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Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform¹

The Supreme Court may be headed for its most dramatic intervention in American politics—and most flagrant abuse of its power—since *Bush v. Gore*.² Challenges to President Obama’s health care law³ have started to work their way toward the Court and have been sustained by two Republican-appointed district judges.⁴

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1. A version of this Essay was presented at “Healthcare Reform: The Law and Its Implications,” a seminar of the American Health Lawyers Association, held in Chicago on December 6, 2010. This Essay consolidates and adds to arguments presented in an earlier series of blog posts. Andrew Koppelman, *Can’t Think of Another One*, BALKINIZATION (Dec. 14, 2010, 11:17 AM), <http://balkin.blogspot.com/2010/12/cant-think-of-another-one.html>; Andrew Koppelman, *Health Care Reform: The Broccoli Objection*, BALKINIZATION (Jan. 19, 2011, 4:48 PM), <http://balkin.blogspot.com/2011/01/health-care-reform-broccoli-objection.html>; Andrew Koppelman, *Non Sequiturs in the Florida Health Care Decision*, BALKINIZATION (Feb. 2, 2011, 2:42 PM), <http://balkin.blogspot.com/2011/02/non-sequiturs-in-florida-health-care.html>; Andrew Koppelman, *The Virginia Court’s Bizarre Health Law Decision*, BALKINIZATION (Dec. 13, 2010, 5:01 PM), <http://balkin.blogspot.com/2010/12/virginia-courts-bizarre-health-law.html>.
 2. 531 U.S. 98 (2000). For defenses of the modest proposition that the Supreme Court is not constitutionally authorized to appoint the President, see, for example, Laurence H. Tribe, *eroG v. hsuB and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 HARV. L. REV. 170 (2001). See also Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407 (2001).
 3. Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (to be codified primarily in scattered sections of 42 U.S.C.).
 4. Florida *ex rel.* Bondi v. U.S. Dep’t of Health & Human Servs. (*State Attorneys General II*), No. 3:10-cv-91, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011); Virginia *ex rel.* Cuccinelli v. Sebelius (*Cuccinelli II*), 728 F. Supp. 2d 768 (E.D. Va. 2010). Three other district judges—in

The constitutional objections are silly. However, because constitutional law is abstract and technical and because almost no one reads Supreme Court opinions, the conservative majority on the Court may feel emboldened to adopt these silly objections in order to crush the most important progressive legislation in decades. One lesson of *Bush v. Gore*, which did no harm at all to the Court's prestige in the eyes of the public,⁵ is that if there are any limits to the Justices' power, those limits are political: absent a likelihood of public outrage, they can do anything they want. So the fate of health care reform may depend on the constitutional issues being understood at least well enough for shame to have some effect on the Court.

The Patient Protection and Affordable Care Act (PPACA) includes a so-called "individual mandate," which is actually a tax that must be paid by individuals who fail to meet a minimum level of health insurance coverage.⁶ This mandate is the focus of challenges to the law. Without the mandate, the law's protection of people with preexisting conditions would mean that healthy people could wait until they get sick to buy insurance. Because insurance pools rely on cross-subsidization of sick people by healthy participants, this would bankrupt the entire health insurance system. The individual mandate charges those people for at least some of the costs they impose on their fellow citizens. Massachusetts, acting a few years before the federal law, combined its guarantee of coverage with a mandate, but seven other states tried to protect people with preexisting conditions without mandating coverage for everyone. The results in those states ranged from huge premium increases to the complete collapse of the market.⁷

Two federal district judges have declared this provision unconstitutional.⁸ The novel approach to constitutional law that they propose would misread the

the District of Columbia, the Western District of Virginia, and the Eastern District of Virginia—summarily threw out similar challenges. *Mead v. Holder*, No. 10-950, 2011 WL 611139 (D.D.C. Feb. 22, 2011); *Liberty Univ. v. Geithner*, No. 6:10-cv-00014, 2010 WL 4860299 (W.D. Va. Nov. 30, 2010); *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010).

5. See Herbert M. Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 JUDICATURE 32 (2001) (noting that the decline among Democrats was offset by improvement among Republicans).
6. PPACA § 1501(b), 124 Stat. at 244 (to be codified at 26 U.S.C. § 5000A).
7. See Brief for March of Dimes Foundation et al. as Amici Curiae in Support of Motion to Dismiss at 4-8, *Cuccinelli II*, 728 F. Supp. 2d 768 (E.D. Va. 2010) (No. 3:10-cv-00188), available at <http://www.nscl.org/areas/federal-rights/amicus-brief-in-support-of-health-reform-1>.
8. *State Attorneys General II*, 2011 WL 285683, at *33; *Cuccinelli II*, 728 F. Supp. 2d at 788.

Constitution, betray the intentions of the Framers, and cripple the nation's ability to address one of its most pressing problems.

The correct legal analysis is simple. Congress has the authority to solve problems that the states cannot separately solve. It can choose any reasonable means to do that.

Part I of this Essay presents a brief explanation of why Congress has the power to enact this law. Part II rebuts the constitutional objections. Part III offers what the law's opponents have demanded: an account of the limits of congressional power. Part IV explains why federal action was necessary in this case. Part V critiques the radical libertarianism that underlies the constitutional case against the law, a case that is encapsulated in the notorious "Broccoli Objection." Part VI concludes.

I. THE OBVIOUS CONSTITUTIONALITY

The mandate is within Congress's power under Article I, Section 8 of the Constitution to "regulate Commerce . . . among the several states."⁹ Under settled present law, some of it nearly two hundred years old, Congress may regulate activity that has a substantial effect on interstate commerce.¹⁰ As recently as 2005, the Supreme Court held that Congress may regulate local noneconomic behavior when such regulation is an "essential part[]" of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."¹¹ The Court thus upheld a federal ban on growing marijuana for personal consumption.¹²

The power to regulate insurance markets is part of the commerce power. The Supreme Court declared in 1944: "Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States."¹³ So

9. U.S. CONST. art. I, § 8, cl. 3.

10. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 118-29 (1942); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 193-98 (1824).

