The Health Care Lawsuits: Unraveling A Century of Constitutional Law and The Fabric of Modern American Government

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February 2011

American Constitution Society | 1333 H Street, NW, 11th Floor | Washington, DC 20005

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Introduction and Summary

Nearly a year after President Obama signed the Affordable Care Act (ACA) into law, battles over its constitutionality flare in over twenty separate lawsuits and countless media and political arenas. As Congress was drafting the law, when opponents first broached the prospect of constitutional challenges, experts across a broad ideological spectrum derided the constitutional case against the legislation as, in the words of Harvard's Charles Fried, Solicitor General to President Ronald Reagan, "preposterous." Thus far, most of the cases have indeed been dismissed, and two of the federal district courts that have reached the merits have upheld the principal target of the challenges – the requirement that most Americans who can afford it carry health insurance, the so-called "individual mandate" or "individual responsibility provision." However, two district courts have struck the mandate down. In addition to the widespread attack on the individual responsibility provision, 26 Republican state officials have made a claim in the Western District of Florida challenging the ACA's expansion of Medicaid. The district judge hearing that case ruled the claim inconsistent with applicable precedents, but suggested that those precedents might merit reconsideration. Ultimately, these issues will be resolved, perhaps two years or so hence, by the Supreme Court. Key members of the Court's conservative bloc have written or joined opinions that would be hard to square with disapproval of the mandate or other ACA provisions under challenge. But this is a Court with a track record in politically or ideologically charged cases of giving precedent short shrift and splitting 5-4 along partisan lines, so precedent may not be prologue in this case.

This issue brief will consider what, beyond the specifically targeted ACA provisions, is at stake in these cases. The brief will not focus on detailing the by now familiar standard arguments for and against the validity of the challenged provisions. Instead, the brief assesses the broader potential impact of the claims at issue in the suits. What are the implications of the theories behind them? If a Supreme Court majority were to embrace those claims, what would the new constitutional landscape look like? Will basic underpinnings of established constitutional law and governmental practice shift? If so, how, and how much? Apart from the ACA, what other important statutes and areas of policy could expect potential collateral damage from follow-on challenges?

In summary, the brief concludes:

- The pending health care reform challenges constitute a bold bid for historic, sweeping constitutional change. If successful, the challenges would be a major step toward resuscitating a web of tight constitutional constraints on congressional

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authority that conservative Supreme Court majorities repeatedly invoked during the first third of the 20th century to strike down economic regulatory laws. In the late 1930s and thereafter, the Supreme Court jettisoned this conservative activist jurisprudence, replacing it with constitutional interpretations supporting Progressive Era, New Deal, Great Society, and kindred reforms.

- The legal theories behind the health care lawsuits take dead aim at three bedrock understandings that inform the vision of a democratically governed, economically robust nation first reflected in Chief Justice John Marshall's early nineteenth century seminal interpretations of federal economic policy-making authority, and reaffirmed in all Supreme Court decisions since the New Deal era. These understandings are:

    1. The federal government exists and is empowered to address objectives that states acting individually lack, in the words of the Framers, the "competence" to handle on their own.[1] In very recent times, the same understanding has been articulated by the late Chief Justice William H. Rehnquist as the difference between matters that are "truly national" and those that are "truly local."[2] As Justice Anthony Kennedy expressed the principle: "Congress can regulate on the assumption that we have a single market and a unified purpose to build a stable national economy."[3]

    2. To tackle those "truly national" problems, the federal government has the flexibility to pick solutions that are the most "competent" in practice. In the words of Justice Antonin Scalia, the national government "possesses every power needed to make [its solution] effective."[4]

    3. The democratic branches, not the judiciary, have the principal constitutional writ to shape economic policy, and, accordingly, the courts are to defer to Congress and give it the running room necessary to target objectives and craft effective solutions. In other words, economic

[1] The Framers repeatedly used "competence," and its antonym "incompetence," to distinguish federal from state constitutional authority, not to mean "ability" or "ineptness," but rather jurisdictional "capacity" or "scope." See Jack Balkin, *Commerce*, 109 MICH. L. REV. 1, 8-13 (2010).); Akhil Amar, AMERICA'S CONSTITUTION: A BIOGRAPHY 107-08 (2005). The principles driving the drafting of Congress' legislative authority were a widely shared consensus among the delegates to the Constitutional Convention that the "National Legislature ought to be impowered . . . to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted [by state legislation], . . . or in all cases for the general interests of the union." Jack N. Rakove, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 177-78 (1997). These and original sources on which they draw are concisely marshaled in written testimony of Elizabeth Wydra and Douglas Kendall of the Constitutional Accountability Center submitted to the Senate Judiciary Committee on February 1, 2011, and by Elizabeth Wydra and David Gans, in *Setting The Record Straight: The Tea Party and the Constitutional Powers of the Federal Government* (July 16, 2010). Both the latter two documents are available on the site of the Constitutional Accountability Center, http://theusconstitution.org/.

[2] United States v. Lopez, 514 U.S. 549, 567-68.

[3] *Id.* at 574 (Kennedy J., concurring) (1995).

[4] Gonzales v. Raich, 545 U.S. 1, 36 (2005) (Scalia, J. concurring) (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 118-19 (1942)).

> "regulatory legislation . . . is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators," or where the legislation violates individual rights that are "fundamental" or expressly protected by particular constitutional provisions.[5]

The individual responsibility provision, as well as other targeted ACA features, cannot be overturned without violating these basic understandings and the specific doctrinal rules and principles implementing them. In turn, such a decision will call into question the constitutional bases for, and hence could trigger copycat challenges to, provisions of other landmark laws and programs, including safety net programs such as Medicare, Medicaid, Social Security, and CHIP (the Children's Health Insurance Program); civil rights law guarantees against private discrimination by places of public accommodation or in the workplace; federal grant programs in education, transportation, and other large-scale cooperative federalism initiatives; and environmental protection. As the judiciary disposes of these ensuing suits, it will jostle against and upstage Congress and the President as a direction-setter and micro-manager of national economic policy.

In place of a constitutional jurisprudence that prioritizes effective and responsive national governance, the pending health care reform challengers would substitute a radically different regime. As stated by 38 leading Republican members of the House of Representatives in an amicus curiae brief filed in one of the cases: "*Congress cannot pass just any law that seems to most efficiently address a national problem.*"[6] This self-styled "precept," which in similar form recurs in briefs, argument transcripts, and even judicial opinions impugning the ACA, is a recipe for circumscribing the capacity of the federal government to meet national needs. Barring Congress from enacting the ACA exemplifies this impact, since doing so would deny Congress the ability to effectively reform a dysfunctional national health care market comprising over 17% of the national economy, that causes 62% of personal bankruptcies, leaves 50 million citizens uninsured, and deprives individuals with pre-existing medical conditions of access to affordable health insurance and, thus, needed health care. If nine, or more realistically, five life-tenured justices can block an undisputed rational solution for an economic problem so big and so urgent, what limit is there on the Court's capacity to hamstring federal stewardship of the national economy?

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[5] United States v. Carolene Products Co., 304 U.S. 144, 152 & n.4 (1938). The Court at footnote 4 of this opinion famously prescribed "rational basis" deference to Congress' legislative judgment, except in cases involving alleged violations of "fundamental" individual or minority rights, incapable of protection through democratic political processes. *Id.*

[6] Brief for American Center for Law & Justice et al. as Amici Curiae Supporting Plaintiff, Virginia v. Sebelius, No. 3:10-cv-00188-HEH at 2-3 (E.D. Va. June 7, 2010) (emphasis added), *available at* http://www.aclj.org/media/PDF/Virginia_Amicus_Brief_20100607.pdf.

I. The Constitution as a Charter for National Governance

A. A Historical Overview: Restoration of the Framers' Vision

Contrary to misimpressions spread by some supporters of **t**he health care reform lawsuits, the constitutional doctrines on which Congress relied in drafting the ACA did not spring to life only in 1937 when the Supreme Court definitively rejected the so-called *Lochner* era doctrinal apparatus that a conservative Supreme Court had deployed to abort numerous Progressive and New Deal era reforms.[7] If anything, it would be more accurate to view what libertarian critics call the New Deal Supreme Court's "revolution of 1937" as a restoration of the vision of the original Framers, who sought to supplant the feckless Articles of Confederation with a charter for effective and responsive national governance.[8] That vision was given doctrinal form by the Framers' contemporary Chief Justice John Marshall and his fellow Supreme Court justices in the first third of the 19th century. In the century between Marshall's iconic decisions and the New Deal Court's reactivation of effective governance as a lodestar for constitutional interpretation, the textual basis for robust federal authority was materially enhanced by the Reconstruction and Progressive Era amendments.

