian norms. Those norms might not deserve indirect protection through semisubstantive review, but they are unquestionably constitutional in nature.

#### B. *Whether the Individual Mandate Violates the Asserted Liberty Interests*

A second and more plausible objection to semisubstantive review in the ACA litigation lies in the view that the individual mandate does not violate the freedom of health or the freedom of contract. This argument

---

132. *Id.* Admittedly, Justice Stone started the footnote with a distinction between enumerated and unenumerated rights, *id.*, but that particular distinction has fallen by the wayside in the modern era of implied fundamental rights. *See Baker & Young, supra* note 126, at 81–83 (noting a few reasons that the textual distinction is unsatisfying in the modern rights era).

133. *Carolene Products*, 304 U.S. at 152 n.4.

134. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW passim* (1980) (developing a holistic philosophy of judicial review out of the notion that judges should intervene to correct representational failures).

135. *See Baker & Young, supra* note 126, at 83–84.

136. There have been academic arguments that economic liberties should be given no constitutional consideration. *See, e.g.,* Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 45–50 (summarizing and rejecting this scholarly argument). However, there has been no serious suggestion in the doctrine that economic liberty is constitutionally irrelevant.

could take one of two forms, both of which rest on plausible premises but only one of which could distinguish the ACA case from the ordinary case of semisubstantive review. The first such argument is that no court would invalidate the individual mandate even if the judges were applying the substantive doctrines in their most robust forms. The second is that the individual mandate cannot be said to violate the substantive doctrines because the mandate was enacted through the supermajoritarian political process, which serves as the only testing ground for laws that restrict nonfundamental liberties such as the freedom of health and the freedom of contract. Again, both of these arguments rest on plausible premises, but only the second presents a viable distinction between this case and the ordinary semisubstantive case.<sup>137</sup>

The first argument utterly fails to differentiate the ACA litigation from ordinary semisubstantive review. Although it is almost certainly true, as a doctrinal matter, that a court applying robust forms of the freedom of health and freedom of contract would uphold the individual mandate against those challenges, semisubstantive review does not depend on the presence of an actual constitutional violation. In fact, the opposite may be true. Process-based invalidations seem to be more common for statutes that would *not* be held invalid on direct review.<sup>138</sup> That said, it is of course also true that semisubstantive invalidation is and ought to be inappropriate for a challenge that raises no true constitutional concerns, even if it nominally appeals to a constitutionally relevant interest. Courts have therefore applied semisubstantive review only for statutes that raise serious constitutional questions or doubts—or at least pose genuine challenges to broad constitutional values.<sup>139</sup> But the individual mandate does that.

### 1. The Freedom of Contract

Consider the freedom of contract argument. I'll be the first to admit that the arguments against the mandate are weak. Even during the *Lochner* era, when the freedom of contract received robust judicial enforcement, the case against the mandate would be significantly harder to make than scholars have implied in their passing references to the ACA plaintiffs'

---

137. See *infra* Part III.

138. See Manning, *supra* note 21, at 404 (“Indeed, the defining feature of constitutionally inspired clear statement rules is that even when a given interpretation of a statute would *not* violate the constitutional provision[s] from which the triggering value emanates, that interpretation might still be said to collide with the background value itself.”); Posner, *supra* note 53, at 816 (noting that semisubstantive review creates “a judge-made constitutional ‘penumbra’” by invalidating statutory applications that would not be unconstitutional on direct review); Vermeule, *supra* note 30, at 1960–61 (discussing this point and providing examples); Young, *supra* note 21, at 1552 (arguing that “soft limits” on constitutionally sensitive regulations are justifiable as judicial “resistance norms”).

139. See Young, *supra* note 21, at 1551 (defending semisubstantive review as a means of “push[ing] interpretations in directions that reflect enduring public values”).

*Lochner*-like arguments. The *Lochner* Court itself upheld insurance rate regulations against substantive due process challenges<sup>140</sup> under an exception for “statutes fixing rates and charges to be exacted by businesses impressed with a public interest.”<sup>141</sup> Under that exception, the Court allowed indirect approaches to rate regulation, including regulations of insurance brokers’ commissions,<sup>142</sup> and it might, therefore, have upheld the mandate as a measure intended to decrease rates by combating adverse selection. Furthermore, the *Lochner*-era Court twice dodged the question of whether compulsory insurance laws might breach the freedom of contract, refusing to invalidate apparent insurance mandates.<sup>143</sup> Notably in this regard, the first state requirement for automobile insurance passed in Massachusetts in 1925, at the height of the *Lochner* era,<sup>144</sup> and mandatory workers’ compensation regimes, which some states treated as insurance requirements, were introduced in the 1910s.<sup>145</sup> It is therefore not at all obvious that compulsory insurance provisions would violate the freedom of contract even if the substantive doctrine were enforced directly.

Nevertheless, there is something to Professor Randy Barnett’s insistence that a health insurance requirement is different in kind from all other laws compelling private economic transactions.<sup>146</sup> First, unlike other such penalties, including those upheld in *Wickard v. Filburn*<sup>147</sup> and *Heart of Atlanta Motel, Inc. v. United States*,<sup>148</sup> as well as all other kinds of

140. See *O’Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257 (1931); *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389, 412–13 (1914). Notably, during this era, insurance was not considered to be interstate commerce. Congress therefore could not implement rate regulations, but the states could. See *Paul v. Virginia*, 75 U.S. 168, 183 (1868), *overruled by* *United States v. Se. Underwriters Ass’n*, 322 U.S. 533, 552–53 (1944).

