

POLITICAL IDEOLOGY AND CONSTITUTIONAL DECISIONMAKING: THE COMING EXAMPLE OF THE AFFORDABLE CARE ACT

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I

INTRODUCTION

On December 8, 2000, the Florida Supreme Court ordered the counting of all of the uncounted ballots in the Florida presidential election.¹ The Bush campaign made it clear that it would seek immediate Supreme Court review. I recall saying that night that everyone I knew who voted for Gore thought that the Florida Supreme Court was correct and that every ballot should be counted, but that everyone I knew who voted for Bush thought that the Florida Supreme Court was wrong and that there should be an end to the counting. I questioned whether it was likely, or even possible, that the Justices on the Supreme Court would see it any differently. This comment proved prescient.

I never have believed that *Bush v. Gore*² reflected the fact that five justices wanted Bush as President and that four wanted Gore in that role. Rather, I thought that it was much more about how a person's political orientation and ideology determines his or her positions and that this is generally no different for justices than for others in society. I remember thinking on December 8 that I expected that the five most conservative Justices would see the matter as other conservatives did and somehow find a way to write an opinion favoring Bush and ending the counting. That they did so in an opinion that makes little sense as a matter of constitutional doctrine further reinforced my sense that the outcome was a reflection of the larger political forces and how they influence the way in which people, including justices, see social issues.

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1. *Gore v. Harris*, 772 So. 2d 1243, 1247 (Fla. 2000).

2. 531 U.S. 98 (2000) (per curiam) (holding that counting uncounted votes in presidential election without preset standards violated equal protection, thus ensuring the presidency for George W. Bush). For a description of the events surrounding the decision, see ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000* (2001); RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001); JEFFREY TOOBIN, *TOO CLOSE TO CALL: THE THIRTY-SIX DAY BATTLE TO DECIDE THE 2000 ELECTION* (2001).

As I think about the Supreme Court dealing with the constitutionality of the Patient Protection and Affordable Care Act³ during the current term, this very much comes to mind. As a matter of constitutional law, under existing doctrines, it should be an easy case. The Act is clearly constitutional under the commerce power or under the taxing and spending power or as an exercise of authority under the Necessary and Proper Clause.⁴ But the outcome in the Supreme Court is very much in doubt because of the way in which the constitutional issue has come to be defined by political ideology. The Affordable Care Act passed the Senate on December 24, 2009, by a filibuster-proof majority of 60–39, with all Democrats and two Independents voting for, and all Republicans voting against. It passed the House of Representatives on March 21, 2010, by a vote of 219–212, with all 178 Republicans and 34 Democrats voting against the bill. In political debates since, the rhetoric has been defined entirely by ideology. In the lower federal courts, with only one exception on each side, every judge appointed by a Democratic President has voted to uphold the law and every judge appointed by a Republican President has voted to strike it down.⁵

The question is whether the Supreme Court will follow this pattern. If it does and if the Court strikes the law down, what will be the effects? Sometimes decisions on issues that seem the product of ideology have little effect on constitutional doctrines. *Bush v. Gore*, for example, had no apparent effect on constitutional law in that it has never been cited by the Supreme Court and has rarely been relied on by the lower federal courts; it really was a decision for that day only. But the positions taken on abortion have had a profound effect on constitutional law, as both supporters and opponents of abortion rights have developed entire theories of constitutional interpretation to justify their approaches, which in turn influence positions on other issues. If the Affordable Care Act is struck down, I believe the impact will not be easily cabined and many other federal laws could be put in jeopardy.

Part II of the paper explains why I believe that the individual mandate in the Affordable Care Act is clearly constitutional and should be an easy question for the Court to decide. Part III suggests that there are constitutional issues—and this may be one—where views, including of the Justices, are the product of the social construct of ideology far more than constitutional doctrine. Part IV then considers the potential implications if the Court were to strike down the

3. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

4. U.S. CONST. art. 1, § 8, cl. 3 (granting Congress the power to “regulate commerce . . . among the several states”); U.S. CONST. art. 1, § 8, cl. 1 (granting Congress the power to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare”); U.S. CONST. art. 1, § 8, cl. 18 (granting Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution” its powers).

