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WILLIAM BRENNAN LECTURE 2014: *NFIB v. SEBELIUS* AND THE CONSTITUTIONAL DEBATE OVER FEDERALISM

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INTRODUCTION

I would like to start by thanking Professor Andrew Spiropoulos for his wonderful introduction, and all of you for braving the extreme cold to come and listen to a lecture about constitutional federalism.¹ I want to also thank Oklahoma City University for hosting the William Brennan lecture series. It is a great honor for me to follow in the footsteps of the many distinguished past lecturers, such as William Eskridge, Erwin Chemerinsky, Randy Barnett, Nicole Garnett, and last year's speaker, Judge Diane Sykes. Many of the previous lecturers are either former law school professors of mine or professional colleagues and mentors that I have learned a great deal from.

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1. It is perhaps worth noting that the temperature in Oklahoma City on the night I gave the lecture was barely above zero.

I should also say a word about Justice William Brennan, the man after whom this lecture series is named. He was unquestionably one of the most successful and influential Supreme Court justices of the twentieth century. I have to confess that he would probably agree with very little of what I am about to say tonight. But he did write a famous article on constitutional federalism in 1977 where he emphasized the role of state constitutions in protecting individual liberty in various ways.² Some of what I am about to say is in the spirit of that article, though it may not be fully in the spirit of Justice Brennan's overall views on federalism and constitutional law.

Today, I will focus on the most controversial federalism decision in recent Supreme Court history, *NFIB v. Sebelius*.³ It to a large extent upheld (albeit in a somewhat altered form) the Affordable Care Act—especially the individual health insurance mandate, which requires most Americans to purchase government-approved health insurance. Originally the mandate was to take effect in 2014, though it is not clear whether that requirement will fully take effect this year, due to the Obama administration's decision to delay implementation of the mandate for much of the population.⁴

The Obamacare case exemplifies a clash between two competing visions of constitutional federalism. On one side, we have what I would call the “New Deal Vision” growing out of the New Deal reaction to the Great Depression, which concluded that the lesson of that era was that we should interpret the scope of congressional authority to allow Congress to regulate virtually anything that has an effect on the national economy. Supporters of this view believe it to be not only the best interpretation of the Constitution but also an absolute necessity in the modern era, where we have a highly interconnected economy in which activity in one state routinely affects others.⁵ We must have centralized, expert regulation in order to deal with the many complex problems that arise in the modern world.

2. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (arguing that state governments can protect individual rights neglected or violated by the federal government).

3. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566 (2012).

4. See Clara Ritger, *Obama Administration to Delay Individual Mandate for Some*, NAT'L J. (Dec. 19, 2013), <http://www.nationaljournal.com/health-care/obama-administration-to-delay-individual-mandate-for-some-20131219>; *Obamacare's Secret Mandate Exemption*, WALL ST. J., Mar. 12, 2014.

5. See SOTIRIOS A. BARBER, *THE FALLACIES OF STATES' RIGHTS* (2013); ERWIN CHERMERINSKY, *ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY* (2008).

As President Franklin D. Roosevelt famously put it in 1935, we must “view the interstate commerce clause in the light of present-day civilization” as opposed to “the horse-and-buggy age when that clause was written.”⁶ The president went on to point out that

the whole picture was a different one when the interstate commerce clause was put into the Constitution [from what] it is now. Since that time, because of the improvement in transportation, because of the fact that, as we know, what happens in one State has a good deal of influence on the people in another State, we have developed an entirely different philosophy.⁷

On the other side, there is the limited government vision, which says that even in the modern world (or perhaps *especially* in the modern world), we need strong judicial enforcement of limits on Congress’ enumerated powers even if in some instances those limits make it more difficult for Congress to enact regulations that have an effect on the economy.⁸ Like their historic adversaries, advocates of the limited government view argue not just that it is the correct interpretation of the Constitution, but also that it is well adapted to the realities of the modern world. They claim that, far from calling for greater centralization, the complexity of the modern economy actually strengthens the case for limiting congressional power. The more complex things are, the more interdependent and less likely it is that a single set of one-size-fits-all regulations made at the center will actually work especially well.⁹ The more complicated the economy is, the greater the limitations of knowledge and incentives that the federal government faces and the more dangerous it is for its power to be largely unconstrained. In addition,

6. 4 FRANKLIN D. ROOSEVELT, *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 209 (1938).

7. *Id.* at 210.

8. See generally RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* (2014) (arguing for enforcement of tight limits on federal power, even under modern conditions); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (rev. ed. 2014) (arguing for enforcement of the original meaning of limits on federal power).

9. For a classic statement of this view, see, F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960).

limits on federal power foster beneficial competition between state and local governments and empower individuals to “vote with their feet.”¹⁰

The clash between these two visions runs through all of the major issues raised in *NFIB v. Sebelius*. In this lecture, I begin by focusing on the main argument that the federal government offered to justify the individual mandate—the claim that it is authorized by the Commerce Clause. I then address claims that it was authorized by the Necessary and Proper Clause and also of course by the Tax Clause, the argument that surprisingly ultimately more or less saved the individual mandate. The clash between competing visions of federalism is evident not only in the decision on the individual mandate, but also from the very different part of the case focusing on the states’ challenge to the Medicaid portion of the ACA, under which state governments that refuse to greatly expand their Medicaid programs were threatened with the loss of all federal Medicaid funds.

Finally, in the last part of the talk, I go beyond the legal aspects of the case to focus on how the debate over it was greatly influenced by the blogosphere. This was probably unprecedented relative to previous Supreme Court cases. A key role was played by the Volokh Conspiracy and by several of my colleagues on that blog.¹¹ One of them, Professor Randy Barnett, has been called “the godfather” of the case against the individual mandate by the *New York Times*.¹² He developed those arguments in large part through his blogging at the Volokh Conspiracy, which also played a key part in popularizing them and making them known to the legal community.

This has implications for the way future Supreme Court litigation on important cases will proceed. It also has some implications for the future state of the debate over constitutional federalism. If there is one

10. See, e.g., ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* 119 (2013).

11. We have discussed our role in much greater detail in a recent book. See RANDY E. BARNETT ET AL., *A CONSPIRACY AGAINST OBAMACARE: THE VOLOKH CONSPIRACY AND THE HEALTH CARE CASE* (Trevor Burrus ed., 2013).

12. See Kate Zernike, *Proposed Amendment Would Enable States to Repeal Federal Law*, N.Y. TIMES, Dec. 20, 2010, at A14 (noting that Barnett is “considered by many scholars to be the intellectual godfather of the argument that the health law is unconstitutional”). For another *New York Times* account stressing Barnett’s role in developing the arguments challenging the mandate, see Sheryl Gay Stolberg & Charlie Savage, *Vindication for Challenger of Health Care Law*, N.Y. TIMES, Mar. 27, 2012, at A1.

conclusion that we can safely draw from *NFIB vs. Sebelius*, it is that the debate is not going to end anytime soon.