141. *Adkins v. Children’s Hosp.*, 261 U.S. 525, 546–47 (1923).

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

143. See *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 541–43 (1935) (noting that a California court had characterized the state’s workers’ compensation regime as “compulsory insurance,” but upholding the regime against a freedom of contract challenge on the ground that it merely assigned liabilities); *Hawkins v. Bleakly*, 243 U.S. 210, 219 (1917) (declining to address the constitutionality of a compulsory workers’ compensation regime that did not bind the party before the Court); see also *In re Opinion of the Justices*, 129 A. 117, 120 (1925) (upholding New Hampshire’s compulsory automobile insurance law against Equal Protection and dormant Commerce Clause challenges but failing to address a freedom of contract challenge).

144. JAMES M. ANDERSON ET AL., INSTITUTE FOR CIVIL JUSTICE, THE U.S. EXPERIENCE WITH NO-FAULT AUTOMOBILE INSURANCE: A RETROSPECTIVE 8 n.1 (2010), *available at* [www.rand.org/pubs/monographs/2010/RAND\\_MG860.pdf](http://www.rand.org/pubs/monographs/2010/RAND_MG860.pdf).

145. Gregory P. Guyton, *A Brief History of Workers’ Compensation*, 19 IOWA ORTHOPAEDIC J. 106, 108 (1999), *available at* <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1888620/>.

146. See Barnett, *Commandeering the People*, *supra* note 18, at 583–87.

147. 317 U.S. 111, 133 (1942) (holding that Congress could penalize a farmer for growing wheat for use on his farm).

148. 379 U.S. 241, 262 (1964) (holding that Congress could penalize private businesses who

compulsory insurance provisions, the ACA mandate is triggered simply by being a resident of the United States.<sup>149</sup> One need not buy a car, buy a home, employ people, open a motel, or grow wheat in order to trigger the ACA's penalty. Second, unlike other bare requirements of residency, the individual mandate is a requirement regarding private behavior. It is not a public duty of citizenship, like registering for the draft or serving on a jury—requirements for participation in popular government. Nor is it a tax (because it's not labeled a tax!), nor is it even an obligation to participate in a *public* entitlement program like Social Security or Medicare (which have participation requirements even for those who did not pay into the systems through taxation). The individual mandate is a requirement that all residents of the United States enter into private contracts with private insurance companies. Third, the ACA mandate is not quite like other simple incentives for private purchases, such as the first-time homebuyer tax credit.<sup>150</sup> Unlike those incentives, the ACA mandate has been accompanied by an extensive rhetoric of obligation, including the “mandate” moniker as well as state-interest justifications related to free-rider and collective action problems. Perhaps these kinds of “expressive” harms should not matter in the constitutional analysis, but they often do.<sup>151</sup>

Overall, these arguments are almost certainly insufficient to invalidate the ACA on direct substantive review. Indeed, all they really prove is that the ACA mandate is unprecedented. That said, however, the arguments do raise a hint of constitutional doubt under a basic freedom of contract; if nothing else, the novelty of the ACA demonstrates that the precise constitutional question has not been answered before. And these arguments certainly appeal to a general public value of economic liberty.<sup>152</sup> All told,

---

refused to serve African-Americans).

149. Pub. L. No. 111-148, 124 Stat. 119 (2010).

150. See *First-Time Homebuyer Credit*, IRS, <http://www.irs.gov/newsroom/article/0,,id=204671,00.html> (last visited March 18, 2012). Notably, no one treated the first-time homebuyer credit as a requirement that everyone buy a house, even though it was functionally indistinguishable from the insurance mandate. All U.S. residents who failed to buy a house in the relevant tax years paid \$8,000 more in taxes than they otherwise would have, which as a percentage of compliance cost is pretty close to the \$695 penalty for failure to buy health insurance. *Id.* The average home cost about \$270,000 in 2009, making the penalty about 3% of the cost of compliance. See *Average Home Prices 2009*, MONEY-ZINE.COM, <http://www.money-zine.com/Financial-Planning/Buying-a-Home/Average-Home-Prices-2009/> (last visited March 18, 2012). The average family health insurance plan costs about \$15,000, making the penalty about 5% of the cost of compliance. See *Average Cost of Family Health Insurance Plan Climbs 9 Percent*, INSURANCEQUOTES.COM, <http://www.insurancequotes.com/family-health-insurance-cost-rises/> (last visited March 18, 2012).

151. See, e.g., Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1532 (2000); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 733 (1998).

152. Certainly, if we take the Tea Party movement as a form of popular constitutionalism, then

then, the right answer is likely that the mandate is not constitutionally problematic but that the ACA plaintiffs have done enough to trigger ordinary semisubstantive review.

## 2. The Freedom of Health

In addition to their broad assertions of economic liberty, the plaintiffs have raised the more limited argument that the individual mandate impermissibly intrudes on healthcare autonomy. This argument, too, is quite weak on direct doctrinal analysis. The negative liberty interest that the Supreme Court has recognized in freedom of health cases is merely an application of the interest in bodily autonomy—a freedom to control medical decisions in order to control one’s bodily health. That freedom clearly includes a freedom to reject healthcare—an extension of the common law rule that forced treatment constitutes battery—and it also includes a freedom to obtain at least some kinds of healthcare, particularly reproductive services.<sup>153</sup>

The ACA mandate, however, is a requirement for health *insurance*, not *healthcare*. Individuals with health insurance remain free to reject whatever care they do not want and to consume whatever care they do want, though they might need to pay out-of-pocket for care that the insurer deems medically unnecessary.<sup>154</sup> The negative liberty interest is therefore largely, if not entirely, intact.<sup>155</sup> In short, the individual mandate does not require Americans to “eat their broccoli”—only to pay for it.<sup>156</sup>

---

we can say in somewhat conclusory fashion that the mandate raises constitutional doubts and intrudes on public values. *See generally* Ilya Somin, *The Tea Party Movement and Popular Constitutionalism*, 105 NW. U. L. REV. COLLOQUY 300 (2011); Rebecca E. Zietlow, *Popular Originalism? The Tea Party Movement and Constitutional Theory*, 64 FLA. L. REV. 483 (2012). *But see* Jared A. Goldstein, *Can Popular Constitutionalism Survive the Tea Party Movement?*, 105 NW. U. L. REV. COLLOQUY 288, 289 (2011) (arguing that “the Tea Party movement calls into question some of the central claims of popular constitutionalism”).