5. Judge Jeffrey Sutton, an appointee of President George W. Bush, voted to uphold the individual mandate in *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. 2011). Judge Frank Hull, an appointee of President Bill Clinton, voted to invalidate the individual mandate in *Florida ex rel. Att’y Gen. v. U.S. Dep’t Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011).

Affordable Care Act.

There is an overwhelming desire on the part of many law students, law faculty, and judges to believe that constitutional doctrine can exist and develop apart from how views on the issues are defined in society. Unquestionably, sometimes this is true. But my point is that on some issues it is not; some issues define what it means to be liberal or conservative, and on these it is wrong to see constitutional doctrine apart from the larger social views on the issues.

Up until now—in Congress, in the political debate, and in the courts—views about the Affordable Care Act have been almost entirely defined by ideology. The crucial question as the Supreme Court is poised to consider the Act is whether it will follow this pattern or depart from it. In practical reality, this may be no more than about whether one justice—most likely Anthony Kennedy—will follow the partisan pattern or depart from it.

II

THE AFFORDABLE CARE ACT IS CLEARLY CONSTITUTIONAL

Under current constitutional law, the federal healthcare law is constitutional. It is not even a close question. The key issue is whether Congress has the authority to require that all individuals either purchase health insurance by 2014 or pay a penalty to be collected by the Internal Revenue Service.⁶ Opponents contend that the minimum coverage provision is unconstitutional as exceeding the scope of Congress's powers. But as explained below, the provision is constitutional under Congress's authority to regulate commerce among the states, as an exercise of congressional power to tax and spend for the general welfare, or under the Necessary and Proper Clause.

It is important to note that none of the challengers to the healthcare law are claiming that the individual mandate is unconstitutional as infringing personal freedom. Conservative rhetoric attacking the law often is phrased in these terms, and the underlying basis for objection is likely that people should have the right to be uninsured without paying a penalty if they wish.⁷ But under post-1937 constitutional law, economic and social welfare legislation is upheld so long as it is reasonable.⁸ Rarely has any law been struck down as failing this “rational basis” test, and not even the Affordable Care Act's fiercest critics

6. 26 U.S.C.A. § 5000A (West 2011) (minimum coverage provision).

7. Even the constant refrain, discussed below, that if Congress can mandate health coverage it also can force people to buy (and maybe even eat) broccoli, raises an individual freedom concern. Yet, the challenge to the individual mandate in litigation is *never* about individual freedom; it is always about the scope of Congress's powers.

8. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 729–31 (1963) (“Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. . . . [That doctrine] has long since been discarded. . . . It is now settled that States have power to legislate against what are found to be injurious practices in their commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.” (internal quotation marks omitted)).

challenge the constitutionality of the individual mandate on this basis.

Thus, the litigation has focused entirely on whether Congress has the authority to require that individuals either purchase health insurance or pay a penalty. This is an easy question. Congress surely could have raised taxes on everyone in an amount equal to the cost of health coverage and then paid the money to insurance companies to provide health insurance coverage for everyone. Not even the staunchest opponents of the law deny Congress's ability to do this in the same way that it enacted a Social Security tax and created a Social Security program.⁹ Certainly there are those who still argue that Social Security should be declared unconstitutional, but that is regarded as a radical position, and no one realistically believes that the current Court would even entertain such a notion.

In other words, it is clear that Congress can charge all taxpayers money for healthcare coverage and then provide health coverage to everyone. If Congress created such a system, could it allow an exception for those who buy their own health insurance? There is no reason why not; taxing and spending programs commonly have countless exceptions.

Isn't that exactly what Congress has done in the Affordable Care Act? The functional effect of the law is that almost everyone has to pay an amount to the Internal Revenue Service to provide for healthcare coverage, which everyone then receives, but people can have an exception to this if they purchase their own health insurance.

Imagine that the Social Security Act was amended to create an exception to Social Security taxes and payments for those who created their own retirement accounts. That certainly would not make the Social Security Act unconstitutional. The Affordable Care Act is no different from this.

The case has been litigated, and will be presented to the Supreme Court, as whether the individual mandate is constitutional under specific powers granted to Congress under Article I of the Constitution. Although this is how the matter has and will be presented, it is important to approach the issue by keeping in mind why overall the individual mandate is constitutional: Congress can require everyone to pay a tax to pay for healthcare and let those with insurance opt out; that is exactly what the Affordable Care Act does.