11. *Gonzales v. Raich*, 545 U.S. 1, 24 (2005) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)). The Court does not mention the activity/inactivity distinction, pressed vigorously by opponents of the mandate and considered below. The question is not whether the trigger for regulation is activity, but rather whether the regulation itself is part of a regulation of economic activity. *Id.* at 17.

12. *Id.* at 32-33.

13. *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 540 (1944).

Congress has the power to impose regulations to make sure that huge numbers of Americans do not go uninsured.

The problem of insuring those with preexisting conditions could be addressed with a single-payer insurance system of the kind that exists in Canada, France, England, the Netherlands, and Australia. In such systems, everyone gets insurance provided by the government, funded by general taxation.¹⁴ The American government already forces you to buy single-payer insurance against poverty in your old age: Social Security. A similar single-payer system of medical care makes a great deal of sense, but too many powerful interests were arrayed against it for it to have any hope of enactment. Political obstacles aside, Congress is entitled to decide that a government monopoly of health provision would be inefficient and that insurance is best provided by the private sector. In that case, the only way to guarantee health insurance for everyone is to require the healthy to purchase private insurance. The remedy tightly fits the problem.

Congress has discretion to decide the best way to exercise its authority. The list of congressional powers in Article I ends with an authorization to “make all Laws which shall be necessary and proper” to carry out its responsibilities.¹⁵ The interpretation of this provision was settled in 1819 by Chief Justice John Marshall in *McCulloch v. Maryland*.¹⁶ The central question in *McCulloch* was whether Congress had the power to charter the Bank of the United States, the precursor of today’s Federal Reserve Bank. The Constitution does not enumerate any power to create corporations. The State of Maryland, which was trying to tax the Bank out of existence, argued that the “necessary and proper” language permitted Congress only to choose means that were *absolutely* necessary to carry out those powers.¹⁷ Marshall rejected this reading, which would make the government “incompetent to its great objects.”¹⁸ The federal government must collect and spend revenue throughout the United States, Marshall observed, and so must quickly transfer funds across hundreds of miles. “Is that construction of the constitution to be preferred which would

14. See Anna Bernasek, *Health Care Problem? Check the American Psyche*, N.Y. TIMES, Dec. 31, 2006, <http://www.nytimes.com/2006/12/31/business/yourmoney/31view.html>; Jonathan Cohn, *Healthy Examples: Plenty of Countries Get Healthcare Right*, BOS. GLOBE, July 5, 2009, http://www.boston.com/bostonglobe/ideas/articles/2009/07/05/healthy_examples_plenty_of_countries_get_healthcare_right.

15. U.S. CONST. art. I, § 8, cl. 18.

16. 17 U.S. (4 Wheat.) 316 (1819).

17. *Id.* at 324.

18. *Id.* at 418.

render these operations hazardous, difficult, and expensive?”¹⁹ Without implied powers, Congress’s power “to establish post offices” could not entail the ability to punish mail robbers and might not even entail the power to carry letters from one post office to another.²⁰ “It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post office and post road.”²¹ He concluded that Congress could choose any convenient means for carrying out its enumerated powers.

The basic rule of *McCulloch* was reaffirmed by the Court as recently as May 2010 in *United States v. Comstock*.²² In deciding whether Congress is appropriately exercising its powers under the Necessary and Proper Clause, the question is “whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”²³ The choice of means is left

“primarily . . . to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.”²⁴

Thus, for example, even though the Constitution mentions no federal crimes other than counterfeiting, treason, and piracy, Congress has broad authority to enact criminal statutes.²⁵ The Constitution does not mention the individual mandate either, but Congress nonetheless has broad authority to impose monetary costs on those who choose to go without insurance.

19. *Id.* at 408.

20. *Id.* at 417 (quoting U.S. CONST. art. I, § 8, cl. 7).

21. *Id.*

22. *United States v. Comstock*, 130 S. Ct. 1949 (2010).

23. *Id.* at 1956.

24. *Id.* at 1957 (quoting *Burroughs v. United States*, 290 U.S. 534, 547-48 (1934) (McReynolds, J., dissenting)); see also *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (Scalia, J., concurring in the judgment) (“[W]here Congress has the authority to enact a regulation of interstate commerce, ‘it possesses every power needed to make that regulation effective.’” (emphasis added) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942))).

25. See *Comstock*, 130 S. Ct. at 1957.

II. THE PURPORTED CONSTITUTIONAL LIMITATIONS

Now that I have laid out the simple case for the bill's constitutionality, I will take up the objections that claim to complicate that case.

A. *The Commerce Power*

The principal complaint about the mandate is that Congress should only be able to regulate economic activity, and the mandate is not a regulation of any activity. David Rivkin and Lee Casey object that it will “apply to every American simply because they exist.”²⁶ But for reasons already explained, unless free riders are brought into the system, there is no way to insure everyone else. The Virginia judge, Henry Hudson, nonetheless declared that in order to be subject to regulation by Congress, an individual had to engage in “some type of self-initiated action.”²⁷ The Florida judge, Roger Vinson, similarly argued that failure to purchase health insurance is “inactivity”²⁸ and that Congress cannot regulate inactivity.

Vinson acknowledged that there is no authority for the activity/inactivity distinction but cited *United States v. Lopez*²⁹ for the proposition that, unless the commerce power is somehow limited, it would be “difficult to perceive any limitation on federal power.”³⁰ If Congress can regulate inactivity, Vinson declared, it “could do almost anything it wanted,” and “we would have a Constitution in name only.”³¹ *Lopez* itself, however, imposed limits on federal power, even though the law it struck down (a ban on possessing handguns near schools) did not regulate inactivity.³² *Lopez* constrains Congressional power without relying on the activity/inactivity distinction. The authority on which Vinson relies undermines the point he is trying to make.

It is an interesting semantic question whether the decision to free ride on the health care system without paying for insurance is economic activity. It is

26. David B. Rivkin, Jr., Lee A. Casey, & Jack M. Balkin, Debate, *A Healthy Debate: The Constitutionality of an Individual Mandate*, 158 U. PA. L. REV. PENNUMBRA 93, 99 (2009), <http://www.pennumbra.com/debates/pdfs/HealthyDebate.pdf> (opening statement of Rivkin and Casey).