153. *See generally* Moncrieff, *supra* note 6, at 2216–27 (discussing the Supreme Court jurisprudence on the freedom of health).

154. *See id.* at 2247–51 (discussing the relevance of medical necessity review to the constitutionality of the individual mandate under a freedom of health); *see also* B. Jessie Hill, *What Is the Meaning of Health? Potential Constitutional Implications of Defining “Medical Necessity” and “Essential Health Benefits” Under the Affordable Care Act*, 37 AM. J.L. & MED. (forthcoming 2012) (discussing the ways in which the ACA will involve government in definitions of medical necessity, potentially in abrogation of the freedom of health).

155. *But see* Marshall B. Kapp, *If We Can Force People to Purchase Health Insurance, then Let’s Force Them to Be Treated Too*, 37 AM. J.L. & MED. (forthcoming 2012).

156. *See* Andrew Koppelman, *Health Care Reform: The Broccoli Objection*, BALKINIZATION (Jan. 19, 2011), <http://balkin.blogspot.com/2011/01/health-care-reform-broccoli-objection.html>; *see also* Florida *ex rel.* Bondi v. U.S. Dep’t of Health & Human Servs., 780 F. Supp. 2d 1256, 1288–89 (N.D. Fla. 2011) (“Congress could require that people buy and consume broccoli at regular intervals, not only because the required purchases will positively impact interstate commerce, but also because people who eat healthier tend to be healthier, and are thus more productive and put less of a strain on the health care system.”).

Nevertheless, the mandate raises a handful of plausible constitutional concerns under the freedom of health, including two narrow doctrinal questions and one broad values-based challenge. As a doctrinal matter, courts do sometimes invalidate mandatory payment structures when constitutionally important goods and services are at issue. In the First Amendment context in particular, the Supreme Court has invalidated two kinds of purely fiscal regimes that seem roughly analogous to the individual mandate.

First, subsidization and fee-setting regimes for artistic, religious, or political expression are unconstitutional if they are not neutral with respect to ideological content.<sup>157</sup> Even though such regimes obviously leave speakers free to engage in their preferred expressive activities with their own money, the Court has held that government may not distort the relative price to the speaker of various expressive contents. The same rule might render medical necessity review constitutionally problematic once government starts requiring everyone to have an insurance contract;<sup>158</sup> medical necessity review and its resulting payment decisions are emphatically non-neutral with respect to the relative values of medical services, and they definitely distort the relative price to the patient of various treatment decisions.<sup>159</sup> Admittedly, these same arguments have failed in the abortion context; the Supreme Court has upheld non-neutral subsidization regimes, such as Medicaid's coverage of childbirth but exclusion of abortion services.<sup>160</sup> The constitutional calculus might look quite different, though, for aspects of healthcare that do not involve life-and-death decisions or fetal interests.<sup>161</sup>

---

157. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845–46 (1995) (invalidating a university policy of refusing to fund religious student groups on the ground that the policy would chill religious expression on campus); *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 137 (1992) (invalidating a fee-setting regime for parades and assemblies in public places on the ground that the regime was not content-neutral and would therefore chill expression).

158. There is one important distinction, which is that the payment decisions are made by private companies rather than state agencies. Under the state action doctrine, that distinction might make all the difference, even though insurance companies are highly regulated. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 58 (1999) (holding that private insurers' utilization review, even when specifically statutorily authorized, does not constitute state action). The individual mandate and the ACA's additional insurance regulations, however, might render the government sufficiently entangled with the insurance companies to allow a finding of state action. *See, e.g., Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721–26 (1961).

159. *See, e.g., Aetna Health, Inc. v. Davila*, 542 U.S. 200, 204–05 (2004) (recounting the stories of two plaintiffs who (to their detriment) made healthcare decisions according to their insurers' determinations of medical necessity rather than purchasing doctor-recommended care out-of-pocket).

160. *Harris v. McRae*, 448 U.S. 297, 326–27 (1980); *Maher v. Roe*, 432 U.S. 464, 479–81 (1977).

161. *See, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992) (acknowledging that states have "a substantial interest in potential life" that needs to be balanced against a woman's reproductive autonomy).