To be more specific, the law is constitutional under the Commerce Clause, the taxing and spending power, or the Necessary and Proper Clause. Of course, the government prevails if the Court finds that the individual mandate is permissible under any one of these authorities.

A. Commerce Power

Since 1995, the Court has used a three-prong test for determining whether a

9. See *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) (upholding the tax in the Social Security Act); *Helvering v. Davis*, 301 U.S. 619 (1937) (upholding the Social Security Act under Congress's power to spend for the "general welfare").

federal law is constitutional under the commerce power. In *United States v. Lopez*, the Court identified three types of activities that Congress can regulate under the Commerce Clause.¹⁰ First, Congress can “regulate the use of the channels of interstate commerce.”¹¹ Second, Congress may legislate “to regulate and protect the instrumentalities of interstate commerce.”¹² The Court said that this includes the power to regulate persons and things in interstate commerce.¹³ Finally, the Court said that Congress may “regulate those activities having a substantial relation to interstate commerce.”¹⁴ Chief Justice Rehnquist said that the prior case law was uncertain as to whether an activity must “affect” or “substantially affect” interstate commerce to be regulated under this approach.¹⁵ Chief Justice Rehnquist concluded that the more restrictive interpretation of congressional power is preferable and that “the proper test requires an analysis of whether the regulated activity ‘substantially affects’ interstate commerce.”¹⁶

Under the third prong of the *Lopez* test, Congress may regulate *economic activity* that, taken cumulatively across the country, has a substantial effect on interstate commerce. *United States v. Morrison*,¹⁷ which considered whether the civil damages provision of the federal Violence Against Women Act¹⁸ was constitutional, was key in developing the third prong’s economic activity requirement. The provision authorized victims of gender-motivated violence to sue for money damages. Congress found that gender-motivated violence costs the American economy billions of dollars a year and is a substantial constraint on the freedom of travel by women throughout the country.¹⁹ There was a lengthy legislative history of the Violence Against Women Act in which Congress found that assaults against women, when looked at cumulatively across the country, have a substantial effect on interstate commerce.²⁰

The Supreme Court expressly rejected these findings as insufficient to sustain the law. Chief Justice Rehnquist emphasized that Congress was regulating noneconomic activity that has traditionally been dealt with by state laws. He wrote:

Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation’s

10. 514 U.S. 549 (1995) (declaring unconstitutional the federal Gun-Free School Zone Act, which made it a federal crime to have a firearm within 1,000 feet of a school, as exceeding the scope of the Commerce Clause).

11. *Id.* at 558.

12. *Id.*

13. *Id.*

14. *Id.* at 558–59.

15. *Id.* at 559.

16. *Id.*

17. 529 U.S. 598 (2000) (declaring unconstitutional the civil damages provision of the Violence Against Women Act as exceeding the scope of the Commerce Clause).

18. 42 U.S.C.A. § 13981 (West 2011).

19. *Morrison*, 529 U.S. at 632–33 (Souter, J., dissenting).

20. *Id.* at 628–30.

history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.²¹

The Supreme Court found Congress's findings of impact on the economy inadequate to sustain the law under the Commerce Clause. The Court said that "[i]f accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."²² By this reasoning, the Court explained, Congress could regulate all violent crimes in the United States. The Court thus concluded: "We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregated effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local."²³

Thus, under current law there are two questions in assessing whether the individual mandate is within the scope of the commerce power. First, is Congress regulating economic activity? Second, if so, looked at in the aggregate, is there a substantial effect on interstate commerce?

It is the former question that opponents of the law, including judges who have struck it down, have focused on.²⁴ They contend that people who do not wish to purchase health insurance are inactive and that Congress cannot regulate inactivity. They argue that it is unprecedented for Congress to require an economic transaction and that if Congress can require purchasing of health insurance, there is no stopping point in terms of what Congress can force people to buy.

The key flaw in this argument is its failure to recognize that literally everyone at some point will need to use the healthcare system. Children must be vaccinated to attend school. If a person contracts a communicable disease, the government can require that it be treated. If a person is in a car accident, the ambulance will take him or her to the nearest emergency room for treatment and medical care will be provided.

Therefore everyone faces an *economic* choice: whether to purchase health insurance or whether to self-insure. Either is economic activity. Congress is regulating this economic choice by imposing a penalty on those who choose to self-insure in order to create a system where all can have adequate access to the healthcare system.