27. *Cuccinelli II*, 728 F. Supp. 2d 768, 782 (E.D. Va. 2010).

28. *State Attorneys General II*, No. 3:10-cv-91, 2011 WL 285683, at *7 (N.D. Fla. Jan. 31, 2011).

29. 514 U.S. 549, 564 (1995).

30. *State Attorneys General II*, 2011 WL 285683, at *18, *22.

31. *Id.* at *22.

32. See *Lopez*, 514 U.S. 549.

an economic decision with economic consequences, but it still may not be economic *activity*, and a great deal of ink has been spilled on that question.³³ But it does not matter. Under the Necessary and Proper Clause, it is enough that there is a national problem that only Congress can solve, and that “the means chosen are reasonably adapted to the attainment of a legitimate end.”³⁴

Opponents of the mandate claim that, even if Congress can regulate health care, it cannot demand that you purchase private insurance. “Congress has never before mandated that a citizen enter into an economic transaction with a private company,” writes Professor Randy Barnett, “so there can be no judicial precedent for such a law.”³⁵ But when Congress chartered the Bank of the United States, it had never done that before either. The underlying principle behind the individual mandate is not novel at all. The Court declared it in *McCulloch*: a government that has the right to do an act—here, to regulate health care—“must, according to the dictates of reason, be allowed to select the means.”³⁶

B. The Necessary and Proper Clause

Judges Hudson and Vinson both supposed that the commerce power is somehow a limit on Congress’s power to choose appropriate means.³⁷

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33. See, e.g., David Kopel, *The Obamacare Mandate Is Unconstitutional*, DAILY CALLER (Oct. 8, 2010, 4:32 PM), <http://dailycaller.com/2010/10/08/the-obamacare-mandate-is-unconstitutional/>; Ilya Somin, *Michigan District Court Upholds Individual Mandate Against Challenge by the Thomas More Law Center*, THE VOLOKH CONSPIRACY (Oct. 7, 2010, 6:19 PM), <http://volokh.com/2010/10/07/michigan-district-court-upholds-individual-mandate-against-challenge-by-the-thomas-more-law-center/>; see also *Mead v. Holder*, No. 10-950, 2011 WL 611139, at *18 (D.D.C. Feb. 22, 2011) (noting that the pertinent distinction is between physical activity and the mental activity of deciding whether to become insured). A particularly effective response to the inactivity argument is Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. (forthcoming 2011), available at <http://ssrn.com/abstract=1747189>.
 34. *United States v. Comstock*, 130 S. Ct. 1949, 1957 (2010) (quoting *Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring) (internal quotation marks omitted)).
 35. Randy Barnett, *Exceeding Congress’s Authority*, N.Y. TIMES: ROOM FOR DEBATE (Mar. 28, 2010, 7:00 PM), <http://roomfordebate.blogs.nytimes.com/2010/03/28/is-the-health-care-law-unconstitutional/#randy>.
 36. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 409-10 (1819).
 37. *State Attorneys General II*, No. 3:10-cv-91, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011) (invalidating PPACA); *Cuccinelli II*, 728 F. Supp. 2d 768 (E.D. Va. 2010) (invalidating PPACA); *Florida ex rel. McCollum v. U.S. Dep’t of Health & Human Servs. (State Attorneys General I)*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010) (refusing to dismiss challenge); *Virginia ex*

“If a person’s decision not to purchase health insurance at a particular time does not constitute the type of economic activity subject to regulation under the Commerce Clause,” Judge Hudson declared, “then logically, an attempt to enforce such provision under the Necessary and Proper Clause is equally offensive to the Constitution.”³⁸ By the same “logic,” if I cannot pick up a pencil with my brain, then it follows that I cannot do it with my hand either. This reads the Necessary and Proper Clause out of the Constitution completely, and it inverts the fundamental *McCulloch* principle.³⁹ Try this reasoning in a few other constitutional contexts. If locking up mail robbers is no part of the operation of a post office, then an attempt to do that under the Necessary and Proper Clause is equally offensive to the Constitution. If growing marijuana for one’s own consumption is not regulable economic activity, then it too is immune from federal law.

Judge Vinson acknowledged, and even quoted, Chief Justice Marshall’s declaration in *McCulloch* that if “the end be legitimate,” then “all means which are appropriate, which are plainly adapted to that end . . . are constitutional.”⁴⁰ He then admitted that, under the settled meaning of the commerce power, which he did not question,⁴¹ “regulating the health care insurance industry (including preventing insurers from excluding or charging higher rates to people with pre-existing conditions)” is a legitimate end.⁴² But, *three sentences later*, he declared, “The Necessary and Proper Clause cannot be utilized to ‘pass laws for the accomplishment of objects’ that are not within Congress’s enumerated powers.”⁴³ Did he so quickly forget that he had just admitted that the object *was* within Congress’s enumerated powers?

Judge Vinson noted that the government has “asserted again and again that the individual mandate is absolutely ‘necessary’ and ‘essential’ for the Act to

rel. Cuccinelli v. Sebelius (*Cuccinelli I*), 702 F. Supp. 2d 598 (E.D. Va. 2010) (refusing to dismiss challenge).

38. The sentence appears in both *Cuccinelli* opinions. See *Cuccinelli II*, 728 F. Supp. 2d at 779; *Cuccinelli I*, 702 F. Supp. 2d at 611.
39. I teach an introductory Constitutional Law class at Northwestern Law School. We read *McCulloch* in the first week.
40. *State Attorneys General II*, 2011 WL 285683, at *32 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421).
41. He did suggest, as “an historical aside,” that insurance contracts are not part of commerce under what he takes to be the original understanding, but he did not pursue the point. *Id.* at *12 n.11. Evidently he was not bold enough to overrule decades-old settled Supreme Court case law on this point.
42. *Id.* at *32.
43. *Id.* (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 423).

operate as it was intended by Congress. I accept that it is.”⁴⁴ Indeed, because the mandate was so necessary to the legislative scheme, he declared it nonseverable and invalidated the entire law.⁴⁵ This stipulated necessity implies that *even if McCulloch had come out the other way*—even if Marshall had accepted Maryland’s claim that any Congressional action must be *absolutely* necessary to the exercise of an enumerated power—the mandate would be authorized by the Necessary and Proper Clause.