I. THE INDIVIDUAL MANDATE

A. *The Commerce Clause*

I begin with the Commerce Clause justification for the individual mandate. This was initially the main reason why the federal government claimed that the individual health insurance mandate was authorized by the Constitution. The Commerce Clause gives Congress the power to “regulate Commerce . . . among the several States.”¹³ If you just look at the text of the clause without looking at anything else, it seems that in order to be authorized by it, a congressional regulation must meet two requirements. First, it must regulate commerce; second, the commerce it regulates must be interstate. When we consider the individual health insurance mandate from the standpoint of these requirements, it flunks both. It goes 0 for 2. Not having health insurance in and of itself is not commerce. And it also is not interstate.

This common-sense interpretation of the Commerce Clause is consistent with the way the Supreme Court interpreted the clause for roughly the first 150 years of American history. Generally speaking, it was restricted to regulating interstate transportation and the actual movement of goods and services across state lines.¹⁴ There were some borderline cases that the Court dealt with that perhaps could have gone either way,¹⁵ but that was the general dominant interpretation until the 1930s.

Since the late 1930s and early 1940s, the Supreme Court in a series of decisions has greatly expanded the scope of the Commerce Clause

13. U.S. CONST. art. I, § 8, cl. 3.

14. *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 203 (1824) (noting that “inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State” are part of the “immense mass” of issues not covered by the Commerce Clause).

15. *See, e.g.*, *Champion v. Ames*, 188 U.S. 321 (1903) (close 5–4 decision upholding a federal law banning the interstate transportation of lottery tickets, even though Congress’ purpose in enacting the law was primarily to control the in-state effects of lotteries). The dissenters argued that lottery tickets—because they lack any intrinsic value—are not actually “articles of commerce.” *Id.* at 367–68 (Fuller, C.J., dissenting).

beyond text and original meaning.¹⁶ We have come to the point where the Court now interprets the clause to give Congress the power to regulate virtually any economic activity. The Court's most extreme Commerce Clause decision, *Gonzales v. Raich* in 2005, the medical marijuana case, ruled that economic activity is anything that involves "the production, distribution, and consumption of commodities."¹⁷ I believe that this incredibly broad definition of the scope of the commerce power is severely flawed. One of my first academic articles on constitutional federalism was a piece devoted to explaining why *Gonzales v. Raich* is badly misguided.¹⁸ But even this ruling, as broad as it was, was not quite broad enough to cover the individual mandate case. Failure to purchase health insurance is not the production of a commodity, it is not the consumption of a commodity, and it certainly is not the distribution of a commodity. Thus, even *Gonzales v. Raich* was not broad enough to bring the individual mandate within the scope of federal Commerce Clause authority.

One can argue, as the government did, that the power to regulate interstate commerce is simply the power to make any regulations that might have a significant effect on commerce, especially in the aggregate.¹⁹ But if you take that position, then there will be unlimited power under the Commerce Clause to regulate or mandate practically anything. Certainly, Congress would have the power to mandate the purchase of virtually any commodity, including even broccoli—an example that came up a lot during the debate over this case.²⁰

16. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (establishing the broadest of the New Deal-era decisions expanding the scope of the Commerce power).

17. *Gonzales v. Raich*, 545 U.S. 1, 25 (2005) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)) (internal quotation marks omitted).

18. Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507 (2006).

19. Several of the lower court decisions upholding the individual mandate adopted this reasoning. See Ilya Somin, *A Mandate for Mandates: Is the Individual Health Insurance Case a Slippery Slope?*, 75 L. & CONTEMP. PROBS. 75, 82–83 (2012) (quoting *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 894 (E.D. Mich. 2010); *Mead v. Holder*, 766 F. Supp. 2d 16, 36 (D.D.C. 2011); *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 633–34 (W.D. Va. 2010), *vacated*, 671 F.3d 391 (2011)).

20. Federal district Judge Roger Vinson may have been the first judge to raise the broccoli analogy, in an opinion striking down the individual mandate in the case that eventually reached the Supreme Court. *Florida ex rel. Bondi v. U.S. Dep't of HHS*, 780 F. Supp. 2d 1256, 1289 (N.D. Fla. 2011), *aff'd in part, rev'd in part sub nom. Florida ex rel. Attorney Gen. v. U.S. Dep't of HHS*, 648 F.3d 1235 (11th Cir. 2011), *aff'd in part, rev'd in part sub nom. NFIB*, 132 S. Ct. 2566 (2012).

Undeniably, the purchase or non-purchase of broccoli has an effect on interstate commerce. The same can be said of seemingly non-economic mandates, such as a requirement that everyone must exercise every day or must get up at a certain time. People who exercise regularly are more productive than those who do not. I have seen this in my own life. If I go without exercise for a long time, I become much less productive. I contribute even less than the little that I usually contribute to the national economy. And the same applies to many other people. In the aggregate, therefore, lack of exercise has a substantial effect on interstate commerce. Thus, this line of argument leads to virtually unconstrained power. This is perfectly consistent with the New Deal vision, but not with the view that there must be meaningful limits on the scope of congressional power.

In an attempt to get out of this bind, during the course of the litigation, defenders of the individual mandate offered a series of what I have dubbed “‘health care is special’ argument[s].”²¹ These theories claimed that the health care market is somehow a special case, such that an unlimited federal power to regulate anything related to health care does not necessarily imply unlimited federal power in general. The most commonly offered argument of this type was the claim that health care is special because it is a product that all of us will use at some point in our lives.²² This supposedly differentiates it from most other products, including broccoli.

21. Ilya Somin, *A Taxing, but Potentially Hopeful Decision*, SCOTUSBLOG (June 28, 2012, 6:13 PM), <http://www.scotusblog.com/2012/06/a-taxing-but-potentially-hopeful-decision/>. For a more detailed critique of these arguments, see Somin, *supra* note 19, at 84–87.

22. This argument was advanced in almost every lower court decision upholding the individual mandate on Commerce Clause grounds. *See* *Mead v. Holder*, 766 F. Supp. 2d 16, 37 (D.D.C. 2011) (emphasizing “the inevitability of individuals’ entrance into . . . [the health care] market”), *aff’d sub nom.* *Seven-Sky v. Holder*, 661 F.3d 1, 18 (D.C. Cir. 2011) (emphasizing that “the health insurance market is a rather unique one, both because virtually everyone will enter or affect it, and because the uninsured inflict a disproportionate harm on the rest of the market as a result of their later consumption of health care services”), *abrogated in part by NFIB*, 132 S. Ct. at 2581; *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 894 (E.D. Mich. 2010) (“The health care market is unlike other markets. No one can guarantee his or her health, or ensure that he or she will never participate in the health care market The plaintiffs have not opted out of the health care services market because, as living, breathing beings . . . they cannot opt out of this market.”), *aff’d*, 651 F.3d 529, 544 (6th Cir. 2011) (emphasizing that “[v]irtually everyone requires health care services at some point”) *abrogated in part by NFIB*, 132 S. Ct. at 2581; *Liberty Univ. v. Geithner*, 753 F. Supp. 2d 611, 633–34 (W.D. Va. 2010) (“Nearly everyone will require health care services at some point in their lifetimes, and it

The problem with this argument is that it requires a bait and switch. It shifts the focus from health *insurance*, which is what the ACA actually requires us to purchase, to the broader category of health *care*. If everyone was already inevitably going to use health insurance, there would be no need for the individual mandate in the first place, since everyone would already have insurance.