Opponents of the Affordable Care Act say that if it is upheld then the government can force people to buy an American car or to eat broccoli. But a person can opt not to drive or not to eat vegetables; no one realistically can opt out of healthcare.

21. *Id.* at 613 (majority opinion).

22. *Id.* at 615.

23. *Id.* at 617–18.

24. *See, e.g., Florida ex rel. Att'y Gen. v. U.S. Dep't Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (declaring unconstitutional the individual mandate as exceeding the scope of Congress's commerce power).

Moreover, the “slippery slope” argument is really an objection to the third prong of the *Lopez* test and not to upholding the individual mandate. As Justice Thomas has long argued, there is little limit on Congress’s commerce power so long as it can regulate based on substantial effects on interstate commerce. For example, in his *Morrison* concurrence, Justice Thomas objected, as he did in *Lopez*, to the “substantial effects” test as a way of justifying congressional action under the commerce power. He wrote:

[T]he very notion of a ‘substantial effects’ test under the Commerce Clause is inconsistent with the original understanding of Congress’ powers and with this Court’s early Commerce Clause cases. By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.²⁵

The slippery slope that opponents point to traces not to the Court upholding the individual mandate, but to the ability of Congress to regulate economic activity that has a substantial effect on interstate commerce.

Under the “substantial effects” test of the third prong of *Lopez*, Congress has very broad power to regulate economic activity, including mandating the purchase of health insurance. But this has been so since the Court adopted the test. The failure until now of Congress to impose individual mandates has happened not because of judicial limits on the commerce power, but because of the political process. If the Court upholds the individual mandate, political realities make it highly unlikely that Congress will then choose to require that people buy broccoli or American cars.²⁶

The second question then becomes whether, taken cumulatively, the economic activity of deciding to purchase health insurance or to self-insure has a substantial effect on interstate commerce. Health related spending was \$2.5 trillion in 2009, or 17.6% of the national economy. In the last case to deal with the scope of Congress’s Commerce Clause power, *Gonzales v. Raich* in 2005, the Court held that Congress could criminally prohibit and punish cultivation and possession of a small amount of marijuana for personal medicinal use.²⁷ If Congress has the power to prevent Angela Raich from growing a small amount of marijuana to offset the ill effects of chemotherapy, then surely it has the authority to regulate a two-trillion-dollar industry.

Moreover and very importantly, *Raich* reaffirmed that Congress need only have a rational basis for believing that it is regulating economic activity that has a substantial effect on interstate commerce, and certainly at least that exists here. The Court declared:

25. *Morrison*, 529 U.S. at 627 (Thomas, J., concurring).

26. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (arguing that judicial review to protect states is unnecessary because sufficient protection for states exists through the structure of the political system).

27. 545 U.S. 1 (2005).

In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding.²⁸

It is inconceivable that it could be argued that there is not a *rational basis* for believing that, on aggregate, the economic activity of deciding to self-insure has a substantial effect on interstate commerce. The fact that some fifty million Americans go without health insurance has an enormous effect on interstate commerce. For instance, when uninsured patients cannot pay their hospital bills, premiums go up for everyone else in order to cover the cost of that care. There is certainly a rational basis for believing that such cost shifting substantially affects the price of insurance and health services across the country.

Opponents of the individual mandate argue that the rational basis test applies only to deciding whether there is a substantial effect on interstate commerce, but not as to whether there is economic activity. There is no basis for drawing such a distinction. The third prong of the *Lopez* test is that Congress can regulate economic activity that, taken cumulatively, has a substantial effect on interstate commerce. There is no reason why Congress should need only a reasonable basis for determining the substantial effect on commerce, but not as to whether it is economic activity. Justice Stevens' language in *Gonzales v. Raich* specifically speaks of Congress needing a rational basis for believing that there is a substantial effect on commerce because that was the issue he was addressing. There is no evidence he meant to exclude the determination of whether it is economic activity from the rational basis inquiry. In fact, Justice Scalia, in his opinion concurring in the judgment in *Raich*, suggests no such limit, as he declares: "The relevant question is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power."²⁹

B. Congress's Taxing and Spending Power

Although the discussions and court decisions about the constitutionality of the Affordable Care Act have focused primarily on the Commerce Clause, there is an alternative basis for upholding the law: Congress's broad power to tax and spend for the general welfare. The Supreme Court has broadly interpreted the scope of this power.³⁰

Those who do not obtain health insurance must pay a penalty, calculated as a percentage of income and administered through the federal tax collection system. The penalty applies only to those who have income exceeding an amount specified by statute and is calculated solely based on this income. In 2016, for example, the payment by a taxpayer who does not obtain coverage will

28. *Id.* at 22 (quoting *Lopez*).