Second, the Supreme Court has held that laws requiring cross-subsidizations of private commercial speech are unconstitutional, even though such regimes obviously leave speakers free to craft and convey their own messages with their remaining funds.<sup>162</sup> The individual mandate creates the same kind of mandatory cross-subsidization for healthcare by requiring individuals to purchase comprehensive coverage rather than insuring only against their individual risks.<sup>163</sup> The purpose and effect of the minimum coverage provision is to pool risk more broadly, redistributing from the healthy to the sick.<sup>164</sup>

I do not mean to suggest here that the individual mandate violates the freedom of health simply because it resembles unconstitutional speech regimes. The freedom of speech is given significantly greater weight in constitutional law than the freedom of health; there is a rule in First Amendment law that financial allocations constitute protectable expressive actions under the First Amendment,<sup>165</sup> which obviously makes economic regulations harder to pass in the First Amendment context; and the broad value underlying the First Amendment is the freedom of belief, which is more likely to have communitarian and financial dimensions than the highly individualistic, physical value of bodily integrity. The point here, however, is only that the individual mandate is not free and clear of constitutional doubt simply because the statute is about health insurance rather than healthcare. The mere retention of negative liberty is not always sufficient in constitutional analysis. At a minimum, these analogical arguments might be enough to create the kind of constitutional doubt that frequently triggers semisubstantive review.

More generally, the individual mandate raises a specter of excessive governmental involvement in healthcare decisionmaking, as the Tea Party has made clear in persistent references to healthcare rationing<sup>166</sup> and

---

162. See *United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001); *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 466 (1997); *Keller v. State Bar of Cal.*, 496 U.S. 1, 5–7 (1990); *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 222–23 (1977); see also Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147, 148–49 (2006) (discussing the forced subsidization cases in the compelled speech doctrine).

163. For example, an individual with minimal or no risk of becoming diabetic must nevertheless pay for diabetes coverage. See 42 U.S.C.A. § 18022(b)(1)(I) (West 2010) (requiring individuals to carry coverage for “chronic disease management”). That requirement is, and is intended to be, a mandatory subsidization of diabetic individuals’ healthcare consumption.

164. See Allison K. Hoffman, *Three Models of Health Insurance: The Conceptual Pluralism of the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1873, 1887–88 (2011) (discussing health redistribution as one of the ACA’s three goals).

165. See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 898 (2010).

166. See Martin Feldstein, *ObamaCare Is All About Rationing: Overspending Is Far Preferable to Artificially Limiting the Availability of New Procedures and Technologies*, WALL ST. J., Aug. 18, 2009, <http://online.wsj.com/article/SB10001424052970204683204574358233780260914.html>; Sarah Palin, *Lies, Damn Lies—Obamacare 6 Months Later, It’s Time to*

socialized medicine<sup>167</sup> (the two bogeymen that the freedom of health would be most likely to prohibit).<sup>168</sup> Although the penalty attached to the individual mandate is far from draconian and although individuals remain free in the post-ACA world to choose whatever course of treatment they prefer (as long as they can afford it), the mandate is undoubtedly a requirement for participation in a national healthcare system. It is plausible that the freedom of health is, broadly speaking, about allowing individuals to choose their healthcare environment, including the choice of whether an outside or government entity oversees their healthcare consumption decisions. The plaintiffs' arguments about healthcare autonomy, thus, evoke a relevant public value that might suffice to trigger semisubstantive review.

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

### C. *Whether Nonfundamental Liberties Get Indirect Protection*

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

Both Coenen, in his exhaustive review of Rehnquist Court semisubstantive review, and Professor Roderick M. Hills, Jr., in his less-exhaustive consideration of the Rehnquist Court's federalism jurisprudence, found that the Court provided indirect protection only to fundamental substantive values,<sup>169</sup> or at least substantive questions that are categorically aligned with fundamental values.<sup>170</sup> Assuming their

---

*Take Back the 20!*, FOXNEWS.COM (Sept. 24, 2010), <http://www.foxnews.com/opinion/2010/09/24/sarah-palin-health-care-reform-obamacare-berwick-death-panels-facebook/> (reasserting that “those rationing ‘death panels’ are there” in the ACA).

167. See, e.g., MICHAEL F. CANNON, CATO INSTITUTE, DOES BARACK OBAMA SUPPORT SOCIALIZED MEDICINE? (2008), available at [http://www.cato.org/pub\\_display.php?pub\\_id=9679](http://www.cato.org/pub_display.php?pub_id=9679); Shikha Dalmia, *ObamaCare Is a Trojan Horse for Socialized Medicine: Why Medicare-Style Insurance Will Kill Our Health Care System*, REASON.COM (June 19, 2009), <http://reason.com/archives/2009/06/19/obamacare-is-a-trojan-horse-fo>; Palin, *supra* note 166 (urging voters to “repeal and replace Obamacare” with “free market reform”).

168. See Moncrieff, *supra* note 6, at 2238–51.

169. See Coenen, *Semisubstantive Constitutional Review*, *supra* note 21, at 1283–84; Hills, *Individual Right to Federalism*, *supra* note 21, at 889–91.

170. Hills' argument was really that the Rehnquist Court protected “noneconomic” liberties in

characterization is right, the ACA case is certainly different from other semisubstantive cases. There can be little doubt that the freedom of health and freedom of contract are not currently fundamental liberties for constitutional purposes. The freedom of contract lost its fundamental status with the death of the *Lochner* era in 1937.<sup>171</sup> As for the freedom of health, the Supreme Court once referred to the freedom to reject care as a “significant liberty interest,”<sup>172</sup> but it applied something less than strict scrutiny in that case and has generally deferred to a wide range of state interests in freedom of health cases.<sup>173</sup> The one federal appellate opinion that deemed the freedom to obtain care a fundamental liberty interest was promptly overturned en banc and then denied certiorari.<sup>174</sup>

There might, therefore, be a genuine descriptive distinction between the ACA cases and a typical case of semisubstantive review insofar as the asserted liberties are not fundamental liberties.<sup>175</sup> The question, though, is whether that distinction should make a difference.