If you allow the substitution of health care for health insurance, the same reasoning would justify the broccoli mandate or pretty much any other mandate. For example, not everybody eats broccoli, perhaps because not everyone likes it as much as I do. Many do not realize—as I did after doing some research on the subject—that broccoli is actually extremely good for your health.²³ But even those Americans who have the misfortune of not eating broccoli are participants in the broader market for food. Indeed, the market for food is even more difficult to avoid than the market for healthcare. If you do not believe me, just try avoiding it. You probably will not be able to do so for very long.

We can say the same thing about virtually any other purchase mandate you can imagine. Consider a mandate requiring the purchase of General Motors cars. Not everybody has a car. But everyone does participate in the market for transportation; even if you walk everywhere you go, you probably still have to purchase shoes. So you can justify a car mandate by exactly the same reasoning. I will not go through all the different types of mandates that could be justified in the same way. But I think you get the point. The market for health insurance is not nearly as special as it seems at first.

Another way in which the market for health insurance is supposedly special is that federal law, in some circumstances, requires health care providers to offer free services to those who cannot pay for it.²⁴ Therefore, requiring the purchase of health insurance is different from

is not always possible to predict when one will be afflicted by illness or injury and require care.”), *vacated*, 671 F.3d 391 (4th Cir. 2011). Justice Ruth Bader Ginsburg also argued this in her concurring opinion in the Supreme Court case. *See NFIB*, 132 S. Ct. at 2619–20 (Ginsburg, J., concurring in part, dissenting in part).

23. *See Somin, supra* note 19, at 82 n.27 (citing Lisa Chasan-Taber et al., *A Prospective Study of Carotenoid and Vitamin A Intakes and Risk of Cataract Extraction in US Women*, 70 *AM. J. CLINICAL NUTRITION* 509, 512–14 (1999); Kaumudi J. Joshipura et al., *Fruit and Vegetable Intake in Relation to Risk of Ischemic Stroke*, 282 *J. AM. MED. ASS'N* 1233, 1237 (1999); Martha L. Slattery et al., *Carotenoids and Colon Cancer*, 71 *AM. J. CLINICAL NUTRITION* 575, 577, 579 (2000)).

24. For this argument, see *Mead*, 766 F. Supp. 2d at 36–37.

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requiring the purchase of a product where there is no free service requirement.

The question arises: Why does this requirement make the situation constitutionally special as opposed to merely factually different? The answer seems to be that if you fail to purchase health insurance but then use free health care that providers are required to give, then they—the providers—suffer economically. And indeed, they do suffer. But the same thing happens anytime you choose not to purchase any product. If I decide not to buy broccoli, people who produce broccoli do not make as much of a profit as they would in a world where I do purchase it. If I choose not to purchase a car, car manufacturers suffer at the margin. And so on.

Maybe the pain is somewhat greater if, in addition to losing business, producers are forced to provide some free services. But that is just a difference in degree, not a difference in kind. Indeed, a relatively modest free service mandate may lead to less producer suffering than a large decline in voluntary purchases would. Consider what happened to the American auto industry when it began to face significant Japanese competition and there was a relative decline in the number of people willing to purchase American-made cars. That may have led to greater declines in the profitability of the auto industry than health care providers suffer from providing mandatory free service. In fact, such free services were only a small fraction of all health care expenditures in the U.S. before the ACA, and many of them were not even for people covered by the Obamacare health insurance mandate.²⁵ Overall, while there are some factual differences between this mandate and various other possible mandates, it is hard to see why there is any legal difference.

25. See Somin, *supra* note 19, at 86 (citing *Florida ex rel. Attorney Gen.*, 648 F.3d at 1244; COUNCIL OF ECON. ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 189 (2011)) (noting that uncompensated expenditures on free health care services for the uninsured were only about “0.3% of U.S. GDP for 2010,” “only a tiny fraction” of total health care expenditures). Moreover, most of this uncompensated care was provided not to people who would be required to purchase health insurance under the ACA but to individuals who are poor enough to be exempt from the individual mandate. See Avik Roy, *Myths of the “Free Rider” Health Care Problem*, FORBES (Feb. 2, 2011, 10:22 AM), <http://www.forbes.com/sites/theapothecary/2011/02/02/myths-of-the-free-rider-health-care-problem/>.

B. The Necessary and Proper Clause

Because the health-care-is-special arguments ran into various problems in the lower courts, over time the federal government began to put more emphasis on the claim that even if the mandate is not authorized by the Commerce Clause alone, perhaps it is authorized by a combination of the Commerce Clause and the Necessary and Proper Clause.

The Necessary and Proper Clause gives Congress the power “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”²⁶ The federal government claimed that even if requiring the purchase of health insurance is not a regulation of interstate commerce in itself, it was still necessary for the broader project of Obamacare, which undeniably regulates the important health care industry.

Since *McCulloch v. Maryland* (1819), the Supreme Court has defined the word “necessary” extremely broadly to mean anything that is “useful” or “convenient.”²⁷ It is hard to deny that the individual mandate is, at least to some extent, useful or convenient for regulating health care and health insurance. It may turn out to be less effective than its developers thought it would be. But it is certainly useful or convenient, at least in some minimum sense of these terms. Nor was it ever likely that the Supreme Court would somehow redefine “useful,” although great thinkers and political leaders and drafters of the Constitution such as James Madison actually believed that the Supreme Court was wrong to define “necessary” that broadly. Nonetheless, it’s very unlikely that the Court today is going to reverse 200 years of precedent and go back to James Madison’s views. Though I personally believe that Madison had a good case, it would be unlikely to persuade the Supreme Court.

But the Necessary and Proper Clause is not just the “necessary clause.” The word “proper” is in there also. And the Supreme Court ruled that a regulation authorized by the Clause must be both necessary *and* proper.²⁸ But they had never given a definition of what it means to be

26. U.S. CONST. art. I, § 8, cl. 18.

27. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413–15 (1819).