29. *Id.* at 37 (Scalia, J., concurring).

30. *See* United States v. Butler, 297 U.S. 1, 66 (1936) (explaining Congress's broad power to tax and spend for the general welfare).

never be greater than either 2.5% of the taxpayer's household income above the income tax filing threshold or a flat dollar amount ranging from \$695 to \$2085, depending on family size.³¹

Simply put, the federal healthcare law imposes a tax on those who do not purchase insurance to generate revenue that the federal government can use to address the significant cost of providing healthcare for taxpayers without adequate insurance. The only objection is that the law does not specifically use the word "tax." But as the Supreme Court often has recognized, labels do not determine constitutionality.³² As the Court has explained, a monetary exaction's "practical impact, not [its] name tag," determines its constitutionality.³³

Whether the law uses the word "tax" is irrelevant in assessing whether this is an action that fits within the scope of Congress's very broad power to tax and spend for the general welfare. Besides, the legislative history is clear that members of Congress on both sides of the political aisle saw this as a tax and used the words "tax" and "penalty" interchangeably.³⁴

The United States Court of Appeals for the Fourth Circuit came to exactly this conclusion and thus held that the federal court could not enjoin the collection of the tax due to the Anti-Injunction Act.³⁵ As part of the Internal Revenue Code, the Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person."³⁶ The Fourth Circuit concluded that the Affordable Care Act creates a tax and therefore said that the Anti-Injunction Act precludes an injunction to stop its enforcement.

C. The Necessary and Proper Clause

Article I, section 8 grants Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers,

31. 26 U.S.C.A. § 5000A (West 2011).

32. *See, e.g.,* *Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (1992) (rejecting labels as determinative of constitutional analysis).

33. *Jefferson Cnty. v. Acker*, 527 U.S. 423, 439 (1999).

34. 156 CONG. REC. H1917 (daily ed. Mar. 21, 2010) (statement of Rep. Kirk) ("Among the new taxes is a new 'Individual Mandate Tax' . . . of \$2,250 per household or 2 percent of household income."); 155 CONG. REC. S12768 (daily ed. Dec. 9, 2009) (statement of Sen. Grassley) ("The . . . individual mandate penalty tax . . . is a tax. It can be called a penalty, but it is a tax."); 155 CONG. REC. S11454 (daily ed. Nov. 18, 2009) (statement of Sen. McCain) ("Taxes on individuals who fail to maintain government-approved health insurance coverage will pay \$4 billion in new penalties . . ."); 155 CONG. REC. H12576 (daily ed. Nov. 6, 2009) (statement of Rep. Franks) ("It would impose a 2.5 percent penalty tax on those who do not acquire health care insurance."); 155 CONG. REC. S11143 (daily ed. Nov. 5, 2009) (statement of Sen. Johanns) (discussing "penalty tax on individuals without insurance"); 155 CONG. REC. S10746 (daily ed. Oct. 27, 2009) (statement of Sen. Enzi) ("Most young people will probably do the math and decide . . . I can pay the \$750-a-year tax penalty rather than pay \$5,000 a year more for health insurance."); 155 CONG. REC. S8644 (daily ed. Aug. 3, 2009) (statement of Sen. Kyl) ("There would be a penalty if they refused to [buy health insurance] that would go directly to their income tax.").

35. *Liberty Univ., Inc. v. Geithner*, 2011 WL 3962915 (4th Cir. Sept. 8, 2011).