The Senate's 1987 rejection of Robert Bork's Supreme Court nomination squelched what some observers viewed as a movement to overturn the post-New Deal constitutional consensus.[9] But while Bork and the generation of conservative constitutionalists for whom he spoke condemned the "activism" of the Warren Court in expanding Bill of Rights protections for individuals and minorities, they also called the "activist Court of the *Lochner* era . . . as illegitimate as the Warren Court," and endorsed the post-New Deal postulate of judicial deference to Congress on economic regulatory matters. A cadre of libertarian academics and advocates continued to champion Lochneresque constraints on federal economic regulatory authority, but they were very few in number and stood self-consciously outside the mainstream of conservative constitutional jurisprudence.[10]

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[7] *Lochner v. New York*, 198 U.S. 45 (1905), launched and has come to symbolize the notoriously activist anti-regulatory regime of the first third of the 20th century. The case held that maximum hours regulation violated employers' and employees' "freedom of contract," a "right" that the five justice majority divined in the Fifth and Fourteenth Amendments' ban on deprivation of liberty without due process of law. *Id.*

[8] Justice Clarence Thomas, the Supreme Court's sole libertarian-leaning member, has called the New Deal Court's jurisprudential shift a "wrong turn." United States v. Lopez, 514 U.S. 549, 594 (1995); D.C. Circuit Judge Janice Rogers Brown used more florid language: "A Whiter Shade of Pale," Speech to the Federalist Society, University of Chicago Law School, (April 20, 1000), at 12; Justice Anthony Kennedy concisely reviews the evolution of Commerce Clause jurisprudence in his Lopez concurrence, 514 U.S. at 570-74. For the Framers' vision, see sources cited in note 1, *supra*. For the principles prescribed by Chief Justice Marshall for construing the Necessary and Proper and Commerce Clauses, *see* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (Commerce Clause authorizes establishment of a National Bank); Gibbons v. Ogden 22 U.S. (9 Wheat) 1 (1824) (Ferry monopoly under state law preempted by Congress exercising Commerce Clause powers), discussed at notes 15 and 19-20 below.

[9] Bruce Ackerman, WE THE PEOPLE: FOUNDATIONS 51-52 (1991). During the same period, in 1987-88, a Reagan nominee for the Ninth Circuit Court of Appeals, Bernard Siegan, was rejected expressly because of his professed aversion to post-1937 expansionary interpretations of Federal economic regulatory authority.

[10] *See, e.g.*, Stephen Macedo, THE NEW RIGHT V. THE CONSTITUTION (The CATO Institute, 1986), which contains chapters entitled "The Framers v. Judge Bork," "The Majoritarian Myth," and "Principled Judicial Activism." The history of conflict between libertarian and mainstream conservative legal thought-leaders is elaborated in Damon Root, *Conservatives v. Libertarians: The Debate over Judicial Activism Divides Former Allies* (July 2010), http://www.freerepublic.com/focus/f-news/2530504/posts. *See also* Doug Kendall and Glenn Sugameli, *Janice*

During the late 1990s, a five-justice bloc coalesced to introduce novel doctrines constraining federal legislative authority to implement the Commerce Clause and enforce the Fourteenth Amendment. This "federalism revolution" was widely feared as an effort to open the door to a major assault on the post-New Deal constitutional regime. But from 2003 to 2005, the "federalism" bloc dissolved, and the revolution, such as it was, fizzled; a retreat substantially endorsed by Chief Justice John Roberts during his 2005 confirmation hearing.[11] Again, however, it bears emphasis that the justices who engineered the 1990s federalism boomlet, especially in decisions applying the constitutional provisions at issue in the ACA litigations, offered no challenge to, and indeed reinforced, the basic constitutional doctrines enabling post-New Deal active national government.[12]

B. Doctrinal Ground Rules Established by the Marshall and New Deal Supreme Courts

As discussed, the modern post-New Deal constitutional regime, based squarely on the Framers' design as implemented by the Marshall Court two centuries ago, prioritizes effective governance of the national economy. On the level of doctrine, this regime comprises rules generously construing three of Congress' Article I powers: (1) the power to regulate commerce among the states, (2) the power to collect and spend revenue for the general welfare, and (3) the power to enact measures necessary and proper to implement the foregoing two (and other enumerated) powers. An additional, critical component of the current regime is a "strict constructionist" approach to the Fifth Amendment prohibition of federal deprivation of property or liberty without due process of law, thus rigorously constraining the ability of the judiciary to invalidate economic regulatory legislation. Finally, the Court has developed various doctrines obligating the judiciary to defer to congressional judgments and to respect congressional procedures necessary to enable Congress to function effectively.

1. The Commerce Clause as a Platform for National Economic Policy

No objective was more critical to the Framers of the original Constitution than enabling the new central government to ensure a robust national economy by countering balkanizing protectionist propensities on the part of the states and mercantilist policies of foreign governments. A principle vehicle for achieving that objective was what we refer to as "the Commerce Clause" – the third clause of Section 8 of Article I, authorizing Congress to "regulate

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Rogers Brown and the Environment: A Dangerous Choice for a Critical Court, A Report by Community Rights Counsel and Earthjustice at 2, 8 (October 23, 2003), *available at* http://www.communityrights.org/PDFs/BrownReport.pdf.

[11] This history is traced in a previous ACS issue brief, subsequently published as Simon Lazarus, *Federalism R.I.P.? Did the Roberts Hearings Junk the Rehnquist Court's Federalism Revolution?*, 56 DEPAUL L. REV 1, 14-21, 45-50 (2006).

[12] *Id*. at 30-31. *See* infra notes 15-17, 22-25 and accompanying text.

commerce with foreign nations, and among the several states . . . ." In construing that broad and general provision, three interpretive rules would be essential to its purpose:

a. Congress' commerce power covers economic matters that are "national" in scope, as distinguished from "local."

b. Matters subject to federal Commerce Clause jurisdiction must be determined on the basis of flexible and practical criteria, i.e., their "operation and effects" on the interstate economy, not rigid and economically arbitrary categorical criteria.

c. Application of the clause must facilitate Congress' practical ability "to regulate."

The Framers' commitment to this conception of the Commerce Clause [13] was implemented in detail by the foundational Commerce Clause decisions of Chief Justice Marshall. Thus, Marshall gave "interstate commerce" a concise, emphatically practical and flexible definition: "that commerce which *concerns* more states than one, which *"extend[s] to or affect[s]* other States." Accordingly, he said, "the power of Congress" could not be bounded in rigid categorical or geographical terms. That "power . . . does not stop at the jurisdictional lines of the several States." Marshall rejected the claim that application of the clause should be constrained by a canon of "narrow" or "strict construction." On the contrary, he said, the purpose of the clause should govern, explaining that in resolving any "serious doubts respecting the extent of any given power, it is a well settled rule, that the objectives for which it was given . . . should have great influence in the construction." A "narrow construction," he stressed, would undermine the Framers' enabling priority and "would cripple the government, and render it unequal to [its intended] object . . . for which the powers given, as fairly understood, render it competent. . . ." Hence, the clause confers on Congress the flexibility and freedom to deploy that capability: "[T]he power to regulate . . . is to prescribe the rule by which commerce is governed. This power . . . is complete in itself, may be exercised to its utmost extent and acknowledges no limitations, other than those prescribed in the Constitution."[14]

Marshall's broad definition has not been fundamentally challenged by conservative justices appointed by 20th and 21st century Republican presidents, up to this point at least, with the exception of Justice Clarence Thomas. In writing the first of only two post-New Deal decisions invalidating federal statutes as exceeding Congress' Commerce Clause authority, Chief Justice Rehnquist reaffirmed Marshall's touchstone "distinction between what is truly national and what is truly local."[15] Further, Chief Justice Rehnquist restated and reaffirmed the entire doctrinal litany of post-New Deal jurisprudence – that the commerce power encompasses "intrastate" matters which "substantially affect" interstate commerce, and that Congress may

[13] *See* note 1, *supra*.
[14] Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 187-89, 194-95, 196-98 (1824) (emphasis added).
[15] United States v. Lopez, 514 U.S. 549, 567-68 (2005).

regulate matters neither interstate nor "economic" in nature where necessary to effectuate a larger regulatory scheme legitimate under the Commerce Clause.[16]

Moreover, in the same case, Justice Anthony Kennedy wrote a concurring opinion that endorsed Chief Justice Marshall's "early and authoritative recognition" of Congress' "extensive power and ample discretion" to regulate interstate commerce. Kennedy traced, and emphatically disavowed, the early 20th century Court's turn away from Marshall's "flexible," "practical conception of commercial regulation," and its deployment of categorical "content-based" boundaries on the commerce power. "Congress," Kennedy summed up, "can regulate [under the Commerce Clause] on the assumption that we have a single market and a unified purpose to build a stable national economy."[17]

2. Congress' "Necessary and Proper" Authority to Make Regulation Work

A critical adjunct to the Commerce Clause is the "Necessary and Proper" Clause, which provides that Congress may enact "all laws which shall be necessary and proper, for carrying into execution the foregoing [enumerated powers, including the Commerce Clause] . . . ."[18] Two interpretive rules shape modern Necessary and Proper Clause jurisprudence, both of which were laid down two centuries ago by Chief Justice Marshall. The first rule is that the term "necessary" should be read broadly to cover any means that is "convenient" or "appropriate."[19] The second rule is that, while the ends or statutory goals that Congress chooses must be authorized by an enumerated power, the means it fashions to achieve such ends need not themselves fall within the ambit of an enumerated power. "Let the end be legitimate, let it be within the scope of the constitution," Marshall wrote in terms familiar to every first year law student. "[A]ll means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[20] Even more pointedly, Marshall explained:

> The power being given, it is the interest of the nation to facilitate its execution. *It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means*.[21]

Modern post-New Deal decisions have repeatedly and without exception confirmed, and even extended, Marshall's two rules. Chief Justice Rehnquist, in his *Lopez* decision invalidating

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[16] *Id.* at 558-61. The actual holding in Lopez was limited to the proposition that the Commerce Clause does not extend to "noneconomic" activities with such attenuated relationship to interstate commerce that the Court "would have to pile inference upon inference" to make the necessary connection. The limited scope of the Lopez ruling was further demonstrated when Congress re-passed the stricken statutory prohibition on possession of a gun within 1000 yards of a school and added what Rehnquist had termed a "jurisdictional element" – a prerequisite for conviction that any gun involved in an offense have traveled in interstate commerce. *See* Guns Free School Zone Act of 1995, 18 U.S.C. § 922(q) (1995).