Vinson did suggest a more definite limitation on Congressional power: the Necessary and Proper Clause cannot be invoked if the problem Congress is trying to address is Congress’s own fault. Here is the argument:

[R]ather than being used to implement or facilitate enforcement of the Act’s insurance industry reforms, the individual mandate is actually being used as the means to avoid the adverse consequences of the Act itself. Such an application of the Necessary and Proper Clause would have the perverse effect of enabling Congress to pass ill-conceived, or economically disruptive statutes, secure in the knowledge that the more dysfunctional the results of the statute are, the more essential or “necessary” the statutory fix would be. Under such a rationale, the more harm the statute does, the more power Congress could assume for itself under the Necessary and Proper Clause. This result would, of course, expand the Necessary and Proper Clause far beyond its original meaning.⁴⁶

If, however, Congress has no power to address negative consequences that follow from its own statutory scheme, then Chief Justice Marshall was wrong about mail robbery after all. Mail robbery is an adverse consequence of Congress’s decision to establish a post office: had it not done that, all those valuable documents would not be gathered together in one place. But, you might say, *That is crazy; of course Congress can decide that it’s worth having a post office, even if establishing one creates negative side effects, which then must be addressed.* If, as Judge Vinson admitted, Congress can also decide that people with preexisting conditions can be protected, then these cases are indistinguishable.

44. *Id.* at *33.

45. *Id.* at *36-37.

46. *Id.* at *31.

C. *The Taxing Power*

Even if you somehow suppose that the health care mandate exceeds the commerce power, it would be valid anyway as an exercise of the power to tax. Congress has a general power to “collect Taxes” to provide for the “general Welfare of the United States.”⁴⁷ The taxing power is not limited to objects of interstate commerce. A tax, the Court held in 1950, does not become unconstitutional “because it touches on activities which Congress might not otherwise regulate.”⁴⁸ A claim that the tax is a “direct tax”—forbidden by Article I, Section 9⁴⁹—is even stranger, since the mandate is neither a general tax on individuals nor a tax on real estate, the original targets of this obscure and now rarely invoked provision.⁵⁰

Judges Hudson and Vinson declared that the mandate is not a tax because some of the law’s sponsors sometimes claimed that it was not and because the statute declared that it was based on the commerce power.⁵¹ This reasoning would create two remarkable new doctrines: federal courts have authority to police the public statements of politicians, and Congress must expressly invoke all possible constitutional bases for legislation.⁵² It is, however, long-settled doctrine that federal statutes are presumed to be constitutional and that—as the Supreme Court said in 1948— “[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.”⁵³ Judge Vinson also repeatedly suggested that whenever Congress does something it has not done before, its action is presumptively unconstitutional.⁵⁴ These new rules would, if consistently

47. U.S. CONST. art. I, § 8, cl. 1.

48. *United States v. Sanchez*, 340 U.S. 42, 44 (1950).

49. U.S. CONST. art. I, § 9, cl. 4.

50. The frivolousness of these arguments is further documented in Rivkin, Casey, & Balkin, *supra* note 26, at 114 (closing statement of Balkin).

51. *Cuccinelli II*, 728 F. Supp. 2d 768, 782-86 (E.D. Va. 2010); *State Attorneys General I*, 716 F. Supp. 2d 1120, 1130-34 (N.D. Fla. 2010). The law did not, however, expressly disclaim reliance on the taxing power. In a strange dictum, after sustaining the statute on Commerce Clause grounds, Judge Kessler endorsed this argument. *Mead v. Holder*, No. 10-950, 2011 WL 611139, at *23 (D.D.C. Feb. 22, 2011).

52. See Gillian Metzger & Trevor Morrison, *Health Care Reform, the Tax Power, and the Presumption of Constitutionality*, BALKINIZATION (Oct. 19, 2010, 1:50 PM), <http://balkin.blogspot.com/2010/10/health-care-reform-tax-power-and.html>.

53. *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948).

54. See *State Attorneys General II*, No. 3:10-cv-91, 2011 WL 285683, at *29 (N.D. Fla. Jan. 31, 2011); *State Attorneys General I*, 716 F. Supp. 2d at 1164 n.21.

applied, randomly blow up large parts of the U.S. Code. This is constitutional interpretation undertaken in the spirit of a saboteur in wartime.

III. THE REAL CONSTITUTIONAL LIMITS

My Northwestern Law colleague Steven Lubet has offered an elegant summary of the constitutional claim against the federal health insurance mandate: “(1) There must be some limit on federal power; (2) I can’t think of another one; and therefore, (3) the limit must preclude the individual mandate.”⁵⁵

There may be no need for judicially imposed limits on Congressional power. There were practically no such limits between the 1930s and the 1990s, yet the federal government did not take over all state functions: tort law, contract law, criminal law, and education remained dominated by state law.⁵⁶ *Lopez* imposed a new restriction, though its contours remain uncertain. The *Lopez* Court thought it relevant that Congress was trying to regulate noneconomic activity,⁵⁷ and the Court later suggested in *United States v. Morrison* that Congress has broad authority over the economy.⁵⁸ This

