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Liberty “vs.” Federalism in ACA Litigation

Posted on June 29, 2011 at 11:05 pm by Jay Schweikert

I’m planning on writing a couple posts specifically analyzing the recent Sixth Circuit decision upholding the individual mandate (Judge Sutton’s opinion in particular), but I first wanted to address a more general issue on which I have been called out by my fellow co-enrichers: namely, if the problem with the mandate is that it unduly infringes “liberty,” isn’t that *really* an argument about due process, not the Commerce Clause? Or alternatively, if we concede that *states* have the authority to pass mandates, why not the federal government as well?

Luke notes that this objection is “a point that . . . mandate-opponents don’t address often enough.” But with respect, I think the better characterization is that the *defenders* of the mandate who frequently make this charge have not really listened to the answers that mandate-opponents have (quite often) given. Randy Barnett discussed this exact point less than a month ago, and mentioned it in two of his Washington Examiner op-eds (here and here). Michael Carvin discussed the point in some detail in oral argument before the Eleventh Circuit (the relevant exchange begins at around 1:48:00, and the specific answer is around 1:52:00). And while I don’t have pincites, I am almost certain this same subject was discussed in the HLS debate between Professors Tribe, Fried, and Barnett, and before the Senate Judiciary Committee. I can further attest that I have seen it come up in some form in almost every Federalist Society debate I have seen on the topic (but I don’t have links for all of those). We can only hope that Just Enrichment will be the forum to put this issue to rest, once and for all.

Here’s the general answer: yes, the objections to the individual mandate are objections grounded in “liberty,” in that they argue that Congress has restricted individual liberty in a manner unauthorized by the Constitution. But there’s no *conflict* in saying that this is both a “liberty” case and a “federalism” case, because the whole *point* of federalism, and of separation of powers more generally, *is* to protect individual liberty, not to preserve the aesthetics of “divided powers” for its own sake. This is a distinction on which the Supreme Court has been quite clear, most recently in *Free Enterprise Fund v. PCAOB*, *Printz v. United States*, and *New York v. United States*. The Bill of Rights may be *one* way in which the Constitution protects liberty, but *another* way (and until 1791, the *only* way*) is through the enumeration of limited federal powers and horizontal division of the federal government. It is not for the honor and dignity of Massachusetts state legislators that we limit federal power, but because we think the division between state and national authority is the most effective structure for securing individual rights.

So why might a health insurance mandate violate the Commerce Clause, but not the Due Process Clause? Well, not to sound too obvious, but because the police power allows states to restrict your liberty in more ways than the national government. In *Lopez*, we could easily have said, “hey, what’s really at stake here is the *liberty* to carry guns near schools — but everyone accepts that the restriction at stake doesn’t violate due process, so why should states be allowed to do this when the federal government can’t?” But that approach completely misses the point — the question is whether the *manner* of restricting liberty is one *specifically* authorized by Art. I, § 8, or only *generally* authorized by the states’ police power.

Of course, we all know that Congress itself has lots of power to restrict individual liberty under the Commerce Clause. so what I take the “but isn’t this *really* about liberty?” objection to *really* be getting at is “why should *this* kind of economic liberty violation be problematic when all these *other* economic

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Contributors

- Adam Chandler
- Dustin Cho
- Greg Dihlmann-Malzer
- Nate Hamilton
- Jason Harrow
- Anthony Kammer
- Michael Kenneally
- Joshua Matz
- Luke McCloud
- Andrew Moshirnia
- Amanda Rice
- Mark Savignac
- Jay Schweikert

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- **Herman Cain’s Nightmare Vision of the First Amendment (27)**
  - Wood: You’ve got to be kidding me-it’s so trasnaprtenly clear now!
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  - Adam Chandler: From yesterday’s Washington Post: Perhaps in a first for a Supreme Court filing, it reports...
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  - Tom: Seems like a question you should answer prior to attending law school.
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Archives

- December 2011
- November 2011
- October 2011
- September 2011

liberty violations are okay?” But then that question just collapses into the standard debates about activity/inactivity, regulating commerce vs. creating commerce, etc. (more to come on that tomorrow). So the fact that this case is about “liberty” is no more problematic than in all the other federalism cases that have *also* been about liberty.