[17] *Lopez*, 514 U.S. at 568-74 (Kennedy, J., concurring).

[18] U.S. CONST. art. I § 8, cl. 18.

[19] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 366-67 (1819).

[20] *Id.* at 421.

[21] *Id*. at 408. (emphasis added).

the gun-free school zones statute, reaffirmed that the Necessary and Proper Clause authorized requirements outside Congress' enumerated powers that are "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut" without the otherwise *ultra vires* requirement.[22] In 2005, Justice Scalia elaborately described the necessary and proper power, specifying that the clause "empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation," and that "where Congress has the authority to enact a regulation of interstate commerce, 'it possesses every power needed to make that regulation effective.'"[23] Less than a year ago, a 7-2 majority, including Chief Justice John Roberts and Justice Kennedy, confirmed that the clause authorizes Congress to legislate wherever "the means chosen are reasonably adapted to the attainment of a legitimate end."[24]

3. Congress' Tax-and-Spend Power as a Lever to Promote the "General Welfare"

While media attention regarding the health care reform suits has been focused on the Commerce Clause, the case for the individual mandate provision, as well as other challenged provisions of the ACA, alternatively rests on Congress' Article I authority to raise and spend revenue for the nation's "general welfare."[25] To overturn the mandate, as well as to approve challengers' claims against the ACA's expansion of Medicaid (discussed below), courts will have to confront the modern interpretation of that provision.

Two rules give the General Welfare Clause robust leverage for prescribing and implementing national policies. First, the objectives of a measure that imposes taxes or spends funds pursuant to the clause are not confined by the enumerated powers assigned Congress in Article I, but only by the broad direction in the text of the clause itself that the measure serve the "general welfare of the United States."[26] Hence, the scope of the tax-and-spend power is even broader than the scope of the Commerce Clause augmented by the Necessary and Proper Clause. This is particularly important because Congress has broad leeway to attach conditions to the acceptance of funds provided pursuant to its broad spending authority by states or other grant recipients, as the modern Court has emphatically reaffirmed.[27] Second, as long as a measure raises some revenue, it is valid as a tax authorized by the General Welfare Clause, whether or not its purpose is primarily to promote a policy goal, rather than simply to raise revenue. As the

[22] *Lopez*, 514 U.S. at 561.
[23] Gonzales v. Raich, 545 U.S. 1, 39 (2005).
[24] United States v. Comstock, 130 S. Ct. 1949, 1957 (2010).
[25] The general welfare clause reads: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." U.S. CONST. art. I § 8, cl. 1.
[26] United States v. Butler, 297 U.S. 1, 67 (1936). As noted in my December 2009 issue brief, *United States v. Butler*, decided even before the Court altered its perspective on other constitutional issues to accommodate the New Deal, famously resolved the then-century and a half old debate between Alexander Hamilton and James Madison in favor of Hamilton's view that the scope of the tax-and-spend power was not limited by the other, specifically enumerated Article I powers. Helvering v. Davis, 301 U.S. 619, 640 (1937).
[27] South Dakota v. Dole, 483, U.S. 203, 207-10 (1987).

Court has pronounced: "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."[28]

4. Legislation Rationally Related to Lawful Goals Must Ordinarily be Upheld Unless It Violates a "Fundamental" Individual Right

Common to both modern commerce, necessary and proper, and general welfare clause jurisprudence is the requirement that, ordinarily, such "legislation . . . is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."[29] In effect, this rule of "rational basis" deference amounted to an act of partial judicial unilateral disarmament and a repudiation of the aggressive manner in which the *Lochner* era Court had exploited various constitutional provisions, especially the Fifth Amendment's due process clause, to strike down progressive economic regulatory reforms.

Importantly, while the Court retreated, it did not abdicate. "Substantive" due process protection for individual rights and liberties remains a critical judicial province. But, ordinarily, due process-based assertions of constitutionally protected liberty interests can trump rational exercises of the commerce or general welfare powers only where the interests alleged to have been violated are "fundamental." Over the past three quarters of a century, the Court has identified certain rights as fundamental and struck down otherwise valid (i.e., rational) laws that infringed those rights, such as an individual's right to bodily integrity. But the Court has required rigorous analysis before bestowing the label "fundamental" on an asserted liberty interest, and has done so only rarely.[30]

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[28] United States v. Sanchez, 340 U.S. 42, 44 (1950). In the same vein: "[A] tax is not any the less a tax because it has a regulatory effect, and . . . an act of Congress which on its face purports to be an exercise of the taxing ower is not any the less so because the tax . . . tends to restrict or suppress the thing taxed." Sonzinsky v. United States, 300 U.S. 506, 513 (1937).

[29] United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

[30] *See, e.g.*, Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942); Griswold v. Connecticut, 381 U.S. 479 (1965); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990). As Walter Dellinger recently testified to before Congress, this line of substantive due process cases would provide ample basis for judicial rejection on constitutional grounds of hypothetical extreme laws conjured by health reform opponents as analogous to the ACA mandate, such as requirements to consume specific vegetables or enroll in a health club. *The Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. On the Judiciary*, 112th Cong. 6-7 (2011) [hereinafter *ACA Hearings*]. Although fundamental, this personal liberty interest in bodily integrity is not absolute. Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905) (upholding a state mandatory smallpox vaccination law, on the ground that an individual's refusal to comply endangered others as well as himself). *See ACA Hearings* at 4 (testimony of Charles Fried, analogizing mandatory vaccination to the ACA individual responsibility provision).

II. The Health Reform Lawsuits Would Dismantle the Constitutional Regime Established by Chief Justice Marshall and the Modern Supreme Court to Enable Central Oversight of the National Economy

To recap: as sketched in the preceding section, the established constitutional regime for federal economic regulation rests on eight doctrinal building blocks:

- Congress' power to regulate interstate commerce…

  1. covers matters that have an economic impact national in scope that "*concern* more states than one," and is not limited to matters physically present in more state than one.

  2. is bounded by criteria that are flexible, practical, and focused on impact ("substantial effects" on interstate commerce), and are not rigid or categorical.

  3. is interpreted in accord with the Framers' purpose to empower Congress to manage effectively a robust national economy.

- Congress' authority to enact measures "necessary and proper" to "carry into execution" its specifically enumerated powers…

  4. does not limit Congress to measures that are "absolutely" necessary to achieve lawful goals, but authorizes (and requires judicial approval of) any optional approach that is "plainly adapted" to attain such goals.

  5. is not circumscribed by the Commerce Clause (nor by other enumerated powers), but encompasses "all means" appropriate for achieving Commerce Clause-authorized goals or to ensure the effective operation of a broader statutory program duly authorized by the Commerce Clause (or other enumerated power).

- The General Welfare, or Tax-and-Spend power…

  6. is not circumscribed by Congress' enumerated powers, but may be exercised to achieve any Congressional goal that serves the "general welfare of the United States," and includes the ability to impose conditions in exchange for the acceptance of federal funds.

  7. authorizes legislation that raises revenue, regardless of whether the legislation has a regulatory purpose or a purpose to deter, or even eliminate, types of conduct.

- 8. Neither the Commerce nor the General Welfare Clause justifies measures that violate the Fifth Amendment guarantee against deprivation of liberty without

due process of law, but such measures must ordinarily be upheld if rationally related to a lawful goal, unless they violate personal liberty interests which are "fundamental."

The constitutional theories advanced by the pending health care reform challenges contravene, and in some cases, repudiate outright each of these eight basic rules.

Substantially all the cases brought by health care reform opponents target the individual responsibility provision, or individual mandate, deploying essentially identical arguments. This brief will review solely the opponents' case against the mandate and one other claim: that mounted by 26 Republican state attorneys general and governors in the Western District of Florida in Pensacola contending that the ACA's expansion of Medicaid amounts to "coercion" of states in violation of the 10th Amendment's protections for state "sovereignty."