28. *Printz v. United States*, 521 U.S. 898, 923–24 (1997) (holding that the Necessary and Proper Clause does not authorize a federal law mandating that state officials conduct

“proper.” In *NFIB v. Sebelius*, the Supreme Court gave us its most thorough analysis to date of what “proper” actually means. The four dissenting Justices who would have struck down the law and Chief Justice Roberts concluded that the individual mandate is not proper.²⁹ As Roberts put it, “[e]ven if the individual mandate is ‘necessary’ to the Act’s insurance reforms, such an expansion of federal power is not a ‘proper’ means for making those reforms effective.”³⁰

The four dissenting justices, at the very least, endorsed the view that if proper means anything, it means that you can’t allow a rationale for the law that we give Congress virtually unlimited power.³¹ As James Madison put it in 1791, “Whatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress.”³² The government’s logic in this case would have created the very unlimited discretion that Madison said the clause could not possibly give to Congress. They were in effect saying that the mandate is useful and convenient for regulating interstate commerce and, therefore, it is necessary and proper.³³

And of course you can say exactly the same thing in defense of a mandate to purchase broccoli, a mandate to purchase cars, a mandate to purchase just about anything else in the world, or even a mandate to do something “non-economic,” such as requiring people to get up earlier or exercise regularly. There is almost no mandate that anybody could come up with that would not have at least some substantial effect on interstate commerce and, therefore, would not be at least somewhat useful and convenient for regulating the economy in some way. Because this argument would give Congress unconstrained authority, it should be ruled out as improper.

background checks on gun purchases). For a more extensive discussion of the relevant precedent, see Ilya Somin, *The Individual Mandate and the Proper Meaning of “Proper,”* in *THE HEALTH CARE CASE: THE SUPREME COURT’S DECISIONS AND ITS IMPLICATIONS* 146, 149–52 (Nathaniel Persily et al. eds., 2013).

29. For a more extensive discussion of this aspect of the decision, see Somin, *supra* note 28, at 146.

30. Nat’l Fed’n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2592 (2012).

31. See *id.* at 2646 (joint dissent) (concluding that “the scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power”).

32. James Madison, *Speech in Congress Opposing the National Bank* (1791), reprinted in *JAMES MADISON: WRITINGS* 480, 484 (Jack N. Rakove ed., 1999).

33. See Somin, *supra* note 28, at 155–57 (explaining this flaw in the government’s position in greater detail).

Chief Justice Roberts went somewhat beyond this minimalistic interpretation of “proper.” He instead endorsed the view, adapted from the language of *McCulloch v. Maryland*, that in order for a statute to be proper it has to create a merely “incidental” power—incidental to one of the already enumerated powers—and not a “great substantive and independent power[]” of its own.³⁴ Since the government’s logic would have created an unconstrained power to impose all sorts of other mandates, it was a great and independent power, not merely an incidental one. The basic idea is that Congress can use the Necessary and Proper Clause to pin a tail on a dog, but not a dog on a tail. A dog necessarily and properly needs a tail. But you cannot pin a dog on a tail by taking something relatively small and leveraging the Necessary and Proper Clause to tack a massive additional power on to it. In *NFIB*, we have a clear case of pinning a dog on a tail rather than pinning a tail on a dog.

Roberts’ analysis certainly does not give us anything close to a comprehensive statement of how to differentiate a great and independent power from an incidental one. This is one of the issues that will probably be left for future litigation. But it does offer a useful framework for those future Necessary and Proper Clause cases.

With respect to both the Necessary and Proper Clause and the Commerce Clause arguments, it is clear that if the Court had endorsed the federal government’s position, we would have a virtually unconstrained federal power to mandate anything. Going the other way, as the majority of justices did, preserves some limits on federal power—though the exact nature of those limits is far from completely clear.

C. The Tax Clause

The third argument that the federal government offered in defense of the mandate was the claim that it is authorized by the Tax Clause, which gives Congress the power to establish taxes to pay for various federal programs.³⁵ The fact that this argument is ultimately the one that prevailed was a major surprise to me and also to many other observers because it had consistently lost throughout the arguments of the lower courts. Fifteen out of 16 judges who had considered this issue in the lower courts all ruled against the government on it, including several

34. *NFIB*, 132 S. Ct. at 2591–92 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411, 418, 421 (1819)).

35. U.S. CONST. art. I, § 8, cl. 1.

liberal or Democratic-appointed judges who had upheld the mandate on other grounds. They all rejected the tax argument.³⁶

I am not the first law professor to suggest that the mandate might not be a tax. A much more famous former law professor said the same thing long before me. I refer, of course, to former constitutional law professor Barack Obama, who in 2009 stated that “for us to say that you’ve got to take a responsibility to get health insurance is absolutely not a tax increase.”³⁷ I believe he was absolutely right about that—and Chief Justice Roberts was absolutely wrong. The mere fact that a monetary penalty attaches if you don’t carry out a federal requirement cannot possibly in itself be enough to make it a tax.

In this field, unlike on the commerce and necessary and proper issues, we actually had a good deal of relevant Supreme Court precedent even before the Obamacare case. The Supreme Court has long distinguished between taxes on one hand and penalties on the other. And this case actually fit the Supreme Court’s long-standing definition of what counts as a penalty. For instance, in 1931, and again in 1996, the Court indicated that “a penalty . . . is an exaction imposed by statute as punishment for an unlawful act” or, in this case, an unlawful omission.³⁸ The individual mandate fits this definition to a “T.” Unless you buy the kind of insurance the government says you must purchase, you must pay a fine.

There was an overwhelming consensus in the lower courts on this issue. Even lawyers for the federal government did not have a lot of confidence in this argument, which may be why they relegated it to the last few pages of their Supreme Court brief, which, as experienced appellate lawyers know, is where you put your weakest arguments that you believe have little chance of succeeding.³⁹ Nonetheless, the tax argument ended up prevailing. Chief Justice Roberts endorsed it, and the

36. See Somin, *supra* note 19, at 87 n.53; cf. *Seven-Sky v. Holder*, 661 F.3d 1, 2–11 (D.C. Cir. 2011) (concluding that the mandate is a penalty rather than a tax for purposes of the Anti-Injunction Act, but without making clear whether this means it is not a tax for constitutional purposes).

37. Chris Good, *Obama in 2009: The Individual Mandate Is Not a Tax*, ABC NEWS (June 28, 2012, 10:32 AM), <http://abcnews.go.com/blogs/politics/2012/06/obama-in-2009-its-not-a-tax/>.

38. *United States v. La Franca*, 282 U.S. 568, 572 (1931). This definition was reaffirmed in *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996).

39. Brief for Petitioners (Minimum Coverage Provision) at 52–59, *NFIB*, 132 S. Ct. 2566 (No. 11-398).

four liberal Justices agreed. The Chief Justice offers four distinctions between this thing and what would be an actual mandate that, in his view, justifies calling it a tax, as opposed to a regulatory mandate or penalty.

Chief Justice Roberts first admits that describing the mandate as a tax is not “the most natural interpretation of the [law].”⁴⁰ He recognizes that “[t]he most straightforward reading of the mandate is that it commands individuals to purchase insurance,”⁴¹ which is what all the lower courts that ruled on the issue had said it was. But then Roberts argues that the mandate must be reinterpreted as a tax authorized by the Tax Clause in order to save the statute from being unconstitutional.⁴² Roberts notes several distinctions between the health insurance requirement and a true mandate that, in his view, make it possible to adopt a saving “construction” that avoids unconstitutionality.⁴³

One of his distinctions is that this is a monetary fine as opposed to a law where violators are threatened with incarceration or other penalties.⁴⁴ This distinction does not work very well. There are many crimes for which the penalty is a fine—think of most traffic offenses, for example. Nobody would contend that speeding laws are taxes, even though if you get caught speeding, usually you only have to pay a fine and will not be sent to prison.