If the above explanation doesn’t work for you, or seems too simple, consider this slightly more technical approach: The Tenth Amendment talks specifically about the “powers . . . reserved to the States respectively, or to the people.” Which powers? Well, those “not delegated to the United States.” So unlike the Fifth Amendment, which we might say creates “free-floating” liberty protections, the Tenth Amendment is merely a *reflection* of the enumerated powers scheme. But when we’re trying to answer difficult questions about what powers actually *are* delegated to the United States, it helps to look at *both* sides of the coin. So we would certainly want to look very carefully at the specific text and structure of Art. I, § 8 itself, but we could *also* look to the Tenth Amendment (and some would say, the Ninth Amendment) to *inform* our interpretation of the enumerated powers.

This doctrinal approach, in which the “powers . . . reserved to the States respectively, or to the people” *inform* our understanding of the scope of the Commerce Clause, is the best way to understand the “anti-commandeering” cases (*New York* and *Printz*). The point is not that the Tenth Amendment grants some independent “right” to states to determine what laws they will pass — the Tenth Amendment is not a Fifth Amendment for states. Rather, the traditional prerogative of states to pass their own laws is evidence that the Commerce Clause does *not* reach this far. More generally, this is why we tend to be more skeptical of federal laws that touch on “traditional areas of state authority” (education, family law, violent crime, etc.): not because anything in the Constitution gives states a *shield* against federal regulation in these areas, but because our knowledge of traditional state authority makes us doubt that the enumerated powers really do authorize such regulation.

But of course, the Tenth Amendment also mentions “the people.” So when Congress, for the first time in American history, *affirmatively orders* individuals to buy a particular product from a private party, this novel attempt to violate liberty might *inform* our understanding of whether such an order is within the scope of the enumerated powers. I suppose we might say that the law violates “traditional areas of individual authority.” This is why Randy Barnett often refers to the mandate as an improper “commandeering of the people.” Obviously there’s still a lot more doctrine to work out, even accepting that basic framework — I’m not trying to say that the mandate’s infringement of traditional liberties somehow *proves* that it’s unconstitutional. I’m just trying to show how the *manner* of the liberty violation might be relevant in the inquiry (and relevant *specifically* to the federal government).

Now, might it *also* be the case that individual mandates violate due process, such that states could not pass them either? Sure, it’s conceivable. There’s no reason a federal law can’t be unconstitutional for two reasons, rather than just one. Surely there are all kinds of ways that Congress could violate the Bill of Rights that *also* exceed the enumerated powers (remember that before 1791, enumerated powers were the *exclusive* way the Constitution protected individual liberty). Of course, under current doctrine, a constitutional challenge to any regulation that the government can successfully brand as “economic” is dead on arrival, and usually won’t survive a motion to dismiss. I’ve previously written about how this disparate treatment of “economic” liberty is atextual, ahistorical, and has generally terrible consequences. I, for one, think there *is* a serious (but not obvious) due process challenge to the mandate — but not one that’s getting any traction in today’s courts.

And *that*, I believe, is the *real* reason why Fried, Tribe, Amar & Co. keep harping on this “but you’re *really* talking about liberty” argument, even after it gets answered again and again. It’s a trap. They *know* that the due process argument is a loser, so if they can *frame* the challenge to the mandate as being about “liberty” and *not* federalism, they know they’ve won. But for all the reasons discussed above, I don’t think admitting that the challenge to the mandate is “really about liberty” is the same as admitting that there’s not a genuine federalism problem.

*Excluding, of course, the few, affirmative “rule-of-law protections” in the original Constitution (habeas corpus, and the prohibitions on ex post facto laws, bills of attainder, and laws impairing the obligations of contracts).

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← The Rise of Partisanship Regarding the Separation of Powers

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- August 2011
- July 2011
- June 2011
- May 2011
- April 2011

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8 Responses to *Liberty “vs.” Federalism in ACA Litigation*

Amanda Rice *says:*
June 30, 2011 at 12:10 am

Thanks, Jay. Really appreciate this analysis.

One thought, not on the merits: I got the sense that in that portion of the opinion — the “intuition” riff — Sutton isn’t really talking to us. Instead, he seems to be addressing the casual constitutionalist, who has absorbed the general thrust of the arguments for and against the mandate but not their nuance. You know, the guy who is wound up by arguments about the government making him eat broccoli and bored by the Tenth Amendment.