A. Opponents' Claim that the Individual Mandate Is Unlawful Because it Regulates "Inactivity" Contravenes Established Commerce Clause Doctrine and Nullifies the Necessary and Proper Clause

Opponents do not contend that the ACA's individual responsibility provision runs afoul of any of the established criteria noted above for grounding legislation in the Commerce Clause. They do not contest the statutory findings that detail Congress' determination that decisions to forego health insurance "substantially affect" interstate commerce (and/or are themselves integral components of interstate commerce in health insurance and health care delivery). They do not dispute that achieving universal coverage and reforming abusive insurance practices are statutory goals authorized by Congress' Commerce Clause authority. Nor do they challenge Congress' judgment inscribed in the statutory findings that mandatory insurance is necessary to achieve these lawful goals. Indeed, Virginia Attorney General Kenneth Cuccinelli, plaintiff in one of the most publicized challenges, acknowledged in his complaint that the individual mandate provision is "an essential element of the [ACA] without which . . . the statutory scheme cannot function." He thus concedes it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut" without it.[31]

[31] In short, the case of the ACA individual mandate is entirely different from *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the two late 1990s decisions in which the Court's conservative five justice majority held a federal law to exceed the reach of Congress' commerce power. In those cases – involving a federal ban on possession of a gun within 1000 yards of a school and a federal remedy for violence against women – the question was whether the outlawed practice had a sufficient connection to interstate commerce, and the majority concluded that no meaningful connection existed. In neither case was a contention offered by the federal government that the challenged requirement was integral to a broader valid regulatory scheme, hence supported by the Necessary and Proper clause. *Lopez* and *Morrison* were situations at the periphery of established definitions of the reach of Congress' commerce power, as augmented by its necessary and proper power. In contrast, the ACA individual mandate – addressing decisions that substantially affect an economic sector comprising 17% of GDP and concededly "essential" to effectuating Congress' approach to regulating this sector – is at the core of the circle traced by those established definitions. In the same vein, the ACA's mandatory insurance provision has a far clearer fit with established Commerce Clause criteria than do *Wickard v. Filburn*, 317 U.S. 111 (1942), and *Gonzales v. Raich*, 545 U.S. 1 (2005), the two decisions generally considered to have upheld applications of the commerce power to its outermost boundaries. Both cases involved crops, home-grown for home-use, but banned by federal authorities pursuant to a facially applicable federal regulatory statute. Admittedly, the connection of home-made and consumed crops to, or their impact on, interstate commerce was attenuated, as was

Opponents' argument contends that *even though* the subject-matter of the individual responsibility provision substantially affects commerce, and *even though* the provision is essential to a broader regulatory scheme targeted at objectives sanctioned by the Commerce Clause, it should nevertheless be struck down. The reason they give is that decisions to forego health insurance do not constitute "activity," but rather "inactivity." The interstate commerce covered by the Commerce Clause, they add, encompasses "economic activity," and decisions not to insure, though economic, are not activity. Hence, such decisions are not included in the interstate commerce that Congress may regulate.

Plainly, opponents' activity/ inactivity theory shoves aside the above-noted essential ground rules of Commerce Clause jurisprudence first laid down by Chief Justice Marshall and reinstated and refined by the modern Supreme Court. With respect to the definition of interstate commerce, what Justice Kennedy spotlighted as Marshall's "flexible," "practical," real-world, impact-based concept, would, as it was a century ago, be replaced by a categorical "content-based" boundary that walls Congress off from remedying major problems with massive detrimental economic effects that manifestly "concern more states than one." With respect to the necessary and proper leg of Congress' justification for the individual mandate, the opponents' argument simply scuttles the most fundamental rule underpinning that clause since the Marshall Era: that the clause, in Justice Scalia's words, "empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation."

This *de facto* erasure of the Necessary and Proper Clause from the Constitution appears with special clarity in the December 13, 2010 decision of Judge Henry Hudson of the Eastern District of Virginia, in which he struck the mandate down, embracing and elaborating on the opponents' arguments. First, Judge Hudson reasoned that all prior decisions upholding statutes exercising Congress' commerce power had involved "some type of self-initiated action."[32] Converting this asserted factual distinction between the mandate and other, previously upheld regulatory requirements, into a new rule of law (without citing any legal authority or offering any argument as to why established rules should be displaced by this new one),[33] Hudson then went on to make a further leap:

> If a person's decision not to purchase health insurance at a particular point in time does not constitute the type of economic activity subject to regulation under the Commerce Clause, then logically an attempt to enforce such provision under the Necessary and Proper Clause is equally offensive to the Constitution.[34]

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their importance in the overall regulatory scheme. The ACA mandate's indisputably strong connection to the statute's plan for regulating one of the largest markets of the national economy stands in sharp contrast.

[32] Virginia v. Sebelius, No. 3:10-cv-00188-HEH, slip op. at 24 (E.D. Va. Dec. 13, 2010) (granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment).

[33] Rochelle Broboff, *Examining the Latest Decision on the Affordable Care Act: When Precedent Proves Elusive*, ACSBLOG, Dec. 15, 2010, http://www.acslaw.org/acsblog/node/17881.

[34] *Sebelius*, slip op. at 19.

Immediately after its release, George Washington University Law Professor Orin Kerr (among others) noted this "significant error in Judge Hudson's opinion:"

> The point of the Necessary and Proper clause is that it grants Congress the power to use *means* outside the enumerated list of Article I powers to achieve the *ends* listed in Article I. (emphasis in original). If you say, as a matter of "logic" or otherwise, that the Necessary and Proper Clause only permits Congress to regulate using means that are themselves covered by the Commerce Clause, then *the Necessary and Proper Clause is rendered a nullity. But that's not how the Supreme Court has interpreted the Clause, from Chief Justice Marshall onwards.*[35] (emphasis supplied).

Three days after the release of Judge Hudson's decision, his excision of the Necessary and Proper Clause was reinforced by Judge Roger Vinson, presiding at oral argument in Pensacola, Florida, in the ACA challenge brought by Republican state attorneys general and other elected officials (the "AGs"). Like Hudson, Vinson did not dispute that the individual mandate is directed at attaining constitutional regulatory goals. Nevertheless, Vinson, a Reagan appointee, stressed: "There are lots of *alternative ways* to provide health care to the needy without imposing on individual liberties and freedom of choice." Vinson's brushing aside of Congress' choice of means overlooks the fact that, under the Necessary and Proper Clause, identifying and selecting among "alternative" means is up to Congress. Courts are bound, as Chief Justice Marshall put it in 1819, to approve *all* means "which are plainly adapted to [a lawful] end."

Judge Vinson's suggestion that Congress could and should have chosen another means, apart from being unsupported, constitutes activist second-guessing and micro-managing of congressional policy choices of precisely the sort that the Necessary and Proper Clause, has been understood to preclude. Together with Judge Hudson's assertion that the Necessary and Proper Clause does not authorize legislation that, standing alone, would not fall within an enumerated power, Vinson's alternative means tack repudiates the two essential touchstones of modern – as well as "original" – construction and in effect reads the Necessary and Proper Clause out of the Constitution.

Judge Vinson's final January 31, 2011 decision granting the AGs' motion for summary judgment and striking down the individual mandate repeats his views expressed at oral argument regarding the Necessary and Proper Clause and further asserts that "'Economic' cannot be equated with 'Commerce'" – a direct repudiation of the established recognition of the purpose and scope of the Commerce Clause to empower Congress to "build a stable national economy."[36] Most remarkably, Vinson, purporting to review the history of Commerce Clause interpretation, attempts to trivialize the status of Chief Justice Marshall's foundational interpretation of the commerce power in *Gibbons v. Ogden*. In the same revisionist vein, he airbrushes out of his account of the

[35] Orin Kerr, *The Significant Error in Judge Hudson's Opinion,* THE VOLOKH CONSPIRACY, Dec. 13, 2010, http://volokh.com/2010/12/13/the-significant-error-in-judge-hudsons-opinion/.
[36] United States v. Lopez, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring).

Supreme Court's most recent decision, *Gonzales v. Raich*, the powerful and unambiguous statements in Justice John Paul Stevens' majority opinion and Justice Scalia's concurring opinion that reaffirm and, if anything, strengthen Marshall's broad interpretation of both the Commerce and Necessary and Proper Clauses.[37]

B. Opponents' Back-door Reinstatement of Activist Substantive Due Process

1. Judges Hudson and Vinson: "Liberty Interests" Trump Rational Legislation

In his October 14, 2010 preliminary decision denying the Justice Department's motion to dismiss the claims against the individual mandate provision, Judge Vinson set out a plausible rationale for his displacement of Supreme Court precedent construing the Commerce and Necessary and Proper Clauses. But that rationale, echoed in a fragmentary manner in Judge Hudson's preliminary (July 1, 2010) and final (December 13, 2010) decisions, only serves to underscore the inherently radical character of the case against the ACA.[38]