A second distinction that he emphasizes is that the fine must not be so high as to be “prohibitory.”⁴⁵ You must have a genuine choice: either pay a few hundred dollars every year if you do not have health insurance or follow the dictate of the ACA. As Roberts puts it, “for most Americans the amount due will be far less than the price of insurance It may often be a reasonable financial decision to make the payment rather than purchase insurance.”⁴⁶

This point, too, does not strike me as very persuasive. There are many criminal laws where the penalties are relatively small. Think of traffic tickets or parking tickets or many types of low-level offenses. Most of the time, we surely have a genuine choice about whether to park

40. *NFIB*, 132 S. Ct. at 2594.

41. *Id.* at 2593.

42. *Id.* at 2594.

43. *Id.* (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

44. *Id.* at 2595–96.

45. *Id.* at 2596 (quoting *Bailey v. Drexel Furniture, Co. (Child Labor Tax Case)*, 259 U.S. 20, 37 (1922)).

46. *Id.* at 2595–96 (footnote omitted).

illegally or not. You might end up paying a fine if you violate the law. But for some people it is clearly, in Roberts' terms, a reasonable financial decision—if you are in a big hurry to get to an important job interview, for example. Under his analysis, the parking ticket would also potentially be a tax rather than a penalty.

A third distinction, Roberts argued, is that there is no scienter requirement,⁴⁷ which in plain English means that in order to hit you with a fine under the mandate, the government does not have to prove that you deliberately violated the law. It need only prove that you in fact did not buy the required health insurance even if you were not deliberately intending to violate the ACA. But, as the dissenting justices point out, there are many strict liability crimes on the books.⁴⁸ Strict liability criminal offenses and penalties are certainly not unknown to the law.

Finally, the Chief Justice emphasizes that the fine is enforced by the Internal Revenue Service (IRS), the bureaucracy usually tasked with collecting taxes, and therefore that makes it different from ordinary regulations which usually are enforced by other regulatory agencies.⁴⁹ To my mind, this is just a matter of bureaucratic convenience. If the IRS had the job of enforcing parking tickets or enforcing regulatory penalties against corporations that pollute, for example, that would not transform these penalties into taxes. It would just mean that Congress, for a variety of possible reasons, decided to assign the enforcement task to one bureaucracy rather than another.⁵⁰

Collectively, the four criteria that Roberts emphasizes impose some procedural constraints on congressional power, even though they impose almost no substantive constraint. Under Roberts' approach, Congress can use penalties reinterpreted as taxes to incentivize individuals to do almost anything, including purchasing broccoli, purchasing cars, or waking up early. But there is a limit to how much pressure the government can put on you. One constraint is that it can only impose a monetary fine. It cannot send you to jail or execute you for failing to carry out these commands. Another is that the fine cannot be so high as to be coercive.

47. *Id.* at 2596.

48. *Id.* at 2654 (joint dissent) (quoting *Staples v. United States*, 511 U.S. 600, 618 (1994)).

49. *Id.* at 2595–96 (Roberts, C.J.).

50. As the dissenting justices point out, there are in fact various examples of laws under which the IRS collects penalties. *Id.* at 2654 (joint dissent) (citing 26 U.S.C. §§ 527(j), 5761(c), 9707 (2006); *United States v. Reorganized CF&I Fabricators, Inc.*, 518 U.S. 213, 224 (1996)).

An interesting question is how high it has to get before it reaches that point. Roberts did not clearly address that issue. But it may be an important one down the road. For many people it could be financially advantageous to pay the fine rather than to buy the much more expensive health insurance that they will be required to purchase under Obamacare.⁵¹

In order to make the system work effectively, it is possible that Congress will need to increase the fine in the future. And if increased, at some point it will be high enough to be “prohibitory,” though we may have to wait for the next time this issue gets to the Supreme Court to find out how high is too high. Be that as it may, Roberts’ opinion surely does impose some constraints on how high a fine can be before it ceases to be a tax. We can argue about whether two or three thousand dollars a year is high enough to be coercive. But surely ten, twenty, or thirty thousand dollars would be. Potentially, therefore, this could be an important constraint.

Lastly, there is Roberts’ assumption that if you pay the fine, you are not considered a lawbreaker.⁵² From the standpoint of economic incentives this may not be important. But many people, if they feel they are not actually lawbreakers if they fail to carry out the mandate, see it differently from a moral point of view.⁵³ Obviously, there are limits to public respect for the law: many people drive faster than the speed limit every day, even though they realize that they are lawbreakers if they do so. But nonetheless, this aspect of Roberts’ ruling may diminish compliance with the individual mandate when and if the government begins to enforce it in a serious way.

As interpreted by Roberts, the Tax Clause limits Congress’ powers in a procedural sense but also gives it more or less unlimited power with respect to the substance of the commands backed by “taxes.” This attempt to split the baby may be politically convenient and represent an act of judicial statesmanship by the Chief Justice, as some have

51. Roberts himself cites Congressional Budget Office projections suggesting that at least four million people each year might choose to pay the fine rather than purchase the required insurance. *Id.* at 2597 (citing CONG. BUDGET OFFICE, SELECTED CBO PUBLICATIONS RELATED TO HEALTH CARE LEGISLATION, 2009–2010, at 71 (2010), available at www.cbo.gov/sites/default/files/chofiles/ftpdocs/120xx/doc12033/12-23-selectedhealthcarepublications.pdf).

52. *Id.* at 2596–97.

53. See, e.g., TOM TYLER, WHY PEOPLE OBEY THE LAW (rev. ed. 2006).

suggested.⁵⁴ But it does not seem very logically coherent. At least not to me.

II. THE MEDICAID RULING

The general theme of a clash of constitutional visions also applies to the Medicaid part of the decision. Many people, myself included, underestimated the significance of this issue before the Supreme Court ruled on it. The argument had lost in the lower courts, and we did not expect to succeed in the Supreme Court.⁵⁵ Ironically, it ended up prevailing by a 7–2 margin, with Justices Stephen Breyer and Elena Kagan joining the five most conservative justices in the majority.⁵⁶

In retrospect, we should not have been so surprised. The Court ruled the way it did because otherwise there would have been virtually no structural constitutional limits on Congress' power to pressure the states by means of conditional spending grants. The ACA required states to vastly expand their Medicaid health care programs to cover everyone with an income up to 133% above the poverty line. If they refused, they would lose all of their Medicaid funding, which for most states is a very large proportion of their total budget—10–15% or even more.⁵⁷ As a practical matter, the states would have had no meaningful choice at all.