36. I.R.C. § 7421 (West 2000).

and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”³⁷ In *McCulloch v. Maryland*, Chief Justice Marshall said that this provision makes it clear that Congress may choose any means not prohibited by the Constitution to carry out its express authority.³⁸ In some of the most important words of the opinion, Marshall writes: “Let the end be legitimate, let it be within the scope of the constitution, and all 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.”³⁹

Chief Justice Marshall’s broad view of the meaning of the Necessary and Proper Clause continues to this day. *United States v. Comstock*,⁴⁰ decided in June 2010, is one of the most important Supreme Court cases focusing on the meaning of the Necessary and Proper Clause, and it strongly reaffirms the approach taken in *McCulloch*. A federal statute, the Adam Walsh Child Protection Act of 2006, authorized federal courts to order the indefinite confinement of individuals in the custody of the federal Bureau of Prisons who are deemed to be “sexually dangerous.”⁴¹ Earlier, in *Kansas v. Hendricks*, the Court ruled that it does not violate due process for a state to indefinitely imprison such individuals even after they have completed their prison sentences.⁴² The issue in *Comstock* was whether Congress had the constitutional authority to provide for such indefinite detentions.

In an opinion by Justice Breyer, the Supreme Court upheld the federal law and stressed that it was permissible as an exercise of Congress’s power under the Necessary and Proper Clause. Justice Breyer quoted at length from *McCulloch* and said that “[w]e have since made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”⁴³ The Court explained that “the relevant inquiry is simply ‘whether the means chosen are “reasonably adapted” to the attainment of a legitimate end under the commerce power’ or under other powers that the Constitution grants Congress the authority to implement.”⁴⁴ Using this approach, the Court stressed that Congress has the power, under the Necessary and Proper Clause, to prescribe the sanctions for crimes that it creates. Thus, the Court held that the indefinite commitment of sexually dangerous individuals fits within the scope of the Necessary and Proper Clause as defined by Chief Justice Marshall in *McCulloch*.

37. U.S. CONST. art. 1, § 8, cl. 18.

38. 17 U.S. (4 Wheat.) 316, 421 (1819).

39. *Id.*

40. 130 S. Ct. 1949 (2010).

41. 18 U.S.C.A. § 4248 (West 2011).

42. 521 U.S. 346 (1997).

43. *Comstock*, 130 S. Ct. at 1956.

44. *Id.* at 1957 (quoting *Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring)).

In fact, even Justice Scalia, one of the staunchest advocates of a narrow view of Congress's powers, has expansively interpreted Congress's commerce power in light of the Necessary and Proper Clause. In *Gonzales v. Raich*, Justice Scalia concurred in the judgment and said that Congress had the constitutional authority to prohibit cultivation and possession of small amounts of marijuana for personal medicinal use.⁴⁵ He emphasized that Congress, pursuant to the Necessary and Proper Clause, has the authority to control intrastate production of goods that are of a type that end up in interstate commerce. He explained that "the Necessary and Proper Clause . . . empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation."⁴⁶

Ensuring that all Americans have health insurance is a goal that Congress can pursue. There are fifty million people without healthcare coverage. Their lack of health insurance costs the American economy in countless ways. Illnesses and deaths that would be preventable if only there were better access to the healthcare system impose great costs on the economy. Delays in treatment mean that more expensive treatment is often needed compared to what earlier treatment would have cost. At the very least, adding fifty million people to those covered by health insurance will have a great economic effect.

Congress can choose any reasonable means to effectuate its objective. Requiring that people purchase health insurance or pay a tax is a reasonable way to accomplish it. If Justice Scalia follows his reasoning from *Raich*, even for him the constitutionality of the individual mandate should be clear as an exercise of Congress's authority under the Necessary and Proper Clause.

III

IDEOLOGICAL ORIENTATION AND SUPREME COURT DECISIONMAKING

If this issue had not become so intensely partisan, it would be easy to predict the result in the Supreme Court. But until now, views on the Affordable Care Act have been almost entirely defined by political party affiliation and ideology. Every Democrat in the Senate voted in favor of it and every Republican who voted voted against it. In the House, every Republican voted against it and the vast majority of Democrats voted for it. Every federal judge appointed by a Democratic President has voted to uphold the law, except for Eleventh Circuit Judge Frank Hull, while every federal judge appointed by a Republican President has voted to strike it down, except for Sixth Circuit Judge Jeffrey Sutton.⁴⁷

At this point in time, there is a strong correlation between one's political party affiliation and one's views on the Affordable Care Act. The question is

45. *Raich*, 545 U.S. at 39 (Scalia, J., concurring).