Judge Vinson's moment of candor appears, not in his abbreviated argument endorsing opponents' inactivity Commerce Clause theory, but in an adjacent section of his October 14, 2010 preliminary opinion. In this section, he addresses the AGs' claim that the mandate violates individuals' Fifth Amendment due process rights, brusquely dismissing this theory. He brushes aside, as "long since discarded," *Lochner* and kindred decisions that interpreted "the Due Process Clause…to reach economic rights and liberties." Since the New Deal, he notes, due process-based claims can only set aside economic laws that are not "rationally related to a legitimate end." In the ACA, he continues: "Congress made factual findings . . . that the individual mandate was 'essential' to the insurance market reforms contained in the statute." Judge Vinson agrees with the AGs that an individual "liberty interest" is at stake in the case, but, he goes on, under contemporary, post-*Lochner* doctrine, courts may set aside rationally based statutory requirements only if the liberty interests they impinge constitute "fundamental rights." These, he notes, the Supreme Court has limited to a "narrow class" of interests. The liberty interest in foregoing health insurance, he concluded, has not been so recognized by the Court, and hence, the mandate is impervious to due process challenge because it is rationally related to the ACA's insurance reforms. Remarkably, one page later, Judge Vinson endorses the legal theory behind the AGs' Commerce Clause attack, neglecting to mention, much less reconcile, his

[37] Florida v. U.S. Dep't of Health and Human Services, No. 3:10-cv-91-RV/EMT, slip op. at 13, 28, 55, 60, 61 (N.D. Fla. Jan. 31, 2011) (order granting summary judgment). The points noted here concerning this opinion's evasion and scuttling of Commerce and Necessary and Proper Clause precedent from both the Marshall and post-New Deal eras echoes numerous commentators, notably Andrew Koppelman, *Non-Sequiturs in the Florida Health Care Decision,* BALKINIZATION, Feb. 2, 2011, *http://balkin.blogspot.com/2011/02/non-sequiturs-in-florida-health-care.html,* and Orin Kerr, *The Weak Link in Judge Vinson's Opinion Striking Down the Mandate,* THE VOLOKH CONSPIRACY, Jan. 31, 2010, *http://volokh.com/2011/01/31/the-weak-link-in-judge-vinsons-opinion-striking-down-the-mandate/.*

[38] The following section of this issue brief draws and on and expands upon my opinion column *Jurisdictional Shell Game: Health Reform Lawsuits Sneak "Lochnerism" back from Constitutional Exile*, NATIONAL LAW JOURNAL Dec. 20, 2010, at 29, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202476355698&slreturn=1&hbxlogin=1.

statement when dismissing their due process claim that Congress had established a "rational basis justifying the individual mandate" as a matter of law.

This was no mere rhetorical slip on Judge Vinson's part. On the contrary, balancing the individual liberty interest in foregoing health insurance against Congress' reasons for mandating insurance coverage is precisely what drives Judge Vinson's rejection of the individual mandate provision. "At its core," he concluded in his final decision granting the AGs' motion for summary judgment, "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."[39] Otherwise said, an individual liberty interest in foregoing health insurance trumps an otherwise valid regulation of commerce.

After an intense exchange with counsel for the Department of Justice, Vinson repeated the conclusion he shares with Judge Hudson:

> I'm just saying that as far as an integrated national plan of trying to deal with the problems you've identified [preventing cost-shifting and implementing the insurance reforms in the law], there are lots of optional ways of doing it that are less intrusive, less drastic and *certainly don't go to the extreme of mandating someone to buy insurance if they don't want to*."

In effect, Vinson was condemning the individual mandate provision on the theory that it is not the least restrictive alternative for achieving Congress' goal. This least-restrictive-alternative test would be appropriate IF the mandate were being analyzed as an asserted substantive due process violation, and IF the liberty interest at stake amounted to a "fundamental right," as Judge Vinson himself had correctly explained in his earlier opinion. In any event, least restrictive alternative balancing has no part in determining the scope of the Commerce Clause, as the Government's counsel queried the Court: "[T]he question that actually is before the Court is whether Congress had a rational basis for it, right?"[40]

2. Opponents' "Necessary but Improper" Argument Amounts to Substantive Due Process with No Limiting Principle

To get around the dead end of "rational basis" deference prescribed by Commerce and Necessary and Proper Clause precedent, libertarian academics have proposed an alternative route. Their theory is that while the individual mandate provision is concededly "necessary" for achieving a constitutionally legitimate end, that is not sufficient to approve the legislation because the Constitution requires that it be "necessary AND proper." "Proper," this argument goes, is an independent criterion and a limitation on "necessary." In particular, an otherwise necessary measure may be "improper" if it violates constitutionally derived norms of federalism, i.e., state sovereignty as prescribed by the Tenth Amendment, separation of powers, or individual

[39] Virginia v. Sebelius, No. 3:10-cv-00188-HEH, slip op. at 37 (E.D. Va. Dec. 13, 2010).
[40] Transcript of Oral Argument at 81, Florida v. U.S. Dep't of Health and Human Services, No. 3:10-cv-91-RV/EMT (N.D. Fla. Dec. 16, 2010).

rights.[41] In his January 31, 2011 final decision, Judge Vinson's entire case for rejecting the mandate came down to reliance upon this argument:

> "The defendants [the Department of Justice] have asserted again and again that the individual mandate is absolutely 'necessary and 'essential' for the Act to operate as it was intended by Congress. *I accept that it is*. Nevertheless, the individual mandate falls outside the boundary of Congress' Commerce Clause authority and cannot be reconciled with a limited government of enumerated powers. *By definition, it cannot be 'proper*.'"[42]

Though ingenious, this theory transparently flouts Chief Justice Marshall's prescription that the Necessary and Proper Clause "cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgement. . . ."[43] Moreover, it has never been considered, let alone adopted, by the Supreme Court.

The result of accepting opponents' case against the mandate, with the necessary but improper component either explicit or implicit, would be to import, into determinations of the scope of the Commerce and Necessary and Proper Clauses, protections for individual liberty interests hereto assigned to the Fifth Amendment due process clause. This would not constitute simply a change of textual venue, but a major expansion of judicial power at the expense of Congress. As Judge Vinson explained, substantive due process-based "liberty interests" can trump rationally based statutes only if the claims concern a "narrow" class of "fundamental rights." Not so, it appears, from his – and other reform opponents' – treatment of identical claims in the context of a Commerce Clause attack. In contrast to the rigorous analysis prescribed by substantive due process precedents, there appears to be no limiting principle to the capacity of judges to carve out asserted "liberty interests" from Congress' authority to regulate interstate commerce.

The tremors from thus rewriting the Commerce and Necessary and Proper Clauses would hardly be minor. When opponents' objection to the individual mandate is subjected to the rigorous scrutiny prescribed by post-New Deal substantive due process precedent, its stature as a liberty interest shrinks. To be sure, the Supreme Court has held that an individual's right to refuse medical *treatment* is "fundamental," and can prevail over an otherwise valid federal requirement,[44] but that does not exempt individuals from paying Medicare taxes and thereby contributing to the Medicare insurance pool. If the right to avoid payment for treatment were constitutionally "fundamental," then Medicare taxation would be vulnerable to due process attack, as would state mandatory insurance requirements like those enacted by Massachusetts in 2006. Indeed, refusing to carry health insurance may not constitute a genuine liberty interest at

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[41] Randy Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 6 N.Y.U. J.L. & LIBERTY (forthcoming 2011); Gary Lawson and Patricia Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause,* 43 DUKE L.J. 267, 297 (1993).
[42] Florida v. U.S. Dep't of Health and Human Services, No. 3:10-cv-91-RV/EMT, slip op. at 63 (N.D. Fla. Jan. 31, 2011) (emphasis added).
[43] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420 (1819).
[44] *See supra* note 30.

all. Treating uninsured patients, as most hospitals are required by federal statute to do, shifts tens of billions of dollars in costs annually to providers, insured consumers, and taxpayers. As former Massachusetts Governor Mitt Romney noted when signing the Massachusetts individual mandate:

> "[S]omeone has to pay for the health care that must, by law, be provided: Either the individual pays or the taxpayers pay. A free ride on the government is not libertarian."[45]

In sum, opponents' case against the minimum coverage provision reinstates the precise logic of *Lochner*, along with the baggage that induced conservatives like Bork, Meese, and Roberts to brand that era of jurisprudence as "illegitimate" activism. Federal judges, as with Judges Hudson and Vinson, could be free to stymie even indisputably "essential" legislation, on the basis of asserted "liberty interests" that would have not the remotest chance of qualifying as "fundamental" under long-established rules mediating conflicts between due process rights and Congress' authority to regulate the economy. In effect, a long step will have been taken toward the libertarian goal of a regime in which the longstanding presumption of constitutionality no longer applies to federal laws challenged in court. Instead, any asserted interference with a liberty interest would impose on the federal government the burden of overcoming a "presumption of liberty."[46]

C. Reform Opponents' Arguments against the Individual Responsibility Provision Repudiate Established Rules Governing Congress' Authority to Tax and Spend for the General Welfare

To keep the ACA individual mandate from being evaluated under the broad "general welfare" and "rationally related" criteria of Congress' tax-and-spend authority, opponents rely on two arguments. First, they contend, the individual mandate is not a tax at all because it is too regulatory in its nature. For this conclusion, which conflicts directly with the above-noted post-New Deal precedents, opponents rely on a 1922 decision, *Bailey v. Drexel Furniture*, often styled the *Child Labor Tax Case*. *Bailey* ruled unconstitutional a federal tax on products moving in interstate commerce that had been produced by child labor. Four years prior to this decision, the Court had ruled that a flat ban on child labor exceeded Congress' power under the Commerce Clause.[47] Since 1937, when *Sonzinsky v. U.S.* ruled that regulatory purpose or effect does not cause a law to lose its status as a tax, *Bailey*, along with kindred *Lochner* era decisions, has been ignored.