Since the 1930s, the Supreme Court has interpreted Congress' powers under the Tax Clause very broadly.⁵⁸ Although the Spending Clause only authorizes Congress to use tax revenue “to pay the Debts

54. See, e.g., Jeffrey Rosen, *Big Chief: How to Understand John Roberts*, NEW REPUBLIC, Aug. 2, 2012, at 13 (noting that “liberals found themselves in the unexpected position of applauding Roberts for his act of judicial statesmanship”); David Von Drehle, *Roberts Rules: What the Health Decision Means for the Country*, TIME, June 16, 2012, at 41 (claiming that Roberts' approach had “vindicated the virtue of compromise in an era of Occupiers, Tea Partyers, and litmus-test[ers]”).

55. See *Florida ex rel. Attorney Gen. v. U.S. Dep't of HHS*, 648 F.3d 1235, 1268 (11th Cir. 2011), *abrogated in part by NFIB*, 132 S. Ct. 2566. (rejecting this argument).

56. *NFIB*, 132 S. Ct. at 2601–08.

57. See *id.* at 2604 (citing 42 U.S.C. § 1396d(b) (2010); NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT 2010, at 11 (2011), *available at* <http://www.nasbo.org/sites/default/files/2010%20state%20expenditure%20report-0.pdf>) (showing figures indicating that for the average state, Medicaid spending accounts for 20% of its total budget, of which federal grants cover between 50–83%, which means that states generally get between 10–16% of their total budget from federal Medicaid grants).

58. See, e.g., *Helvering v. Davis*, 301 U.S. 619, 640 (1937) (“The discretion [to decide whether spending is in the general welfare] . . . is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.”).

and provide for the common Defence and general Welfare of the United States,”⁵⁹ the Supreme Court had interpreted the general welfare to be almost anything that Congress says that it is. Therefore, Congress can impose almost any conditions they want on states when they give the states conditional spending grants, so long as the conditions are clear and do not violate some other part of the Constitution.⁶⁰

However, both in the 1930s and in the important 1987 decision in *South Dakota v. Dole*,⁶¹ the Court had said the conditions cannot be so onerous as to be “coercive.” But the Court did not explain how onerous a condition has to be before it violates this rule. The ACA is an extreme example of federal pressure through conditional spending. If any conditional spending grant could be coercive, this one was. Refusing states stood to lose 10% or more of their total budget—not just 10% of all federal grant money but 10% of all the money in their budget. As Chief Justice Roberts famously put it in his opinion, this was like “a gun to the head,”⁶² at least a fiscal gun to the head, if not an actual gun pointing at the head of the governor of the state. If the Supreme Court was going to maintain any meaningful limits under the coercion standard at all, it had to draw a line in this case.

I must admit that I myself am not a fan of the coercion test. I believe there is nothing in the text of the Constitution which says that non-coercive grants are permissible, whereas coercive ones are not. In my view, the right way to constrain congressional power in this area is to revisit the jurisprudence on the meaning of “general welfare.”⁶³ I do not agree that “general welfare” means whatever Congress says it means.

But the Court is unlikely to revisit 1930s decisions on the meaning of general welfare any time soon. Given that reality, its only practical option for limiting the scope of federal spending power was to enforce the coercion test in this case. I believe that is why the Court ultimately ended up resolving the issue the way it did.

59. U.S. CONST. art. I, § 8, cl. 1.

60. *See, e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

61. *Id.* at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937) (noting that “pressure” through conditional spending grants may become unconstitutional when it “turns into compulsion”)).

62. *NFIB*, 132 S. Ct. at 2604.

63. *See* Ilya Somin, *Closing the Pandora’s Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 491 (2002).

Ultimately, the Obamacare case ended in a kind of standoff between the two competing visions of federal power, with each side winning some parts of the case and losing others. Defenders of the New Deal vision succeeded in persuading the Court to uphold most of the ACA, including the individual mandate (albeit reinterpreted as a tax). Advocates of the limited government vision prevailed on the Medicaid issue and saw a majority of the Court endorse their key arguments on the Commerce and Necessary and Proper Clauses, including the Court's most thorough exposition to date on the meaning of "proper."

III. THE BLOGOSPHERE AND THE PUBLIC DEBATE OVER THE OBAMACARE CASE

In considering how this result came about, it is worth looking not just at the relevant legal doctrine but also at the interesting way in which the debate over the legal issues in Obamacare developed. The issues were contested in the court of public opinion as well as in the courtrooms. That, in and of itself, was not a new phenomenon. Going back all the way to the 19th century, activists and others have simultaneously waged constitutional battles in both arenas.

The abolitionists did this in the early 19th century, as did the NAACP and the civil rights movement, the women's rights movement, gun rights advocates, and many other groups that can be named.⁶⁴ When I read an article in *The Atlantic* that suggested it was unusual that Randy Barnett and other lawyers involved in the case against the individual mandate dared to appeal to public opinion while at the same time arguing in court,⁶⁵ I was very surprised. It actually was not unusual at all. Thurgood Marshall did the same thing, as have many others.

What was perhaps new and unprecedented was that this appeal to public opinion took place in part in the blogosphere and not just in traditional media—including at the Volokh Conspiracy, where I am one

64. For a summary of how some of these movements effectively combined litigation and political action, see ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* (forthcoming June 2015), conclusion.

65. Adam Teicholz, *Did Bloggers Kill the Health Care Mandate?*, ATLANTIC (Mar. 28, 2012, 3:00 PM), <http://www.theatlantic.com/national/archive/2012/03/did-bloggers-kill-the-health-care-mandate/255182/>. I responded to the article in Ilya Somin, *Crediting/Blaming the VC for the Possible Defeat of the Individual Mandate*, VOLOKH CONSPIRACY, (Mar. 28, 2012, 6:03 PM), <http://www.volokh.com/2012/03/28/creditingblaming-the-vc-for-the-possible-defeat-of-the-individual-mandate/>, reprinted in BARNETT ET AL., *supra* note 11 at 184–86.

of the regular bloggers.⁶⁶ Many of the arguments against the individual mandate were first developed by Randy Barnett, Jonathan Adler, David Kopel, and some of our other Volokh Conspiracy co-bloggers. Only later were they embodied in legal briefs and academic articles. The Volokh Conspiracy therefore played a key role in developing and presenting the constitutional case against Obamacare.

The blog also played a significant role in influencing the course of the public debate. When Obamacare first was debated in late 2009 and early 2010, right before the statute was enacted and just after, many of the defenders of the individual mandate claimed that it was obviously constitutional. If you believed it was unconstitutional, either you were a person who just doesn't know anything about constitutional law or you might be a partisan hack seeking to help the Republican Party against the Obama administration.⁶⁷ By presenting arguments against the individual mandate by prominent legal scholars, the Volokh Conspiracy was able to undercut the meme that there was a consensus among experts on this issue.⁶⁸

The blog was particularly well-suited to this task in two ways. First, thanks to UCLA law professor Eugene Volokh (who co-founded the blog with his brother Alexander), Randy Barnett, and others, the Volokh Conspiracy had already developed a large audience among legal scholars, jurists, and reporters. Arguments presented there had wide dissemination in the media and the legal community.