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55. E-mail from Steven Lubet, Professor of Law, Nw. Univ., to author (Dec. 14, 2010, 8:51 AM) (on file with author). Jason Mazzone comes close to saying exactly this in Op-Ed., *Can Congress Force You To Be Healthy?*, N.Y. TIMES, Dec. 16, 2010, <http://www.nytimes.com/2010/12/17/opinion/17mazzone.html>. It is actually very easy to think of other limits on federal power. There is the one rejected in *McCulloch v. Maryland*: Congress can only choose means that are *absolutely* necessary to the permitted end. Or here are a few others: Congress cannot enact any legislation that requires the use of instrumentalities that begin with the letter “J.” Congress cannot enact any legislation that calls for enforcement on Tuesdays. Congress cannot choose any means that weighs more than 346 pounds. All of these would drive back the specter of unlimited congressional power, but they have nothing to do with the underlying reasons for wanting to have limited but effective federal power in the first place. The activity/inactivity distinction has the same problem.
56. See Andrew Koppelman, *How ‘Decentralization’ Rationalizes Oligarchy: John McGinnis and the Rehnquist Court*, 20 CONST. COMMENT. 11, 20 (2003).
57. See *United States v. Lopez*, 514 U.S. 549, 559-61 (1995).
58. See *United States v. Morrison*, 529 U.S. 598, 613 (2000) (“Congress may ‘regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.’”) (quoting *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring)); see also *id.* at 610 (“Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”) (quoting *Lopez*, 514 U.S. at 560); *id.* (criticizing Justice Souter’s dissent for “downplay[ing] the role that the economic nature of the regulated activity plays in our Commerce Clause analysis”). In *Gonzales v. Raich*, 545 U.S. 1, 17-19 (2005), the Court further clarified that Congress can regulate some

economic/noneconomic test supports the 1944 holding that Congress can regulate insurance.

There is, however, reason to doubt the soundness of the economic/noneconomic line. While it makes sense to say that Congress can regulate any economic transaction, the Court's language suggests that this might be the test, not only for what is included in the commerce power, but also for what is *excluded*. If that were the rule, then Congress would be deprived of authority over such nontrivial matters as the spoliation of the environment or the spread of contagious diseases across state lines.⁵⁹ The Court has already suggested on this basis that Congress may not have the power to regulate wetlands that are wholly within a single state.⁶⁰

A better rule would implement the line that the Framers of the Constitution drew—a line that has nothing to do with the activity/inactivity distinction, although it supports congressional regulation of the economy. This line also supports the mandate.

At Philadelphia in 1787, the Convention resolved that Congress could “legislate in all cases . . . to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.”⁶¹ This was then translated by the Committee of Detail into the present enumeration of powers in Article I, Section 8, which was accepted as a functional equivalent by the Convention without much discussion.⁶² Article I, Section 8 includes the commerce and “necessary and proper” provisions.

Did the Committee of Detail botch its job, limiting congressional power more than the Convention intended and creating a regime in which Congress could not legislate in cases the separate states were incompetent to address? Did the Convention not notice the massive change? No. “[T]he purpose of enumeration,” Jack Balkin observes, “was not to *displace* the principle but to

noneconomic activity if it is a part of a general class of activity that the Court deems economic.

59. Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 176-79 (2010).

60. See *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

61. 2 THE RECORDS OF THE FEDERAL CONVENTION 21 (Max Farrand ed., 1911); see also 1 *id.* at 21 (Resolution VI of the Virginia Plan).

62. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 178 (1996) (“Though it has been argued that this action marked a crucial, even subversive shift in the deliberations, the fact that it went unchallenged suggests that the committee was only complying with the general expectations of the Convention.”) (footnotes omitted); Robert L. Stern, *That Commerce Which Concerns More States than One*, 47 HARV. L. REV. 1335, 1340 (1934).

enact it.”⁶³ This language was accepted without objection for good reasons. Balkin shows that the word “commerce” at the time of the framing referred to all interaction between people, and so “the commerce power authorizes Congress to regulate problems or activities that produce spillover effects between states or generate collective action problems that concern more than one state.”⁶⁴ If health care markets involve such effects or problems, then the mandate presents, once more, an easy case.⁶⁵ The Framers’ most important decision was to replace the weak Articles of Confederation with a central government strong enough to address common problems.⁶⁶ This is not a recipe for unlimited power: grandstanding statutes that horn in on matters that are purely local, such as the federal ban on the possession of handguns

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63. Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 11 (2010).
64. *Id.* at 6. Some more sober Republicans still advocate this understanding of the commerce power. See, e.g., Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 786 (1996) (noting importance of collective action problems); Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 FLA. L. REV. 1, 6 (2011) (“The most compelling argument in American history for empowering our national government has been the need to overcome collective action problems.”). Other defenses of this reading of the Commerce Clause include Cooter & Siegel, *supra* note 59; Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554 (1996); and Stern, *supra* note 62. I cannot here engage with the radically different reading of the history in Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENT. 25 (2005), which reaches a similar understanding of broad congressional power via a more circuitous route.
65. Another easy case is regulation of wetlands. See Cooter & Siegel, *supra* note 59, at 177; see also Balkin, *supra* note 63, at 43 (“If noneconomic activity creates a federal problem that states cannot individually handle, it should fall within the commerce power.”). Cooter and Siegel argue that the economic/noneconomic distinction “should not demarcate the boundary between federal and state power,” because not all economic activities present collective action problems. Cooter & Siegel, *supra* note 59, at 164. They acknowledge, however, that the direct inquiry into collective action problems “requires extensive factfinding, which interacts with contestable normative judgments.” *Id.* at 154. For this reason, they acknowledge that “the economic/noneconomic categorization may suffice in a rough-and-ready way for defining ‘Commerce’” but worry that the exclusion of noneconomic problems “will frustrate the animating purpose of Section 8, which is to give Congress the authority to solve collective action problems.” *Id.* at 165. This is a real and valid concern, as I have already argued, but it has nothing to do with the mandate.
66. Statements by various Framers emphasizing the importance of broad centralized power to address matters of common interest are collected in Brief of Constitutional Law Professors as Amici Curiae in Support of Defendant-Appellant at 5-9, *Virginia ex rel. Cuccinelli v. Sebelius (Cuccinelli III)*, No. 11-1057 (4th Cir. Mar. 11, 2011), available at <http://aca-litigation.wikispaces.com/file/view/Amicus+brief+of+con+law+profs+---+corrected+%28CA4+11-1057%29.pdf>. For other useful overviews, see Cooter & Siegel, *supra* note 59, at 121-26; and Stern, *supra* note 62, at 1337-48.

near schools that the Supreme Court struck down in *Lopez*, exceed the commerce power. But the national health care insurance market is not a purely local matter.