Judge Hudson's answer to charges that the Child Labor Tax Case belongs to a discredited era in constitutional interpretation is that, "[n]otwithstanding criticism by the pen of some constitutional scholars, the constraining principle articulated in [this and similar cases], while

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[45] Mitt Romney, *Health Care for Everyone? We Found a Way*, WALL ST. J., Apr. 11, 2006, at A16, *available at* http://online.wsj.com/article/SB114472206077422547.html/mod+opinion_main_commentaries.

[46] Randy Barnett elaborates this vision in his book, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

[47] Hammer v. Dagenhart, 247 U.S. 251, 276-77 (1918).

perhaps dormant, remains viable and applicable [to the status of the ACA mandate]."[48] Were a Supreme Court majority to follow Judge Hudson in resuscitating the case, and the radical "constraint" on the tax-and-spend power that it stands for, this would effectively remove an indispensable foundation for legislative authority on which Congress has relied to enact protections and benefits long taken for granted by the public.

Perhaps skittish about relying on a century-old ruling that Congress lacks the power to ban discourage child labor, opponents offer a second, complementary argument. They contend that, while the individual mandate provision imposes federal income tax liability, and has other objective, structural characteristics of a tax, the weight of (concededly ambiguous) evidence from the statute itself and its legislative history (including, prominently, one statement in a television interview by President Obama) demonstrates that Congress *intended* the provision to be *perceived* as a "penalty," not a "tax." [49]

There is no justification for judges to rule legislation unconstitutional where Congress was concededly acting well within authority conferred by the Constitution, but (on the basis of a highly debatable construct of the congressional and extra-congressional record) somehow did not desire that the legislation be linked to a particular, applicable constitutional provision.[50] As several scholars have noted, the validity of a federal law cannot turn on "magic words" or labels: "The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."[51] This "gotcha" approach," if followed by higher courts, may portend more far-reaching judicial interference with Congress' ability to legislate than even the reversals of long-established substantive constitutional doctrine outlined in earlier sections of this issue brief.

D. Opponents' Claim that the ACA's Expansion of Medicaid Coverage Unconstitutionally "Coerces" State Governments in Violation of the Tenth Amendment Would Overturn a Basic Component of Spending Clause Jurisprudence and Undermine Many "Cooperative Federalism" Programs

Opponents' attack on the individual responsibility provision figures in virtually all the suits challenging the ACA and dominates media accounts, but at least one other claim could, if upheld by the Supreme Court, trigger seismic changes in constitutional law and in laws and programs affecting all Americans. This claim, set out in the AGs' complaint targets the ACA's expansion of Medicaid to require, starting in 2014, coverage of all adults below 133% of the Federal Poverty Line.

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[48] Virginia v. Sebelius, No. 3:10-cv-00188-HEH, slip op. at 36 (E.D. Va. Dec. 13, 2010).

[49] Judge Vinson's decision on the motion to dismiss tracks Florida's argument on this issue. Florida v. U.S. Dep't of Health and Human Services, No. 3:10-cv-91-RV/EMT, slip op. at 22 (N.D. Fla. Oct. 14, 2010).

[50] Bear in mind that the question here is not how to interpret and apply a constitutional provision, or to determine whether Congress has authority to enact a particular law. In such cases, Congress' subjective intent, expressed through statutory provisions and legislative history, is certainly pertinent and important. But this is a completely different type of inquiry. Here there is no question that the Constitution authorizes Congress to enact the mandate under its authority to tax and spend for the general welfare. That should be the end of the inquiry.

[51] Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948). *See* Gillian Metzger and Trevor Morrison, *Health Care Reform, the Tax Power, and the Presumption of Constitutionality*, BALKINIZATION, Oct. 19, 2010, http://balkin.blogspot.com/2010/10/health-care-reform-tax-power-and.html.

The AGs acknowledge that state participation in Medicaid has been, since the program was first enacted in 1965, and remains formally voluntary, in that states can opt out. . They assert that the expansion prescribed in the ACA is not only greater in magnitude but different in kind than previous expansions which grew Medicaid from costing $4.5 billion in 1970 to $338 billion and covering over 55 million Americans in 2009.[52] Further and most important, they contend that Medicaid has become so central to states' ability to ensure access to medical care for the variety of less well-off sectors of their citizenry, that state governments have no realistic option to withdraw from the program. Hence, their argument runs, the ACA effectively "coerces" states into accepting broadened coverage and with it, crippling new costs. Such *de facto* coercion, the AGs claim, exceeds Congress' power under the General Welfare Clause and undermines state sovereignty in violation of the Tenth Amendment.

The AGs' "coercion" attack on the Medicaid expansion provisions proposes a radical upheaval in applicable constitutional law. Judge Vinson, in his preliminary October 14 ruling on the Department of Justice's motion to dismiss the AGs' complaint, and in both oral arguments before him, emphatically acknowledged that "the current status of the law provides very little support for the plaintiffs' coercion theory argument. Indeed . . . its entire underpinning is shaky."[53] He noted that "the courts of appeal that have considered the theory have been almost uniformly hostile to it." Vinson specifically rejected the AGs' claim that none of these negative rulings had addressed claims where the degree of financial pressure on state litigants was as intense as in the current case. In so doing, he cited a 1997 case brought by California challenging a Medicaid requirement that it extend emergency medical services to undocumented immigrants – a requirement with a $400 million price-tag for the state. The state claimed that it had no choice because withdrawing from Medicaid altogether would mean "a collapse of its medical system." Vinson noted that the Ninth Circuit in that case "concluded that the state was merely presented with a 'hard political choice.'"[54]

Since there are literally no cases upholding a claim of coercion, and since the AGs' basis for their claim has been both murky and variable through the various phases of the litigation in the District Court so far, it is not possible to predict with confidence what the grounds for and scope of a holding in their favor would be. They have appeared to emphasize several points: (1) an alleged qualitative change in the conceptual basis and financial magnitude of the Medicaid program; (2) the magnitude of federal funding of Medicaid ($251 billion nationally in 2010); (3) the proportion of the states' Medicaid budgets attributable to the federal funds they would lose if they withdrew from the program; (4) the proportion of the states' budgets attributable to the

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[52] Center for Medicare and Medicaid Services, U.S. Department of Health and Human Services, Office of the Actuary, 2008 ACTUARIAL REPORT ON THE FINANCIAL OUTLOOK FOR MEDICAID , page 16, Table 3 (2008); Kaiser Family Foundation, Commission on Medicaid and the Uninsured, *A Timeline of Key Developments*, http://www.kff.org/medicaid/medicaid_timeline.cfm

[53] Florida v. U.S. Dep't of Health and Human Services, No. 3:10-cv-91-RV/EMT, slip op. at 55 (N.D. Fla. Oct. 14, 2010). Judge Vinson noted that the source of the so-called "coercion theory," and one of the only two cases mentioning the concept, rejected a challenge to the Federal-state partnership arrangements of the first Federal unemployment compensation law, stating that "Nothing in the case suggests the exertion of a power akin to undue influence, *if we assume that such a concept can ever be applied with the fitness to the relations between state and nation*." *Id.* (emphasis in original) (citing Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

[54] *Id.* at 54 (citing California v. United States, 104 F.3d 1086 (9th Cir. 1997)).

federal Medicaid contribution; and (5) the importance of the program, and the federal funds allocated to it, to states and their citizens. Each of these grounds for finding "coercion," has been specifically rejected by one or more of the courts of appeal that had heard coercion claims.[55]

Despite thus acknowledging the chasm separating the AGs' coercion claim from current case-law, Judge Vinson nevertheless declined to dismiss the claim because, he said, he was sympathetic to the states' description of their plight, and because, in principle, there must be "a line somewhere between mere pressure and impermissible coercion." [56] In his final decision, Judge Vinson reiterated his understanding that established law precludes granting the AGs' claim, though he invited the Supreme Court to "revisit and reconsider its Spending Clause cases," quoting libertarian scholar Lynn Baker's suggestion that "the greatest threat to state autonomy is, and has long been, Congress's spending power."[57] In any event, it is clear from the account of current law provided by this judge, hardly sympathetic to the ACA, that upholding the AGs' coercion claim would deliver a "jolt to the system," as Chief Justice Roberts called reversals of precedent in his confirmation hearing, that would match or, more likely, surpass any such departures from precedent yet authored by the Roberts Court.

III. Health Reform Opponents' Claims Against the ACA Individual Mandate and Medicaid Expansion Provisions Potentially Threaten a Broad Array of Landmark Laws and Programs

Some health reform challengers downplay the significance of their claims, arguing that they necessitate no overturning of existing "post-New Deal constitutional cases and doctrine" and no damage to laws other than the ACA.[58] To be sure, most of these advocates have long histories of fervent and articulate opposition to the modern post-New Deal state, and to the constitutional regime that supports it.[59] The question is, how far would invalidation of the challenged provisions of the ACA move constitutional interpretation in the direction of that broad libertarian agenda? In the interest of provoking awareness and consideration of these prospects, this Part of the brief will specify the key doctrinal changes that reform opponents' claims entail, and briefly identify examples of areas potentially vulnerable to collateral damage from those changes.

