

Obamacare's individual mandate is a dangerous new federal power

Here's a thought experiment. Imagine that I tell you 100 things that you may not do tomorrow. For example, you cannot run on a treadmill, eat broccoli, buy a car, and 97 other things. While your liberty would be restricted, there would still be an infinite number of things you may still do.

Now suppose I tell you 100 things that you must do tomorrow. You must run on a treadmill, eat broccoli, buy a car, and 97 other things. These 100 mandates could potentially occupy all your time and consume all your financial resources.

You can see why economic mandates such as the individual mandate in Obamacare are so much more onerous than either economic regulations or prohibitions, and why so dangerous an unwritten congressional power should not be implied.

Now, we all know that Congress may mandate that citizens register for the military and serve if called, submit a tax form, fill out a census form, and serve on a jury. But each of these duties is necessary for the operation of government itself; and each has traditionally been recognized as inherent in being a citizen of the United States.

In essence, the individual mandate's defenders are claiming that, because Congress has the power to draft you into the military, it has the power to make you do anything less than this, including mandating that you to send your money to a private company and do business with it for the rest of your life.

To justify this claim of implied power, supporters of the individual mandate say that health care is different or unique. But whether or not this is true, a factual description of health care is not a constitutional principle.

It does not provide any principled line identifying when economic mandates are constitutional and when they are not. Once a power to conscript Americans to enter into contracts with private companies is accepted here, the Supreme Court will never limit it to any particular factual situation in the future.

From now on, Congress would have the power to impose economic mandates whenever it deems it convenient to its regulation of the national economy. So, when a defender of the insurance mandate says "health care is unique," you need to ask, "OK, but what is the constitutional limitation on the power to impose economic mandates?"

Some have responded that the commerce power is limited by the protection of "liberty" in the due process clause. But law professors know, even if the American people do not, that the Supreme Court now limits the due process clause to protecting only a very few specifically defined fundamental rights, none of which includes a right to refrain from doing business with private companies.

As important, claiming that the commerce clause is limited only by the due process clause or some other express prohibition in the Constitution is really to claim that, when the Constitution was enacted, Congress' enumerated powers in Article I were unlimited until they were qualified by adopting the Bill of Rights. Such a proposition has always been rejected by the Supreme Court.

For 200 years, Congress has gotten along without a power to mandate that every citizen enter into a contractual relationship with a private company, and do business with it (or another like it) for the rest of their life.

Congress has ample means to solve free-rider problems by regulating economic activity and devising tax and spending schemes. It does not need a new and dangerous power to compel every American to do business with a private company. Economic mandates are an unnecessary and improper means to the regulation of interstate commerce.

Randy E. Barnett teaches constitutional law at the Georgetown University Law Center. This column is based on testimony he delivers Wednesday before the House Judiciary Committee at a hearing on the constitutionality of the individual mandate.