This approach justifies congressional authority over the economy, even in its local incidents, because the United States in fact has a single unified economy. You may, however, wonder whether health care reform happens to be another unnecessary centralization of an area that states were handling perfectly well. If it is, this might raise doubts about the Court's decision—which, I emphasize, is settled law—to concede to Congress's broad economic authority, and perhaps would even justify a reshaping of settled law to put a stop to this centralization. I now address this concern.

IV. WHY CONGRESSIONAL ACTION WAS NECESSARY

One thing that the Framers did not anticipate was the spectacular advances of the past two hundred years in our capacity to treat disease, prolong life, and ameliorate congenital illness. Many of these innovations are expensive. So with modern medicine comes a new kind of moral horror: the patient with a treatable disease who cannot afford to pay for the treatment.⁶⁷

The spillover effects are clear. Individuals with preexisting conditions are deterred from pursuing new opportunities in states where insurers are allowed to deny them coverage. Those with preexisting conditions whose jobs provide insurance are locked into those jobs: they are afraid to move to a different employer or to start their own businesses. Both of these effects burden the American economy as a whole.

Health insurance regulation also presents a collective action problem. The reform of the American health care system to ensure that no one would be uninsurable or bankrupted by illness was too big a task for the states to address individually. It requires more regulatory skill than most states can muster.

How can we know that collective action problems are the reasons why states have not undertaken massive health care reform? Could it not rather be evidence that local preferences are different in different places and that federalism has enabled variation of a benign sort?

It is difficult to know for certain why legislation does not get enacted. But there are several pieces of information that can be the basis of reasonable inferences. One of these is that, according to a February 2011 Kaiser poll, an

67. See generally JONATHAN COHN, *SICK: THE UNTOLD STORY OF AMERICA'S HEALTH CARE CRISIS AND THE PEOPLE WHO PAY THE PRICE* (2007) (describing various instances of Americans suffering from prohibitively high health care costs related to their curable diseases).

overwhelming majority of Americans—72 percent—supported guaranteed insurance for people with preexisting conditions.⁶⁸ Yet only Massachusetts managed to implement it. If states are not delivering guaranteed insurance, it is not because the electorate likes that state of affairs. Contrast the law at issue in *Lopez*: it was obvious that nothing prevented states from banning handguns near schools, because more than forty of them already had such laws.⁶⁹

Massachusetts is the only state that managed to expand health insurance in the way that the new federal statute does. It has been very successful: less than 3 percent of the state's population was uninsured by 2008, compared with 14 percent before implementation.⁷⁰ The state embarked on that project with some unusual advantages. The number of uninsured persons was relatively low when the policy was adopted. Many of the uninsured were eligible for Medicaid. The percentage of the population carrying employer-sponsored coverage, along with per capita income, was unusually high, creating a larger tax pool.⁷¹ The level of insurance was already quite good, and so the transition was not an enormous lurch. A recent study describes the comparative obstacles faced elsewhere:

Other states will start with very different baseline benefits generally available. For example, some states have a high penetration of high-deductible plans; others are dominated by one or two insurers with a particular set of benefits; and still others have a range of insurance products with significant differences in benefit levels. Requiring comprehensive benefits similar to Massachusetts in these states would likely entail requiring many who currently have insurance to change or upgrade their plans in order to comply. Employers would have to consider upgrading plans at great expense. This could ultimately

68. *Kaiser Health Tracking Poll: February 2011*, HENRY J. KAISER FAMILY FOUND., 4 (Feb. 2011), <http://www.kff.org/kaiserpolls/upload/8156-T.pdf>. The public is much less enthusiastic about the mandate—only 28 percent support it—suggesting that they do not understand that you cannot have one without the other. This is why we have representative government rather than a direct democracy.

69. *See United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

70. Michael T. Doonan & Katharine R. Tull, *Health Care Reform in Massachusetts: Implementation of Coverage Expansions and a Health Insurance Mandate*, 88 MILBANK Q. 54, 70 (2010).

71. *See id.* at 57. The uniqueness of pre-reform Massachusetts is also emphasized from a very different perspective—“everything had already gone wrong” with high health costs and a collapsing market, so the costs of reform were unusually low—in Douglas Holtz-Eakin, *Right Analysis, Wrong Conclusions: Response to Jonathan Gruber*, 30 J. POL'Y ANALYSIS & MGMT. 193, 193-99 (2011).

jeopardize broader support for a reform program. Conversely, setting the [minimal level of coverage] at the least common denominator plan may leave many without adequate coverage and underinsured.⁷²

All of these factors are substantial obstacles to replicating what Massachusetts has done, even if another state's citizens want to do so.

There is also the problem of adverse selection. Any state that mandates insurance for preexisting conditions risks attracting sick people and driving away healthy ones. The magnitude of this effect is uncertain, but its effect on states' incentives is plain. There is not much evidence for the notion that high levels of public support are "welfare magnets" that attract the poor across state lines,⁷³ but fear of creating such magnets has made it hard to ameliorate poverty. A similar dynamic is likely at work here. How great is the danger, really? It is hard to say. People make residence decisions based on a wide range of factors, including the availability of benefits. In the health insurance case, the answer probably varies from one place to another, depending on the costs of moving. For example, the heavy burdens borne by Tennessee's health care system may be related to the fact that its most populous city, Memphis, is bordered by Mississippi and Arkansas, which offer much lower benefits.⁷⁴ TennCare insurers are also concerned that patients from other states may be establishing residency in Tennessee in order to obtain coverage for organ

72. Doonan & Tull, *supra* note 70, at 74.

73. See William F. Danaher, *AFDC and Work: Magnets or Anchors for the Poor?*, 21 SOC. SPECTRUM 33 (2001) (finding no support for the hypothesis); see also Scott W. Allard & Sheldon Danziger, *Welfare Magnets: Myth or Reality?*, 62 J. POL. 350, 350 (2000) (suggesting that, after the passage of welfare reform in 1996, fifteen states imposed welfare residency requirements out of fear of induced migration, despite scant evidence that such migration occurs). The Court long ago noted that such concerns justified a national system of old-age relief: "The existence of . . . a system [of old-age benefits] is a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose. Only a power that is national can serve the interests of all." *Helvering v. Davis*, 301 U.S. 619, 644 (1937).