I *do* think Judge Sutton’s intuition riff, which includes the “why don’t we care when states do this?”/due process bit, is overly dismissive/lacks nuance. But, as I said, I wonder whether that’s not because he’s speaking to a different audience. I think “Fried, Tribe, Amar & Co.” sometimes do the same thing — the popular “constitutional” objection to the mandate isn’t a constitutional one at all, it’s intuition with language from various NYT editorials mixed in. The constitutionality of the mandate has become a very political issue, and your average American (who made the smart decision *not* to spend $150k on a law degree) doesn’t know enough of the law to appreciate the nuance of the arguments (or even what’s really being argued about). “Fried, Tribe, Amar & Co.” v. Barnett is taking place not in law reviews, but in popular newspapers and press appearances.

Reply

Amanda Rice *says:*
June 30, 2011 at 12:15 am

Actually, just noticed you make an not entirely dissimilar point in the other thread.

Reply

Michael Kenneally *says:*
June 30, 2011 at 9:53 am

Would you say more about why you felt that part of his opinion was dismissive or lacking nuance? As far as it went, it seemed entirely convincing to me: If we’re adopting a construction of the Commerce Clause, we shouldn’t let ourselves be guided by considerations that are actually Due Process arguments and that, moreover, lead to untenable results such as invalidation of state mandates everyone accepts as constitutional.

Reply

Amanda Rice *says:*
June 30, 2011 at 1:58 pm

Sure.

To be clear, I agree with you (and Sutton): “If we’re adopting a construction of the Commerce Clause, we shouldn’t let ourselves be guided by considerations that are actually Due Process arguments and that, moreover,

lead to untenable results such as invalidation of state mandates everyone accepts as constitutional.”

But I do think that, in this section, Sutton is speaking to “most Americans,” and not to the more nuanced position Jay and the lawyers challenging the mandate actually put forth. He essentially says as much at the outset (page 51). And using the word “intuition” to characterize the position seemed, to me at least, a bit dismissive. If I were writing a brief and wanted to make an argument proffered by the opposing party seem silly, I might call it an “intuition.” (e.g., “Now that I’ve addressed all of plaintiffs’ *legal* arguments, I’ll turn to their *intuition* — almost as low a blow as calling an opponent’s argument a “policy argument” .)

The plaintiffs weren’t arguing that the government can’t make people do things as a general matter. The argument is much more nuanced and distinguishes between federal and state government power. I do think Sutton responds to the more nuanced argument in the previous portions of his opinion, and I think he was right to address this broader “intuition.” So perhaps what I meant to say is not so much that this portion of Sutton’s argument itself lacks nuance, but that the argument he’s responding to does.

Reply

Michael Kenneally *says:*
June 30, 2011 at 2:15 pm

OK, I see your point. I don’t have any major disputes about any of that. I can definitely see how a labeling of *someone else*’s view as an “intuition” comes off as dismissive. But I guess I read that section as being more autobiographical and therefore not as dismissive—as in, “I feel the force of this lingering intuition, as do many others, and I’m now going to see whether there’s anything to it.”

Reply

Response Post: *Monday Medley « No Pun Intended*

PrometheeFeu *says:*
July 4, 2011 at 12:36 pm

I agree with the point made by Jay above. As one of those who “made the smart decision not to spend $150k on a law degree” I was very much struck with that argument in the oral arguments: (Which again I have to thank Just Enrichment for pointing me to) The decision to select vertical and horizontal separations of power was not made because it is aesthetically pleasing or out of a particular love and respect for the members of the different state legislatures. It really was made as a way to safeguard individual liberty and I think that you cannot separate one from the other.

Reply

PrometheeFeu *says:*

July 4, 2011 at 12:54 pm

@Jay:

When I listened to the arguments, I clearly remember the government making the argument that if they mandated that you cannot refuse a solar panel to someone who asks for it, they would then be able to mandate that everyone spend money on the purchase of solar panels. When you write your post, I hope you say something about how the Court addressed that argument. That bootstrapping of authority is honestly kind of worrisome if validated in principle.

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