A. The New Doctrines Embedded in the Legal Theories Behind the ACA Challenges

The theories advanced by the health care reform challenges contravene, and in some cases, repudiate outright the above-sketched basic rules of the established constitutional regime. Based

[55] Florida v. U.S. Dep't of Health and Human Services, supra note 53, *Reply in Support of Defendants' Motion for Summary Judgment*, at page 22 (filed 12/06/2010).
[56] The Department of Justice responded to the AGs' complaint that the Medicaid expansion provisions will "drive them off a cliff" financially, with multiple studies and statistics purporting to show that the overall financial impact of the ACA on the states would be very small at worst and, for some states at least, significantly positive.
[57] *Florida*, slip op. at 12.
[58] Randy Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 6 N.Y.U. J.L. & LIBERTY (forthcoming 2011).
[59] *See, e.g.*, Randy Barnett, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); Richard A. Epstein, HOW PROGRESSIVES REWROTE THE CONSTITUTION (CATO Institute, 2006).

on the arguments they assert in the litigations, in their place, the ACA challengers would introduce the following new rules:

- A categorical rule that a prerequisite to the imposition of Commerce Clause-based regulation is some form of "self-initiated activity." Whatever scope subsequent decisions might give this vague and unprecedented concept, it cannot include foregoing or not carrying health insurance. Hence, personal decisions or conduct equivalent to foregoing health insurance must similarly be beyond the reach of Congress' commerce power.

- A rule that regulatory measures that, standing alone, are not authorized by the Commerce Clause or other enumerated power cannot be authorized by the Necessary and Proper Clause on the ground that they are essential to achieving a valid statutory goal or to ensure the effectiveness of a broader, valid statutory program.

- A rule that, where a levy or exaction carries a "regulatory purpose," it must be authorized by the Commerce Clause or another enumerated power, not by the broad term "general welfare" in the text of the tax-and-spend clause itself.

- A rule that laws sanctioned by the Commerce Clause or the General Welfare Clause (or, presumably, any other constitutional provision) must fail if they impinge on an individual liberty interest of comparable dimension to the interest in foregoing health insurance. This would replace the existing rule that legislation must be upheld if rationally related to a lawful objective except when conflict is asserted between the law and a "fundamental right." In effect, this would reinstate the precise legal logic used by the pre-New Deal "Lochner" judiciary to strike down economic regulatory laws, but under the rubric of the Commerce Clause instead of the Due Process Clause of the Fifth Amendment.

- A rule that conditional funding programs (funding programs with strings attached) for state governments are unconstitutionally coercive under one or more of the following circumstances: if, *as a practical or political matter*, a state (or states generally) cannot exercise their legal right to reject funding and withdraw from a federal program because of: the absolute level of federal funding, the proportion of the federal funds in question to a state's program to which they contribute, the proportion of the federal contribution to the state's overall budget, or the political or other importance of the federal program to the state.

- A rule that neither Congress nor, presumably, administrative agencies can require states to accept changes in conditional spending programs that significantly increase costs or other burdens for participating states as a

condition of remaining in and continuing to receive funds from the program.

B. Areas of Law Vulnerable to Challenges Based on Reform Opponents' Claims

Given the broad sweep of the doctrines that invalidation of the ACA mandate would repudiate or call into question, and the entrenchment of those doctrines in constitutional jurisprudence and legal and governmental practice, it is difficult to predict the precise impact of such an outcome. At this juncture, some of the most far-reaching consequences may be the most hidden from view. For example, the status of the Necessary and Proper Clause as a facilitator of Congress' ability to choose efficacious ways, independent of its enumerated powers, to "carry [those powers] into execution," has been established since the earliest days of the Republic. For all that time, Congress has crafted legislation with the understanding that individual components of a regulatory scheme need not themselves be in or have a substantial connection to interstate commerce. Only rarely have the courts addressed challenges to such non-interstate commerce-connected pieces of broader programs, and thereby been compelled to reaffirm Chief Justice Marshall's rule. So it is difficult to find cases that could go the other way if that rule is overturned. But such challenges could proliferate, if the Supreme Court endorses Judge Hudson's new rule that "[b]ecause an individual's personal decision to purchase – or decline to purchase – health insurance from a private provider is beyond the historical reach of the Commerce Clause, the Necessary and Proper Clause does not provide a safe sanctuary."

Nevertheless, it is possible to identify at least some policy areas and statutes susceptible to being targeted or affected by the theories pressed by ACA challengers.

1. Benefit Programs – Medicare, Social Security, and Medicaid

Two elements of a decision to strike down the individual mandate provision could pose major threats to the nation's safety net. The first threat arises from the fact that the decision would effectively provide that a personal liberty interest can overcome a statute that is, indisputably, rationally related to and, apart from its conflict with the asserted liberty interest, justified under Congress' Commerce Clause authority. To be sure, opponents argue that the mandate regulates "inactivity," which, they assert, the Commerce Clause does not cover. But, as noted above, the inactivity/ activity distinction at best states a purely factual difference between the individual mandate provision and all other cases applying the Commerce Clause. The only basis for turning that factual difference into a legal standard is precisely the reason given by both Judge Hudson and Judge Vinson: namely, that the ACA mandate impairs a personal liberty interest, an individual's interest in freedom to choose not to purchase health insurance. Similarly, proponents have advanced the necessary but improper theory to strike the mandate, even though it is concededly "necessary" as prescribed by the Necessary and Proper Clause. But, again, the reason why they brand the mandate "improper," is because it violates the same asserted personal liberty interest.

So the question will arise, what is the nature of this liberty interest robust enough to invalidate a rationally based exercise of Congress' commerce power? ACA opponents generalize the principle at stake as the interest in not being compelled to purchase a privately

marketed product. ACA supporters see the issue differently and would characterize the interest at stake as an individual's interest in determining whether and how to pay for health care services, or whether to contribute to an insurance pool available to finance the individual's and others' purchases of health care services at affordable prices. Viewed through the latter lens, in terms of its impact on individual liberty, the ACA mandate is indistinguishable from Medicare or Social Security taxes. To libertarian theorists and advocates, forced contributions to public health and/or retirement programs are, in principle, not necessarily less objectionable than mandatory private insurance. Certainly, cases will be brought alleging that the principle on which a decision adverse to the ACA rests necessarily implicates Medicare and Social Security taxes as well, whether as a substantive due process claim or as a carve-out from the tax power. In the short term, it may seem extreme and untenable, at least politically, to apply the principle underlying a decision to strike down the ACA mandate to require Medicare and Social Security contributions to become voluntary. But just a year ago, most legal experts regarded the claims put forward in the health care reform cases as improbable, if not frivolous. Once such a principle has been embraced by the Supreme Court, political acceptance, not legal logic, will determine how far it will carry in the courts, and how fast it might travel.

In addition to this threat to Medicare and Social Security taxes, the AGs' attack on the ACA's Medicaid expansion provisions would cripple Medicaid – the entire, existing program financing health care for over 50 million Americans, not just Medicaid as it would be revised by the ACA – as well as other state-administered programs that are federally funded and supervised. Any of the criteria suggested by the AGs' counsel for branding the Medicaid expansion as coercion could effectively immunize the states from complying with federal requirements in exchange for accepting federal funds and convert Medicaid into a *de facto* block grant. The AGs' claims, if embraced by the Supreme Court, could effectively prevent Congress or the Department of Health and Human Services from modifying the program in ways to which states would object as adding financial or other burdens unforeseen when they first decided to participate in the program. The federal government could be significantly drained of its ability to ensure that the billions of tax dollars turned over to the states to administer are spent in accord with statutory purposes and requirements.

2. Civil Rights Protections

If ACA opponents' inactivity/ activity distinction is embraced and the individual mandate provision struck down, an obvious target area for copycat claims could be safeguards against discriminatory refusals to serve, sell or rent, or hire. Health care reform opponents distinguish these antidiscrimination laws on the ground that, prior to subjecting themselves to requirements to serve or employ or sell or rent to all, regardless of race or other protected status, hospitality providers, housing sellers or renters, or employers have "initiated" commercial activity. Once individuals have taken such a voluntary step, they say, the government may regulate them under the Commerce Clause (or, presumably, other applicable power).