46. *Id.*

47. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. 2011) (Judge Sutton voted to uphold the law); *Florida ex rel. Att'y Gen. v. U.S. Dep't Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (Judge Hull voted to invalidate the law).

whether the Justices on the Supreme Court will follow this pattern.

I am not saying that every case decided by the Supreme Court can be reduced to partisan politics. Of course that is not the case. My point is more limited: at any point in time, there are some issues that define where one is on the ideological spectrum. In contemporary terminology, to be liberal or conservative means almost always having particular views on these issues. Rare would it be to find a liberal who is against abortion rights or a conservative who is pro-choice. Likewise, usually conservatives favor gun rights, while liberals favor gun control. There are always issues which define where a person is on the political spectrum and that people use to define themselves ideologically.

In other words, if a person were described today with the label “liberal” or “conservative,” there would be general agreement as to what this person’s views are likely to be on a set of issues that at this time define those labels. Social psychologists who have studied opinion formation also tell us that the identification of a view on an issue with a particular ideology in itself influences belief formation. If I see myself as liberal and know that generally liberals take a particular position, I am much more likely to do so, too.

These issues vary over time. In the 1950s and 1960s, civil rights was the dominant issue. In the late 1940s and 1950s, it was views about the communist threat. In the 1930s, it was views about the New Deal. In the late 19th and early 20th centuries, it was views about progressive legislation, like minimum wage and child labor laws.

Also, how particular issues come to be linked to specific ideologies and parties is often a complex process. For a long time, Republicans, the party of Lincoln, were the champions of civil rights, with Southern Democrats as their foes. Today, of course, Democrats and liberals are seen as pro-civil rights, and Republicans and conservatives are far less likely to favor aggressive enforcement or expansion of civil rights protections. It is possible to imagine that abortion rights might have been linked to ideology in a very different way than ultimately developed. Catholics were long a key part of the Democratic coalition and might have pushed it in a different direction, while libertarian Republicans might have influenced their party to be more pro-choice.

It is a mistake to think that constitutional decisionmaking in such areas is entirely a product of precedent and doctrine and not influenced, often decisively, by the larger ideological orientation on the issue in society. *Bush v. Gore*⁴⁸ is a paradigm example of this. I often have wondered what would have happened if the situation had been reversed and Gore had been ahead by several hundred votes in Florida and the Florida Supreme Court agreed to Bush’s request to count every vote. I long have believed that it still would have been a 5–4 decision in favor of Bush, but with each side making exactly the opposite arguments.

There is a strong desire to see constitutional decisions as the products of

48. 531 U.S. 98 (2000).

interpretive methodologies, constitutional doctrines, and neutral principles. I am not saying that these are never important in determining results. But I believe that it is a mistake to ignore how some issues come to be linked to an ideological view and how much that inevitably influences judicial decisionmaking. Nor do I believe that this reduces all constitutional law to partisan preferences; it is a logical fallacy to say that because this sometimes occurs, it is always so.

At the very least, the deep ideological split about the Affordable Care Act means that it is likely that five Justices will be disposed to invalidate the individual mandate and four will be disposed to uphold it. The crucial question is whether arguments based on existing doctrines and precedents can persuade one or more of the five Republican-appointed Justices to transcend the partisan divide and vote to uphold the law.

IV

AND WHAT IF THE LAW IS STRUCK DOWN?

Bush v. Gore has had little apparent effect on constitutional law; it has never been cited by the Supreme Court and has rarely been relied on by the lower federal courts. The Second Amendment decisions in recent years—*District of Columbia v. Heller*⁴⁹ and *McDonald v. City of Chicago*⁵⁰—are certainly important, but it is difficult to see an impact outside of the gun control area.

But *Roe v. Wade* has had a profound effect on constitutional theory and constitutional law. I believe that conservatives developed originalism largely as a way to criticize *Roe* and having done so are left to oppose other non-textual rights. Liberals then must embrace non-originalism to defend *Roe*. Again, this is not inevitably and necessarily so. In the 1920s and 1930s, liberals sounded much more like originalists in explaining why the *Lochner* era decisions were wrong, while conservatives were the non-originalists of the time.