### III. EXTENDING INDIRECT PROTECTION TO NONFUNDAMENTAL LIBERTIES

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

---

this way. He thus aligned the Commerce Clause cases with the “zone of privacy” in Fourteenth Amendment law by pointing out that the boundaries of both doctrines seem to be defined by their “noneconomic” nature. This point does not quite argue that only fundamental rights get indirect protection, but it suggests that liberty interests must be in the same “zone” as fundamental rights in order to get protection. Hills, *supra* note 21, at 889–91.

171. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (ending the *Lochner* era).

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

173. See Moncrieff, *supra* note 6, at 2226–27 (noting that the freedom of health might be fundamental, given the Court’s usual balancing approach in freedom of health cases, but also noting that a wide range of regulatory projects count as compelling state interests for healthcare regulation).

174. See *Abigail Alliance v. Von Eschenbach*, 495 F.3d 695, 703, 711 (D.C. Cir. 2007).

175. Above, I noted hesitations about Coenen’s and Hills’ characterizations of the precedents. See *supra* notes 143–144 and accompanying text.

review “lite,” and that practice is inappropriate for liberties that have been removed from judicial protection altogether.

Although this argument has normative force, its conception of fundamentality is too static and its conception of political safeguards overly simplistic. Semisubstantive review in the context of nonfundamental liberties could serve two important and normatively desirable purposes. First, it could allow the judiciary to test political reactions to libertarian infringements in order to discern whether a liberty interest ought to garner stronger judicial protection. Second, even for liberties that clearly are and ought to remain nonfundamental, semisubstantive review allows the judiciary to give heightened protection to structural rules when they are most important: when they are serving as the only safeguards of liberty. This Part will elaborate each of these arguments in turn.

#### A. *Value Uncertainty and Enactment Cost Manipulation*

In Stephenson’s theory of semisubstantive review, his central claim is that judicial manipulation of legislative enactment costs helps to cure a particular informational problem in the judicial balancing of constitutional constraints against collective preferences.<sup>176</sup> The problem he identifies is that all constitutional constraints should and do give way when a collective interest in breaching them is sufficiently strong, but the political branches have better information than the judiciary about the true strength of an asserted collective interest. By raising the cost of political action when constitutional values are at stake, the judiciary gains important information about public preferences and collective needs and thereby cures the information asymmetry. If the political branches can reenact the problematic policy at the judicially manipulated higher price, then the asserted collective interest is much more likely to be genuine.

Stephenson’s theory, however, explicitly assumes away any uncertainty about the value of the underlying constitutional constraints themselves.<sup>177</sup> Indeed, Stephenson differentiates more generally between the countermajoritarian difficulty,<sup>178</sup> which he deems a legitimacy problem

---

176. See Stephenson, *supra* note 21, at 11:

I advance the stronger claim that judicial imposition of additional enactment costs on legislatures enables courts to reduce their comparative informational disadvantage. The better-informed government decisionmakers will only be willing to act when their true interest in the policy is sufficiently strong; government exaggeration of its true interest becomes a less viable strategy.

177. *Id.* (“[T]he Article assumes away concerns about whether the courts assign the appropriate level of normative significance to various rights, values, and interests.”).

178. *Id.* at 9 (quoting ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (1962)). See generally Barry Friedman, *The Birth of an*

with judicial definition of constitutional *values*, and the balancing difficulty, which he deems an informational problem in judicial determinations of constitutionally relevant *facts*.<sup>179</sup>

The dichotomy between fact and value, though, is not as strong as Stephenson implies. The importance of a particular constitutional constraint is not an abstract, fact-free value that judges unilaterally declare and then perpetually enforce. Instead, constitutional values are evolutive. They are both contingent on and responsive to popular social norms—contingent because judges are part of the populace and thus part of the shifting social environment, and responsive because judges seem aware of their own legitimacy constraints and willing to concede to popular pressures rather than risk court-packing or some other institutional attack.<sup>180</sup> As a result, individual liberties can and do shift between fundamental and nonfundamental status as social norms change, as demonstrated by the death of the *Lochner* era. And the phenomenon is not always as stark as “the shift in time”; the first declaration of an abortion right, for example, looked like it received strict scrutiny,<sup>181</sup> but as the right has evolved in the face of popular resistance, its judicial protection has ebbed.<sup>182</sup> In short, popular political preferences are relevant not only to state interest overrides but also to the strength of the constitutional constraints in the first place.<sup>183</sup>

Take, then, Stephenson’s theory that judicial resistance to antilibertarian legislation is a useful way to gain information about the strength of an asserted state interest. The same theory ought to apply when the information the judiciary lacks is the strength of popular interest in a general (small-“l”) libertarian norm. If a nonfundamental liberty constraint seems to be gaining popularity, the judiciary can use indirect protection

---

*Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) (detailing the countermajoritarian problem); Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933 (2001) (same).

179. Stephenson, *supra* note 21, at 9–11.

180. For an exhaustive historical survey of this phenomenon, see FRIEDMAN, *supra* note 32, at 370–71.

181. See *Roe v. Wade*, 410 U.S. 113, 155 (1973).

182. See *Gonzales v. Carhart*, 550 U.S. 124, 163–68 (2007).

183. This idea has much in common with the notion of popular constitutionalism, though I mean to offer a much more limited idea than the wholesale theories advanced by Dean Larry Kramer and others. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 9 (1999); see also JEREMY WALDRON, *LAW AND DISAGREEMENT* 15 (1999); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 928–29 (2006). The argument is not that the people are, or should be, ultimately responsible for defining the boundaries of constitutional liberties. It is only that the judiciary frequently does lend relevance to the subjective preferences of the governed when deciding how libertarian boundaries are defined and enforced, and enactment cost manipulation can help the judiciary in that project.

and enactment cost manipulation to test political willpower. If the political process continues to infringe the liberty interest without provoking further litigation, the judiciary can decide that the liberty is not worth elevating to fundamental status. If, however, the political process cannot overcome the higher enactment cost to pass additional legislation, then the interest in liberty must be stronger than its nonfundamental status would imply. Alternatively, if many or all subsequent infringements provoke constitutional challenges, then the judiciary could conclude that political safeguards are failing to account for the strong libertarian preferences of a minority group, and perhaps the judiciary should assign fundamental status to the liberty interest on that ground. A minority group's willingness to incur the costs of litigation reveals important information about the depth of its preferences.