Second, in the blogosphere we could respond to events in real time. We could almost immediately post something on the Volokh Conspiracy

66. For my more detailed thoughts on the impact of the Volokh Conspiracy and the blogosphere on the debate over the Obamacare case, see Ilya Somin, *Postscript and Concluding Thoughts*, in BARNETT ET AL., *supra* note 11, at 270–73.

67. For a compilation of some of the dismissive early responses to the constitutional arguments against the individual mandate by supporters of the law, see David Hyman, *Why Did Law Professors Misunderestimate the Lawsuits Against PPACA*, 2014 U. ILL. L. REV. 805, 807–12. Although Hyman focused on statements by law professors, similar comments were made by other Obamacare advocates. For example, in December 2009, Senator Max Baucus claimed that the views of congressional Democrats on the constitutionality of Obamacare were supported by a consensus of “those who study constitutional law as a line of work.” Ilya Somin, *The Myth of an Expert Consensus on the Constitutionality of an Individual Health Insurance Mandate*, VOLOKH CONSPIRACY (Dec. 23, 2009, 6:11 PM), <http://volokh.com/2009/12/23/the-myth-of-an-expert-consensus-on-the-constitutionality-of-an-individual-mandate/>, reprinted in BARNETT ET AL., *supra* note 11, at 22.

68. This point was the focus of one of my earliest posts about the issue. See Somin, *supra* note 67, at 22–23.

right after a development in the case arose. That made it much easier to influence the debate than it would have been through the traditional method of publishing law review articles. A journal article usually takes many months to be written, revised, edited, and published.

Finally, the Volokh Conspiracy bloggers involved, particularly Randy Barnett and Jonathan Adler, were prominent legal scholars and experts on constitutional federalism. It was difficult to dismiss them as either people who did not know anything about constitutional law or hacks for the Republican Party or for some interest group. Indeed, Randy himself had clashed with the Bush administration in *Gonzales v. Raich*,⁶⁹ in which he had represented the medical marijuana users who challenged the constitutionality of the federal ban on medical marijuana. It was therefore hard to paint him as simply a shill for the Republicans.

The blogosphere also had the effect of broadening the debate over constitutional law. Experts who were not in the top five or six or seven law schools were able to reach a broader public than before. In the pre-blogosphere age, the media would mostly go to people at Harvard or Yale or one or two other schools to comment on major constitutional cases. Now, people like Randy Barnett and others were able to have more of an influence on both the media—and through them—public opinion.⁷⁰

It is important not to overstate this point. I do not claim that the blogosphere completely democratized the debate over constitutional law. Far from it. Anyone can start a blog. That part is easy. But it is much harder to attract attention to what you write. The Volokh Conspiracy would have had much less impact if it were not for the fact that Eugene Volokh, Randy Barnett, and several of the others were well-known constitutional law scholars as well as bloggers. If they had not been, their posts on the Obamacare case would have attracted much less attention. Even so, a broader circle of people can now influence the debate through the blogosphere than they could through the traditional media 20 or 30 years ago.

In these and perhaps other ways, the blogosphere did have an important effect on the debate over Obamacare. But it is also important

69. *Gonzales v. Raich*, 545 U.S. 1 (2005). Ironically, Barnett's opponent in *Raich* was Bush administration solicitor general Paul Clement, who later argued *NFIB v. Sebelius* on behalf of the state governments challenging the ACA. See *NFIB*, 132 S. Ct. at 2566.

70. This point is emphasized in David Bernstein, *Conclusion to BARNETT ET AL.*, *supra* note 11, at 267–68.

to emphasize that the blogosphere was far from the only or even the most important factor in that battle. It also mattered that the ACA, unlike most big new federal programs, was widely unpopular from the beginning.⁷¹ That made the courts more willing to strike parts of it down than they would be in the case of a major federal statute that enjoyed broad public support. The opposition of the Republican Party was also crucial.⁷² Courts are much less likely to strike down major legislation that enjoys bipartisan support.

I do not deny for a moment the significance of these political factors. But it would be wrong to conclude that they were the only thing that mattered. Obamacare was far from the first law promoted by the Obama administration that was either unpopular, hated by the Republican Party, or both. Consider the examples of the 2009 stimulus bill and the Dodd-Frank Act. Both were strongly opposed by the GOP.

The stimulus bill was also unpopular with the general public.⁷³ Yet very little in the way of effective litigation was mounted against it. Why? Because it was hard to develop an argument against it that would be credible to legal professionals without requiring that large amounts of precedent be overruled.

In my view, the crucial role of the Volokh Conspiracy was to present legal arguments that professionals could take seriously and to do so in a way that would not require extensive overruling of precedent. That is what differentiated the opposition to Obamacare from opposition to a number of otherwise comparable laws that were enacted in 2009 and 2010 when the Democratic Party had the control over both Congress and

71. Polls consistently showed more opposition to the law than support. See Lawrence R. Jacobs & Suzanne Mettler, *Why Public Opinion Changes: The Implications for Health and Health Policy*, 36 J. HEALTH POL. POL'Y & L. 917, 918–20 (2011) (showing that opponents of the law consistently outnumbered supporters in public opinion polls from August 2009 through 2011 and noting sharp differences with Social Security, which enjoyed broad support almost from the beginning). More recent polls show similar patterns. See Andrew Dugan, *Despite Enrollment Success, Healthcare Law Still Unpopular*, GALLUP (May 29, 2014), <http://www.gallup.com/poll/170750/despite-enrollment-success-healthcare-law-remains-unpopular.aspx>.

72. For the argument that GOP opposition to Obamacare played a crucial role in legitimizing constitutional arguments against the law, see Jack Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012, 2:55 PM), <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/>.

73. See, e.g., Paul Steinhauer, *CNN Poll: 56 Percent Oppose Stimulus Program*, Political Ticker, CNN (Jan. 24, 2010, 12:37 PM), <http://politicalticker.blogs.cnn.com/2010/01/24/cnn-poll-56-percent-oppose-stimulus-program/>.

the White House, and therefore could pass a wide range of important new statutes, despite strong Republican opposition.

CONCLUSION

One thing we can say in the wake of the Obamacare decision is that the future of constitutional federalism is very much in flux. It is clear that we have no consensus as to which of the two broad visions of federalism is correct. There is division in the Supreme Court, division among constitutional law scholars, and division in American society more generally. It is difficult to argue anymore that the New Deal vision is a consensus view that all informed observers adhere to. In addition to its rejection by numerous federal judges, a new generation of legal scholars has challenged it over the last 20 to 30 years. Randy Barnett is perhaps the best known, but there are quite a few others.⁷⁴

The future of Obamacare itself also remains in doubt, even though after *NFIB v. Sebelius* and President Obama's victory in the 2012 election it seemed like it might not be. At least for the moment, the law continues to be unpopular.⁷⁵ In addition, a new wave of litigation has risen against it.