If the Supreme Court invalidates the Affordable Care Act, it will likely do so on the ground that the individual mandate is unconstitutional because Congress is regulating economic inactivity rather than activity. But what about other instances where Congress regulates inactivity? For example, Title II of the 1964 Civil Rights Act regulates inactivity, requiring that hotels and restaurants serve African-American customers even if they do not want to do so. Pollution control laws regulate economic inactivity of businesses that do not purchase pollution control equipment. Food and drug laws that require disclosures and warning labels regulate inactivity of those who do not want to make such disclosures.

These examples might be distinguished on the ground that a person or

49. 554 U.S. 570 (2008) (holding that the Second Amendment protects a right of individuals to have firearms at least in the home for self-defense and is not limited to protecting a right to have firearms only for militia service).

50. 130 S. Ct. 3020 (2010) (holding that the Second Amendment applies to state and local governments through its incorporation into the Fourteenth Amendment).

business could avoid all of these laws by choosing not to engage in the activity of running a restaurant or opening a factory or selling drugs. But this misses the point: in all of these instances what Congress is regulating is inactivity. The core of the argument that the individual mandate is unconstitutional is that Congress cannot regulate *inactivity*.⁵¹ But Congress frequently regulates inactivity. Moreover, it is a fiction to say that Congress is not compelling behavior because a person might choose to close his or her hotel or factory or stop marketing prescription drugs.

As explained above, I disagree with those who see the individual mandate as regulating inactivity. All individuals are engaged in the economic activity of either purchasing health insurance or of self-insuring. But if the Court sees the individual mandate as regulating inactivity, and sees that as being beyond the scope of Congress's power, then other instances in which Congress regulates inactivity will be constitutionally vulnerable.

Moreover, it is difficult to see how the Court can strike down the individual mandate without narrowing the scope of Congress's powers under the Commerce Clause and the Necessary and Proper Clause. As explained in Part II above, under current law, Congress has the power to act under the Commerce Clause so long as it has a reasonable basis for believing that it is regulating economic activity that, taken cumulatively, has a substantial effect on interstate commerce.⁵² The Court cannot realistically strike down the individual mandate without greatly narrowing this test. Will it discard its rule that there need only be a reasonable basis for believing that a law regulates economic activity that has a substantial effect on interstate commerce? Will it narrow what constitutes economic activity? Will it call into question the third prong of the *Lopez* test? After all, it is the third prong of the *Lopez* test, as Justice Thomas has often pointed out, that gives Congress such expansive powers. Any of these holdings could have significant implications in terms of the constitutionality of other laws.

The Court's invalidating the key provision of the Affordable Care Act also might have important implications for the public's perception of constitutional law and the Supreme Court. At least since Richard Nixon ran for president in 1968, conservatives have wrapped themselves in the rhetoric of judicial deference and restraint and accused liberals of judicial activism. But striking down the individual mandate would have to be perceived as judicial activism, however that phrase is defined. A consequence of the Court effectively nullifying the Affordable Care Act hopefully would be that finally people would perceive that the real judicial activism today is from the right. Perhaps that would finally help put an end to the misleading and inaccurate rhetoric that has surrounded constitutional law for decades.⁵³

51. See *Florida ex rel. Att'y Gen.*, 648 F.3d at 1235 (11th Cir. 2011) (striking down individual mandate and emphasizing that it is regulating inactivity).

52. *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

53. See ERWIN CHERMERINSKY, *THE CONSERVATIVE ASSAULT ON THE CONSTITUTION* (2010).

V

CONCLUSION

The relationship between ideology and constitutional decisionmaking by the Supreme Court is a complex one: ideology neither always nor never explains results. There are some issues in each generation that come to define what it means to hold a certain ideology, such as what it means to be liberal or conservative. At this moment, this is true of the Affordable Care Act. The result is that a constitutional question which should be easy is very difficult to predict. It thus provides an excellent vehicle for thinking through the larger and harder questions about the relationship between ideology and constitutional decisionmaking.

This article was written in October 2011, when the Court was on the verge of granting certiorari and considering the constitutionality of the Affordable Care Act. It was written at a time when it remained possible to hope that the Court would transcend the partisanship surrounding the Act and apply existing constitutional doctrines to uphold the individual mandate. Until 10:00 p.m. on December 12, 2000, I hoped that the Justices on the Supreme Court would not see the issues in the Florida presidential election through partisan lenses. I have that same hope with regard to the constitutionality of the individual mandate.