To make this point more concrete, consider the ACA case. It certainly seems plausible that the Tea Party movement is, in part, an assertion of popular dissatisfaction with the nonfundamental status of economic liberty or healthcare autonomy. It also seems plausible, as a purely descriptive and predictive matter, that a deeply held and widely felt dissatisfaction of this kind could motivate the Supreme Court to elevate the freedom of contract or the freedom of health to fundamental status. But the actual depth and breadth of popular dissatisfaction is extremely hard to judge based on a single controversy, particularly for the politically insulated judiciary. With the Tea Party's arguments against the ACA as its only datum so far, the Supreme Court is in a poor position to decide whether it ought to heighten judicial protection for these two interests.

Structural invalidation, however, would help the judiciary to overcome its informational deficiency. Imagine that many states, including some that are party to the current litigation, enacted individual mandates after structural invalidation of the ACA. That would serve as a strong signal that the libertarian interest was not the problem with the ACA—that the plaintiffs were motivated by a genuine federalism interest or by pure political opportunism. Or imagine that many states enacted mandates, but they were all non-plaintiff states. That would indicate that the libertarian interest is stronger in some states than in others, which might be enough to justify the federalism holding.<sup>184</sup> Or imagine that Congress enacted an individual mandate under its taxing or spending powers or enacted a penalty for purchases of uninsured or uncompensated healthcare. Any of those outcomes would indicate that the libertarian interest was not held deeply or widely enough to block the (now costlier) federal legislation. On the other hand, imagine that the political process became incapable of reenacting a mandate in any of its permissible (and costlier) forms. Although that single case would not be enough to justify a change in

---

184. See generally Hills, *Westphalian Liberalism*, *supra* note 21, at 776–77; Maltz, *supra* note 105, at 164; Wilkinson, *supra* note 105, at 304–22.

constitutional doctrine, it would provide the judiciary with relevant information about evolving norms and preferences surrounding the freedoms of health and contract.

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

As noted briefly above, however, this representation-reinforcing theory does not explain the complement of fundamental liberties that the judiciary has chosen to protect or the methods the judiciary has chosen for protecting them.<sup>185</sup> Again, as a purely descriptive and predictive matter, the judiciary seems to care about popular libertarian preferences and to shift liberties between fundamental and nonfundamental status in response to shifting norms. My point here is only that enactment cost manipulation is a useful way for the courts to gain information about libertarian preferences, *to whatever extent they are relevant*, just as it is a useful way for the courts to gain information about regulatory preferences. To the extent that the Court wants to test the breadth and depth of popular demand for stronger substantive liberties, semisubstantive review will help it to do so.

### B. *Safeguarding the Safeguards*

Even if the judiciary wants to maintain the nonfundamental status of economic and healthcare freedoms, though, it still makes sense for the courts to take structural doctrines more seriously when nonfundamental liberties are at stake—and therefore to incorporate libertarian concerns into their structural analyses. Indeed, in some senses, the case for using semisubstantive review ought to be stronger for nonfundamental liberties than it is for fundamental ones.

There have been many defenses of semisubstantive review over the decades (as well as many critiques), but the one overarching justification for the practice is that it allows courts to make constitutional violations *harder* without making them *impossible*.<sup>186</sup> This has two virtues: first, it decreases error costs associated with direct judicial balancing of state and

---

185. See Baker & Young, *supra* note 126, at 83–84 (discussing cases that fail to track the representation reinforcing theory).

186. See Young, *supra* note 21, at 1552; Monaghan, *supra* note 20, at 28–29 (noting the desirability of congressional involvement in the elaboration of constitutional rights); Stephenson, *supra* note 21, at 5–6.

individual interests,<sup>187</sup> and second, it better preserves the political branches' co-equal role in elaborating substantive constitutional norms.<sup>188</sup>

There is a strong argument to be made that these effects lose their desirability when the substantive constitutional value at issue is a nonfundamental liberty.<sup>189</sup> Assuming that such liberties are nonfundamental because the political process can be trusted to strike the right balance between collective and individual interests, there is no reason for the judiciary to make these kinds of constitutional intrusions any harder than they already are under supermajoritarian regulatory requirements like bicameralism and presentment. Judicial oversight of the interest balance is entirely unnecessary, the argument goes, and the *judiciary* ought not to have a co-equal role in elaborating these norms.

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

To make this point more concrete, contrast the ACA situation as I have presented it with an alternative presentation. Imagine that I have overstated the threats to liberty that the ACA presents, in the characterization of either the constitutional questions or the liberty interests themselves. That is, imagine that the ACA raises no serious doubts under the freedom of health or freedom of contract or that those freedoms are entirely irrelevant. If that were true (and if it were true that the ACA's enactment process might have violated structural constitutional constraints), what would be the value of strict judicial construction and enforcement of structural rules? The only value would be that of the rules themselves: federalism in the abstract and deliberation in the abstract. Those values might be important as abstracted safeguards of liberty or as abstracted values, and it might therefore be worth enforcing the structural rules. But it ought to be clear that the total value of enforcement would increase if there were *also* a constitutional liberty interest at stake.