I will only briefly mention some of these cases. The one that might pose the biggest threat to the law from a constitutional perspective is a set of challenges based on the Origination Clause case. If the individual mandate actually is a tax, as the Supreme Court ruled in *NFIB*, then under the Constitution it must be enacted in a bill originating in the House of Representatives.

The version of Obamacare that was enacted by Congress was first passed by the Senate. This seems to be a violation of the Origination Clause, though there are complex arguments and counterarguments on both sides of this issue. I do not know who is going to win. It could go either way, I believe. Interestingly, as in the case of the initial challenge to the mandate, many defenders of Obamacare initially said, in effect,

74. See, e.g., BARNETT, *supra* note 8. See also, MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* (2012); John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002); Lynn A. Baker & Ernest Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001).

75. A May 2014 Gallup poll found that 51% of Americans disapprove of the law, compared to 43% who support it. This split is roughly consistent with previous polls going back many months. See Dugan, *supra* note 71.

that “this must be wrong, it is obviously incorrect, and no expert could possibly believe it.”⁷⁶ But this is, at least to some extent, beginning to wear thin. The text of the Constitution strongly suggests that if the individual mandate is a tax, it has to be passed by the House of Representatives first. It clearly states that “All Bills for raising Revenue shall originate in the House of Representatives”⁷⁷ That does not mean that these lawsuits will prevail or even necessarily get to the Supreme Court.⁷⁸ But I do not believe they can be easily dismissed. We should not repeat the error that so many people made in preemptively disdaining the initial lawsuit against the individual mandate.

Second, there is a purely statutory challenge based on arguments developed by Jonathan Adler, my co-blogger at the Volokh Conspiracy, and Michael Cannon of the Cato Institute.⁷⁹ They point out that under the text of the ACA itself, there can only be federal tax credits available for the purchase of health insurance in states where there is an insurance exchange set up by a state government. So far, only 14 states have set up such exchanges.⁸⁰ The federal government has tried to step in with federal exchanges. But the text of the statute does not seem to authorize subsidies for federal exchanges. If subsidies for insurance under federal exchanges are not permitted, the ACA might not be able to function, as expected. In addition, millions of people might no longer be required to purchase the level of insurance required under the individual mandate.⁸¹

76. This interpretation of their sentiments is, admittedly, based on my subjective personal impressions. It was far less evident in published writings about the Origination Clause cases than those about the earlier round of challenges to the individual mandate, in part perhaps because the former has not yet generated nearly as much public commentary as the latter.

77. U.S. CONST. art. I, § 7, cl. 1.

78. Since this lecture was delivered, a panel of the D.C. Circuit Court of Appeals rejected the Origination Clause argument. *See Sissel v. U.S. Dep’t of HHS*, 951 F. Supp. 2d 159, 174 (D.C. Cir. 2014). A second Origination Clause challenge has since been rejected in the Fifth Circuit. *Hotze v. Sebelius*, 991 F. Supp. 2d 864 (5th Cir. 2014).

79. *See* Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under PPACA*, 23 HEALTH MATRIX 119 (2013); Jonathan H. Adler & Michael F. Cannon, *Another ObamaCare Glitch*, WALL ST. J., Nov. 16, 2011, at A15.

80. *See* Richard Cauchi, *State Actions to Address Health Insurance Exchanges*, NAT’L CONF. ST. LEGISLATURES (Aug. 8, 2014), <http://www.ncsl.org/research/health/state-actions-to-implement-the-health-benefit.aspx>.

81. For the argument that lack of availability of subsidies would free as many as 57 million people from their obligations under the individual mandate, see Michael F. Cannon, Halbig v. Burwell *Would Free More Than 57 Million Americans from the ACA’s Individual and Employer Mandates*, FORBES (July 21, 2014, 11:35 AM), <http://www>

This issue is now before the courts and could go either way.⁸² But there is at least a very plausible argument that the text of the statute directly refers to states and does not indicate that the subsidies are available if the federal government sets up the exchanges.⁸³ Then, of course there is the challenge to the contraception mandate under the Religious Freedom Restoration Act.⁸⁴ That one is not an important challenge to the overall structure of Obamacare. If it prevails, only a very small piece of the structure set up under the law will be lost. But it is important for the broader issue of religious freedom.

All of these lawsuits potentially have legs. Some might end up failing. But it would be wrong to dismiss any of them out of hand. And, obviously, all of them derive some of their momentum from the fact that the initial challenge of Obamacare came so close to success and did actually prevail on some important points. They also benefit from the unpopularity of Obamacare, which makes judges less unwilling to challenge it.

Lastly, I want to emphasize that it is too early for us to have real historical perspective on the Obamacare case. But the way this case is viewed in the future and the way Obamacare as a whole is viewed will probably have an impact on Americans' perceptions of constitutional federalism more generally. If most people ultimately conclude—10, 20, 30 years from now—that Obamacare was a terrible mistake, they will be more sympathetic to the enforcement of constitutional limits on federal

.forbes.com/sites/michaelcannon/2014/07/21/halbig-v-burwell-would-free-more-than-57-million-americans-from-the-acas-individual-employer-mandates/. For arguments that these people would still be subject to it, see Michael Hiltzik, *The Economy Hub, Just Who Would Be "Freed" if the Obamacare Subsidies Are Thrown Out?*, L.A. TIMES (Sept. 2, 2014, 10:33 AM), <http://www.latimes.com/business/hiltzik/la-fi-mh-who-would-be-freed-20140902-column.html>.

82. Since this speech was delivered, two federal courts of appeals have ruled on the issue, one supporting the Adler–Cannon argument and one rejecting it. See *Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014) (endorsing the argument), *reh'g granted*, No. 14-5018, 2014 U.S. App. LEXIS 17099 (D.C. Cir. Sept. 4, 2014); *King v. Burwell*, 759 F.3d 358, (4th Cir. 2014) (rejecting it), *cert. granted*, 135 S. Ct. 475 (2014).

83. The statutory text limits tax credits to "Exchange[s] established by the State." 26 U.S.C. § 36B(b)(2) (2012).

84. Since the original version of this lecture was delivered, the RFRA challenge to the contraception mandate succeeded in the Supreme Court. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). For my perspective on an important aspect of the decision, see Ilya Somin, *Religious Freedom in the Commercial Sphere: Are People Organized as Corporations Entitled to Constitutional Rights?*, STANFORD UNIVERSITY PRESS BLOG (Sept. 30, 2014), <http://stanfordpress.typepad.com/blog/2014/09/religious-freedom-in-the-commercial-sphere.html>.

power by the judiciary. If, on the other hand, Obamacare goes down in history as a great milestone of social legislation that makes American society much better than before, then it might have the same kind of effect as the perceived success of the New Deal in ending the Great Depression, which undoubtedly led many people to believe that judicial enforcement of federalism should be rejected. The jury is still out on Obamacare—and may be out for a long time to come. But for now, we can at least conclude that the Obamacare case was a great clash between competing visions of constitutional federalism. The struggle between them continues.