74. A study commissioned by Tennessee to explain the rising costs of its program concluded that this was a likely partial explanation:

Given that none of the bordering states offer a program similar to TennCare, it is likely that some individuals may come to Tennessee simply to obtain health insurance coverage. . . . [A]s long as TennCare offers a program for the uninsurable, and other states do not, there is the continued risk that some individuals will come to Tennessee solely for health care coverage. One might ask if providers in these bordering states are encouraging patients to relocate to Tennessee in order to access TennCare.

WILLIAM M. MERCER INC., EVALUATION OF CRITICAL ISSUES FACING THE TENNCARE PROGRAM – REPORT 9 (1999).

transplants.⁷⁵ There is no data available on this question,⁷⁶ but it is hard to believe that no one responds to incentives when failure to do so is literally suicidal. Whatever the facts are, the political obstacle is a powerful one. States are reluctant to legislate because they worry that they will lose the race to the bottom. These collective action problems mean that most states cannot reform health insurance even if they all would prefer to. It is a matter in which the states are separately incompetent. Congress has the power to regulate insurance, the Court noted in 1944, because it has power “to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing.”⁷⁷

Compare the case of child labor. When Congress acted in 1916 to ban the interstate shipment of the products of child labor, the government warned that, absent such a law, “[t]he shipment of child-made goods outside of one State directly induces similar employment of children in competing States.”⁷⁸ The collective action problem weighed heavily on state policymakers.⁷⁹ The Supreme Court’s invalidation of the law astounded even those who had most strenuously opposed enactment and provoked a wave of national revulsion and the rapid enactment of a second law—a tax on products of child labor—which the Court also invalidated.⁸⁰ Jonathan Adler, a prominent defender of Judge Hudson’s decision,⁸¹ does not believe the race-to-the-bottom argument in this

75. See DOUGLAS WRIGHT, COMPTROLLER OF THE TREASURY, STATE OF TENN., TENNCARE: A CLOSER LOOK 4-5 (2001), available at <http://www.tnjustice.org/wp-content/uploads/2011/01/Comptroller-TnCare-Brief-10-01.pdf>.

76. See *id.*

77. *United States v. Se. Underwriters Ass’n*, 322 U.S. 533, 552 (1944). The Court here quoted THE FEDERALIST NO. 23 (Alexander Hamilton): “Not to confer in each case a degree of power commensurate to the end, would be to violate the most obvious rules of prudence and propriety, and improvidently to trust the great interests of the nation to hands which are disabled from managing them with vigor and success.” *Id.* at 552 n.37.

78. *Hammer v. Dagenhart*, 247 U.S. 251, 256-57 (1918).

79. In particular, the textile industry in the South feared losing its competitive advantage if child labor were outlawed. See HUGH D. HINDMAN, CHILD LABOR: AN AMERICAN HISTORY 55-59 (2002); STEPHEN B. WOOD, CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW 9, 25, 39 (1968). Critics of child labor were also acutely aware of the collective action problem. See *id.* at 32-33, 295; William Graebner, *Federalism in the Progressive Era: A Structural Interpretation of Reform*, 64 J. AM. HIST. 331, 336-37 (1977).

80. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922); see WOOD, *supra* note 79, at 169-219, 255-99. Contemporary opponents of the mandate who think there are limits on the taxing power rely heavily on *Bailey*.

81. See Jonathan H. Adler, *Initial Thoughts on the Virginia Health Care Ruling*, THE VOLOKH CONSPIRACY (Dec. 13, 2010, 2:29 PM), <http://volokh.com/2010/12/13/initial-thoughts-on-the-virginia-health-care-ruling>; see also Jonathan H. Adler, *Further*

context either, noting that at the time every state already had a law restricting child labor.⁸² This, however, ignores the enormous variation in child labor policy: some laws were weak; others were ineffectively enforced. Interstate competition kept them weak.

The precise uncertainty that drives the objection—that it is hard to know when a race to the bottom is happening—is part of the collective action problem. States do not know whether they will be disadvantaged in interstate competition by having welfare-promoting legislation. This deters them from enacting it. Congress does not have this problem.

As noted earlier, because there is a unified national economy, courts do not and should not demand proof of collective action problems before sustaining economic regulations such as the mandate. With respect to noneconomic regulations, such as environmental laws, all that it makes sense for courts to ask for is (1) a plausible description of a collective action problem and (2) evidence of the failure of states to solve it.⁸³ As we have already seen, neither (1) nor (2) was available in *Lopez*. Both are present in the health care context.

V. THE BROCCOLI REVOLUTION

If the limitations they demand are not accepted, Rivkin and Casey warn, Congress will have the power to do absolutely anything it likes, and “the whole concept of the federal government being a government of enumerated and limited powers goes out the window.”⁸⁴ Judge Vinson worried that “Congress could require that people buy and consume broccoli at regular intervals.”⁸⁵

They understand perfectly well that the law is permissible under presently prevailing interpretations of the Constitution. What they really want is, not to invoke settled law, but to replace the constitutional law we now have with

Thoughts on the Virginia Health Care Ruling and the Necessary and Proper Clause, THE VOLOKH CONSPIRACY (Dec. 13, 2010, 4:43 PM), <http://volokh.com/2010/12/13/further-thoughts-on-the-virginia-health-care-ruling-and-the-necessary-and-proper-clause>.