At first blush, opponents' distinction may seem viable. But, especially when the complex realities of the health insurance and health care markets are considered, the line of demarcation becomes murky. To be sure, someone declining to enter into a commercial transaction with a prospective homebuyer or worker or restaurant customer may plausibly be characterized as

already having voluntarily entered the stream of commerce. But the same can just as plausibly be said for many uninsured persons. A substantial majority of those without insurance coverage at some point during any given year move in or out of coverage and have coverage at some other point within the same year, and 62.6% of the uninsured at a given point in time made at least one visit to a doctor or emergency room within the year.[60] The two models could be characterized as not all that categorically different, a point that will surely be made in court. Depending on the facts in particular cases, challengers can be expected to claim that it would be difficult to distinguish the ACA mandate from antidiscrimination laws that, arguably, require persons to enter into transactions or otherwise "engage in commerce."[61]

A second set of vulnerable civil rights protections are antidiscrimination guarantees prescribed by conditional funding programs such as Title VI of the Civil Rights Act and Title IX of the Education Amendments of 1972, the Age Discrimination Act, the Rehabilitation Act, and the Individuals With Disabilities Education Act (IDEA). These requirements are responsible for such diverse and revolutionary changes as women's sports facilities and teams nationwide and accommodation for people with disabilities by public universities and facilities. Among the most effective engines of equal opportunity on the nation's lawbooks, these conditional funding safeguards could be threatened or obstructed by the Supreme Court's embrace of the "coercion" theory the AGs have leveled at the ACA's Medicaid expansion provisions. In any of its variations, the coercion theory means that the requirements of a conditional funding program could become unenforceable, precisely as funding levels reach a threshold sufficient to constitute an effective inducement. Otherwise stated, the more politically difficult it is for a state to turn away funding, the less power Congress has to impose conditions on that funding. In the case of antidiscrimination conditions, the reason that compliance has been so widespread over the decades since these laws were enacted is precisely that noncompliance could lead to the loss of federal funding for an entire institution (such as a state university), not just the individual program or facility where noncompliance occurs.[62]

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[60] Florida v. U.S. Dep't of Health and Human Services, supra note 53, *Memorandum in Support of Defendants' Motion for SummaryJudgment* 28 (citing Congressional Budget Office, *How Many Lack health Insurance and For How Long* at 4,9 (2003); Thomas More Law Center et al. v. Barack Hussein Obama et al., Civil Case No. 10-11156, Amicus Curiae Brief of Majority leader Harry Reid et al, 13 (filed January 21, 2011) (citing Center for Health Statistics, *Health, United States, 2009, at 318.*.

[61] Probably not coincidentally, supporters of the health care reform suits include opponents of government bans on private discrimination. They will presumably not be displeased if, following a decision adverse to the ACA mandate, the constitutional status of longstanding prohibitions on private discrimination comes under attack. New U.S. Senator Rand Paul created a stir during the 2010 campaign when he acknowledged this view. See http://www.washingtonpost.com/wp-dyn/content/article/2010/05/20/AR2010052003500.html.

[62] The institution-wide bite of Title VI and Title IX guarantees was secured by congressional override of a 1984 Supreme Court decision construing Title VI to restrict funding cut-offs for non-compliance narrowly to affected activities or programs only. Grove City College v. Bell, 465 U.S. 555 (1984*). Grove* City was overridden by the Civil Rights Restoration Act of 1988. http://www.now.org/issues/title_ix/history.html The Rehabilitation Act covers "all of the operations" of a "federally funded program or activity, such that if one part of a department or agency receives federal financial assistance, the whole entity is considered to receive federal assistance. 28 U.S.C.A. §794(b); Schroeder v. City of Chicago, 927 F.2d 957, 962 (7th Cir. 1991). Conservative members of the Court have shown hostility to conditional spending antidiscrimination protections on other occasions, *see* Alexander v. Sandoval, 532 U.S. 275 (2001), and, more generally, to enforcement of conditional spending protections. Phrma v. Walsh, 538 U.S. 644, 674-83 (dissenting opinions of Justices Scalia and Thomas) (2003); R. Bobroff, *Section 1983 and Preemption: Alternative Means of Court Access For Safety Net* Statutes, 10 LOYOLA JOURNAL OF PUBLIC INTEREST LAW 27, 75-80 (2009) Arlington Central School District Board of Education v. Murphy, 126 S. Ct. 2455,

3. Environmental Programs

Four aspects of the ACA opponents' case could pose threats to major environmental laws and programs. First, a new activity/ inactivity barrier to Commerce Clause-based regulation could spell trouble for the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as the Superfund hazardous waste law, and, possibly, the Endangered Species Act and the Clean Water Act. CERCLA prescribes a strict liability regime for exacting contributions from property owners to pay for clean-up of underground toxic contaminants. Property owners, residential as well as commercial, are liable for clean-up of contamination far removed from the borders of their own land, as long as run-off or seepage from sources under their land could have contributed to targeted contamination, under quite loose standards of proof.[63] Judge Hudson dismissed an asserted analogy between the individual mandate provision and CERCLA on the ground that property owners at some point would have purchased the land before incurring liability, thereby engaging in a "self-initiated activity." But in reality, some cases of home or other real property ownership triggering CERCLA liability could show more tenuous and problematic connections to commercial activity than the case of many, uninsured individuals subject to the ACA individual mandate provision. Judge Hudson's dismissal of such a threat to Superfund requirements is unlikely to deter copycat litigants from challenging, nor excuse judges from determining, whether a new rule would require limits on CERCLA strict liability. Insofar as the Endangered Species Act, and/or the Clean Water Act impose restrictions without a prerequisite of "self-initiated activity" on the part of affected property owners, such measures would likewise face court scrutiny under a new rule.

Second, provisions of environmental laws and regulations could be put in play by a new rule that individual components of valid Commerce Clause regulatory programs must themselves be independently subject to Commerce Clause jurisdiction. To take one possible example, Commerce Clause challenges to the detailed mandates in the Surface Mining Control and Reclamation Act, summarily dismissed by a unanimous Supreme Court in 1981, could suddenly become viable 30 years later, by affirmance of Judge Hudson's December 13 ruling that the Necessary and Proper Clause provides no "sanctuary" for individual instrumental pieces of broader regulatory schemes.

Third, if opponents' claims, as embraced by Judges Hudson and Vinson, are embraced by the Supreme Court, resistance and challenges to applications of environmental laws could mushroom, simply because the Court has broken with decades of precedent and erected a categorical barrier to Congress' ability to regulate a major economic sector. This seems especially likely, given the level of hostility conservative justices have already shown to application of the Clean Water Act, for example, to allegedly intrastate targets.[64]

2457-64 (2006), discussed in Simon Lazarus, *Federalism R.I.P.? Did the Roberts hearings Junk the Rehnquist Court's Federalism Revolution?* 56 DEPAUL L. REV. 1, 6-7 (2006).

[63] "One of the most troubling aspects of CERCLA liability is the burden placed upon landowners who did not contribute to the presence of hazardous substances on their property." Paul D. Taylor, *Comment: Liability of Past owners: Does CERCLA Incorporate a Causation-Based Standard?*, 35 S. TEX. L. REV. 535 (1994)..

[64] *See* SWANCC v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) and Rapanos v. United States, 547 U.S. 715 (2006). In SWANCC, a 5-4 majority narrowly construed the Clean Water Act to overturn an Army Corps of Engineers rule extending the statutory jurisdictional term "navigable waters of the United States" to include any

A fourth threat to environmental programs posed by a decision adverse to the individual mandate provision would flow from a determination that interference with a loosely defined personal liberty interest can be the basis for invalidating rationally related and otherwise lawful Commerce Clause (or General Welfare Clause) regulatory requirements. This *Lochnerian* logic could spawn challenges to provisions of environmental statutes and regulations, or to particular applications of them.

IV. Conclusion: Power to the Courts?

Perhaps more significant than specific changes to substantive law are procedural and other below-the-radar ways in which endorsement of the health care reform challenges will accelerate the Supreme Court majority's penchant for empowering itself and weakening Congress, as policy makers and political players. To begin with, that trend will be furthered by the hole such a decision will blow through doctrines of "rational basis" deference to Congressional policy and factual determinations. This particular display of judicial willingness to buck legislators' judgments will loom particularly portentous because of the political importance of the clash and centrality of the subject matter to Congress' constitutional authority to regulate the national economy.

In addition, a decision adverse to the ACA mandate, in particular, will scorn an elaborately conscientious effort by Congress to ensure, and to demonstrate with carefully drafted statutory findings, that the legislation squares with governing Supreme Court precedent. Rejecting the case for the legislation made in the statutory findings is not merely an affront to the drafters, nor cavalier disregard for the Court's own precedents. More importantly, shoving aside the findings will demonstrate indifference to Congressional *reliance upon* those precedents in crafting this historic legislation. This sort of "moving the goal posts" makes it hard or impossible for Congress to shape legislation with confidence that it will be sustained. Combined with the difficulties of re-mobilizing the support necessary to enact complex legislation like the ACA, such decisions, however remediable in theory, in practice can and do kill major legislative initiatives permanently.

The complexities and challenges inherent in the legislative process are the reasons why the New Deal Court adopted practices and doctrines essential to give Congress the running room it needs to discharge its constitutional role. Granting the claims of ACA opponents could severely undermine Congress' capacity to perform that role. That possibility should set off alarm bells, and not just for supporters of health care reform.

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habitat adopted by migratory birds. In *Rapanos*, four justices voted to erect a categorical rule that would, if adopted by a Court majority, significantly hamper Federal wetlands protection efforts, as discussed in Lazarus, supra note 65, 56 DEPAUL L. REV. at 6.