---

187. See Stephenson, *supra* note 21, at 5–6; see also discussion *supra* Part III.A (describing information effects).

188. See Monaghan, *supra* note 20, at 27.

189. See discussion *supra* Part III.A.

It is also worth contrasting this view with semisubstantive review of fundamental liberties. As discussed previously, the argument for semisubstantive review ought to be stronger for nonfundamental liberties than for fundamental ones. The reason is that fundamental liberties are, by definition, those that should not be invaded for the satisfaction of pure majoritarian interests.<sup>190</sup> The justification for removing such liberties from the political process is not entirely clear: it might be that majoritarian enactment processes will not account for strongly felt minority interests;<sup>191</sup> it might be that fundamental rights are “implicit in the concept of ordered liberty”<sup>192</sup> and therefore necessary for societal functioning,<sup>193</sup> or it might be that fundamental liberties are those that are morally required, regardless of majority views.<sup>194</sup> Regardless, the purpose and effect of affording strong judicial protection to fundamental liberties is to remove them from majoritarian or even supermajoritarian regulatory processes. Semisubstantive review, however, does not do that. Unlike direct substantive invalidation, semisubstantive review allows the political process to re-infringe liberty simply by paying a higher enactment cost. There might be good reasons to pursue this strategy, for example: a sense that the collective regulatory need is compelling enough to justify the intrusion on liberty, a sense that the intrusion on liberty is not significant enough to deserve full-blown substantive invalidation, or a sense that the political branches should have a role in elaborating substantive constitutional values. But the theoretical case for mere semisubstantive review of fundamental liberties (as opposed to full judicial review) is harder to make (requires greater nuance) than the case for safeguarding the safeguards of nonfundamental liberties.

#### IV. SAFEGUARDING OR DISTORTING THE SAFEGUARDS

Of course, the argument that judges are merely safeguarding the safeguards demands that semisubstantive structural holdings be defensible as enforcing rather than distorting the structural rules. Otherwise, judges are doing something other than upholding the constitutional mechanisms of libertarian protection (which might nevertheless be justified as enactment cost manipulation or something similar but which requires additional

---

190. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

191. *See ELY*, *supra* note 134, at 135.

192. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

193. *See* Abigail R. Moncrieff, *The Role of Individual Substantive Rights in a Constitutional Technocracy* 1–8 (Bos. Univ. Sch. of Law 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1874204](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1874204) (arguing that fundamental rights protect regulatory regimes that are systematically insusceptible to good technocratic regulation due to inherent value uncertainties).

194. *See* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 184 (1978) (discussing the view that individuals and politicians in this country believe that constitutional rights carry a normative quality, as opposed to being arbitrarily subject to the whims of the majoritarian politic).

argument). This potential problem has been a common critique of semisubstantive review generally, particularly with respect to the constitutionally motivated rules of statutory construction, which often lead judges to pursue unnatural interpretations of statutory language.<sup>195</sup> It has also been a common critique of the holdings in the ACA cases, as scholars have accused the ACA judges of creating two judicially inadministrable and structurally otiose rules in their holdings: both the “t-word rule” for the taxing power and the action–inaction distinction for the commerce power. As critiques of the judges’ holdings so far, I agree. An openly semisubstantive opinion, however, could do much better.

### A. *Taxing*

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

But, of course, there are substantive concerns underlying the rule. First and most obviously, the general value of democratic accountability comes into question if Congress can hide the ball during its enactment deliberations. It is not clear, though, that this kind of abstracted accountability concern should matter for Article I, Section 8 analysis. Congress did not lie about the effect the mandate would have on individuals, and that effect is relevant to taxing and revenue-raising for the general welfare—ends that Congress may pursue under its power to “lay and collect [t]axes.”<sup>196</sup> Given the course that the deliberations took, an informed voter should have realized (and probably did realize) that the mandate looked and quacked a lot like a tax. Overall, the argument that a bill’s supporters must use the word “tax” is not really an argument that they must make their deliberations more transparent, but rather that they must make their deliberations more salient by highlighting the compulsory nature of the exaction.<sup>197</sup>

If the “t-word” analysis incorporated concerns about economic liberty and healthcare autonomy, however, then a requirement for this particular

---

195. See Young, *supra* note 21, at 1577–78.

196. U.S. CONST. art. I, § 8, cl. 1.

197. See Schenk, *supra* note 83, at 256–63 (distinguishing among transparency, salience, and complexity).

kind of negative salience would become much more rational—and much more limited. The ACA plaintiffs’ substantive concerns are that Congress has imposed a new requirement on residency and has obligated participation in a national healthcare system. Both of those potentially troubling aspects of the mandate align well with the general aversion to “taxes.”

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

Second, unlike penalties, taxes are more closely associated with redistribution and social welfare. Particularly in a country with a safety net and a progressive income tax, voters probably associate taxing and spending programs with issues of redistribution in a way that they do not associate penalties with those issues. If the freedom of health problem with the mandate is that it requires universal participation in a scheme of cross-subsidization and health-based redistribution, then the word “tax” will do a better job than the word “penalty” at stimulating debate on the value and propriety of those effects. A semisubstantive ACA case, then, could hold that Congress must use the word “tax” rather than the word “penalty” when it wants to create constitutionally problematic redistributive programs—like healthcare-related redistributive programs—because the presence of the word “tax” will help voters to realize the proposal’s implications for this kind of healthcare autonomy. The word “tax” will enhance the operation of the liberty’s structural safeguards.

In short, the word “tax” generally is more salient than the word “penalty,” but the ACA holding need not be a general requirement that Congress use a negatively salient word in order to exercise its taxing and spending power. Two reasons for that saliency are directly related to the ACA plaintiffs’ and judges’ substantive libertarian concerns. The ACA judges could therefore reasonably hold that the political process—because

it is the only testing ground for and safeguard against infringements of economic and healthcare liberties—must raise the liberty concerns in a salient way if it wants infringements to survive constitutional scrutiny. The “t-word rule” will create that specific kind of salience in this case, enhancing (not distorting) the structural safeguard.

### B. *Commerce Clause*

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

The problem that the mandate seeks to solve is that individuals are irrationally optimistic about their personal health<sup>198</sup> and are therefore insufficiently risk-averse when managing their healthcare finances. Because individuals believe that they are unlikely to require costly medical interventions, they do not save enough to be able to afford such interventions when needed. Congress attempted to correct this problem by penalizing the irrationality itself—by penalizing the everyday business of failing to save—rather than by penalizing the undesirable effects of that irrationality, such as the consumption of uninsured or uncompensated healthcare.

The plaintiffs’ substantive argument is, in large part, an argument that individuals have a right to be irrational in this particular way, at least so long as the irrationality is not causing acute harm. The irrational individuals are making decisions about contracts and healthcare, both of which are constitutionally protected even when irrational, and it might also be true that not all of these individuals are consuming uncompensated care, filing for bankruptcy, or contributing to adverse selection as a result. In its best form, a semisubstantive holding would reason that this irrationality problem looks more like a behavioral problem falling under the states’ police powers than a commercial problem falling under Congress’s enumerated powers. A regularized penalty for a lifestyle decision or for a cognitive failure does not “regulate Commerce . . . among the several States”;<sup>199</sup> it regulates an individual behavioral problem that sometimes (or even usually) has commercial implications. This semisubstantive view aligns the case much more closely with *Lopez* and *Morrison*, which hinged

---

198. See Neil D. Weinstein & William M. Klein, *Resistance of Personal Risk Perceptions to Debiasing Interventions*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 313 (Thomas Gilovich et al. eds., 2002) (describing the persistence of optimism bias in patients’ judgments of their own health risks).

199. U.S. CONST. art. I, § 8, cl. 3.

on the Court's characterization of the statutes as behavioral rather than economic regulations.<sup>200</sup>

Of course, a semisubstantive invalidation would also need to hold that the mandate cannot be sustained under the Necessary and Proper Clause.<sup>201</sup> The correction of optimism bias is undoubtedly one possible means of reducing adverse selection problems and regulating health insurance markets, which are both commercial ends. Under a typical Necessary and Proper Clause analysis, this means–ends rationality ought to render the mandate constitutionally permissible. Under an openly and aggressively semisubstantive analysis, however, the Court could hold that a regularized penalty for failing to save is not a proper tool for the national government to use because it has implications for individual liberty. The Court could argue that *national* incentives for saving, all of which will intrude on economic liberty to one degree or another, should take openly compulsory forms, such as taxes, or should attach only to acute harms, such as consumption of uninsured care. In other words, the Court could argue that national incentives should target taken opportunities rather than foregone ones<sup>202</sup> so that voters will be able to see clearly and to combat effectively the antilibertarian consequences of the enactments. Otherwise, the decision to incentivize savings should not rest with Congress but with the states, which provide better safeguards for liberty, given their advantages of diversity, voice, and exit.<sup>203</sup>

Notably, the analyses in the ACA cases so far and the semisubstantive analysis proposed in this Article would (like all semisubstantive analyses) leave options open for Congress to reenact the mandate's precise incentive, either through "t-word" taxation or through penalties on taken opportunities. To the extent that Article I, Section 8 intends to facilitate corrections of interstate collective action problems, the ACA cases would not fully disrupt that goal.<sup>204</sup> If there is such a collective action problem in health insurance markets and if it is problematic enough to justify the intrusions on healthcare autonomy and economic liberty, then Congress will be able to reenact the mandate at the higher enactment cost.

## CONCLUSION

I want to reiterate that I believe the ACA to be constitutional under all current doctrines. I also am not personally inclined to value the libertarian

---

200. See *supra* note 93 and accompanying text.

201. See *supra* note 92 and accompanying text.

202. See *supra* Part I.B.1.

203. See *supra* note 104 and accompanying text.

204. See generally Cooter & Siegel, *supra* note 104, at 117–20 (discussing collective action problems); Neil S. Siegel, *Free-Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 LAW & CONTEMP. PROBS. (forthcoming 2012) (manuscript at 3–4), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1843228](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1843228).

interests that the ACA plaintiffs have asserted. I count myself as a lucky resident of Massachusetts, where I am already obligated to carry health insurance,<sup>205</sup> and I believe that the functional benefits of a national mandate will outweigh any antilibertarian costs.<sup>206</sup> Nevertheless, the scholarly reaction to the ACA cases seems out of proportion to the opinions' faults, and the scholarly discomfort with the blending of substance and structure seems entirely misguided. The ACA plaintiffs' arguments and the invalidating judges' opinions represent ordinary semisubstantive arguments, and I can see no reason why the habit of giving structural protection to substantive values should not extend to nonfundamental liberties. Indeed, it seems a good idea, at least in theory.

---

205. *See supra* note 17 and accompanying text.

206. *See generally* Moncrieff, *Cost-Benefit Federalism*, *supra* note 37.