82. See Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 SUP. CT. ECON. REV. 205, 227-28 (2001).
83. I do not claim that this proposal is original. For similar proposals, see Balkin, *supra* note 63, at 43; Cooter & Siegel, *supra* note 59, at 181; and Regan, *supra* note 64, at 586, 610.
84. Rivkin, Casey, & Balkin, *supra* note 26, at 99 (opening statement of Rivkin and Casey).
85. *State Attorneys General II*, No. 3:10-cv-91, 2011 WL 285683, at *24 (N.D. Fla. Jan. 31, 2011). Judge Hudson expressed a similar worry during argument, although his concern was asparagus. See Kevin Sack, *Tea Party Shadows Health Care Ruling*, N.Y. TIMES, Feb. 1, 2011, <http://www.nytimes.com/2011/02/02/health/policy/02notebook.html>. In *Mead v. Holder*, No. 10-950, 2011 WL 611139, at *19 (D.D.C. Feb. 22, 2011), the court reports a similar hypothetical by plaintiffs involving wheat.

something radically different.⁸⁶ They claim originalist credentials,⁸⁷ but, as we have seen, these are bogus.⁸⁸ Their proposed reinterpretation of the Constitution would mean that the problem of preexisting conditions cannot be solved at all. A regime in which major national problems cannot be solved by anyone is what the Framers were attempting to replace.

The Broccoli Objection, as I will call it, rests on several mistakes. One of these is mashing two claims together, so that the weaker one sneakily borrows support from the stronger, but less relevant, one. Yes, government cannot make you *eat* broccoli. That would violate the constitutional right to bodily integrity that supports, for example, the right to refuse unwanted medical treatment.⁸⁹ But there is no such right to economic liberty. The economic claim collapses once it is decoupled from the bodily integrity claim. If Congress has broad authority over the economy, then it *can* make you *buy* broccoli.

How scary is that? It is hard to see how such a law could be justified. It would be an abuse of Congress's broad authority under *Morrison*, because the law would not be addressing any collective action problem. But this hypothetical is not an objection to the mandate that Congress actually enacted. There are manifest differences between broccoli and health insurance: no one unavoidably needs broccoli; it is not unpredictable when one will need

86. This is clearest in the work of Randy Barnett, who wants to authorize the Court to dismantle large parts of the federal government and has proposed a constitutional amendment abolishing the federal income tax. See RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); Randy E. Barnett, *The Case for a Federalism Amendment*, WALL ST. J., Apr. 23, 2009, <http://online.wsj.com/article/SB124044199838345461.html>. Another prominent opponent of the law is Richard Epstein, who repudiates the idea of guaranteed health care and thinks that the Civil Rights Act of 1964 is unconstitutional. See RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992); RICHARD A. EPSTEIN, MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE? (1997); Richard A. Epstein, *Impermissible Ratemaking in Health-Insurance Reform: Why the Reid Bill Is Unconstitutional*, POINT OF LAW (Dec. 18, 2009), <http://www.pointoflaw.com/columns/archives/2009/12/impermissible-ratemaking-in-he.php>. The radical and destructive ambitions of the mandate's constitutional critics are nicely anatomized in Simon Lazarus, *The Health Care Lawsuits: Unraveling a Century of Constitutional Law and the Fabric of Modern American Government*, AM. CONSTITUTION SOC'Y (Issue Brief, Feb. 2011), http://www.acslaw.org/sites/default/files/lazarus_-_health_reform_lawsuits_o.pdf.

87. These are particularly on display in *State Attorneys General II*, 2011 WL 285683, at *1-*2, *11-*20.

88. Sadly, such abuses of originalism are not atypical. See Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727 (2009).

89. See *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261 (1990).

broccoli; broccoli is not expensive; providers are permitted by law to refuse it; and there is no significant cost-shifting in the way it is provided.⁹⁰

Here we come to the Broccoli Objection's second mistake: treating a slippery slope argument as a logical one, when in fact it is an empirical one. Frederick Schauer showed over twenty-five years ago that any slippery slope argument depends on a prediction that doing the right thing in the instant case will, in fact, increase the likelihood of doing the wrong thing in the danger case.⁹¹ If there is no danger, then the fact that there logically could be has no weight. For instance, the federal taxing power theoretically empowers the government to tax incomes at 100 percent, thereby wrecking the economy. Relax! It will not happen. John Hart Ely defended his rejection of substantive due process against the objection that Congress could then ban the removal of diseased gall bladders by noting that such a law could not possibly pass. What he wrote then is remarkably pertinent: "[I]t can only deform our constitutional jurisprudence to tailor it to laws that couldn't be enacted, since constitutional law appropriately exists for those situations where representative government cannot be trusted, not for those where we know it can."⁹²

Similarly with the Broccoli Objection. The fear rests on one real problem: there are lots of private producers, including many in agriculture, who will lobby to use the coercive power of the federal government to transfer funds from your pockets into theirs. The last thing they want to do, however, is impose duties on individuals, because then the individuals will know that they have been burdened. There are too many other ways to get special favors from the government in a less visible way. So Congress is never going to try to make you eat your broccoli.⁹³

On the other hand, you are probably already consuming more high-fructose corn syrup than is good for you. Subsidies for the production of corn

90. See Brief of Economic Scholars as Amici Curiae in Support of Appellant, at 6-16, *Cuccinelli III*, No. 11-1057 (4th Cir. Mar. 7, 2011), available at <http://aca-litigation.wikispaces.com/file/view/Amicus+brief+of+Economic+Scholars+%28CA4+11-1057%29.pdf>.

91. Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

92. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 183 (1980).

93. Ilya Somin argues (in response to an earlier blog post of mine, see Koppelman, *Health Care Reform: The Broccoli Objection*, *supra* note 1) that I have underestimated the danger and that "a purchase mandate can transfer money to a favored industry without requiring additional government spending or tax increases." Ilya Somin, *Broccoli, Slippery Slopes, and the Individual Mandate*, THE VOLOKH CONSPIRACY (Jan. 25, 2011, 3:26 PM), <http://volokh.com/2011/01/25/broccoli-slippery-slopes-and-the-individual-mandate>. But this has not happened, and the reason cannot be the action/inaction distinction, which no one had heard of until the mandate's opponents invented it.

have produced huge surpluses of the syrup, which in turn becomes a cheap ingredient for mass-produced food and turns up in a remarkable amount of what you eat.⁹⁴ So consumers have to face obesity, diabetes, and dental caries, but no mandate! You and I are paying for this travesty, and it is happening in such a low-visibility way that many of us never realize that Dracula has been paying regular visits. The Broccoli Objection thus distracts attention from the real problem, one that will not be addressed by the action/inaction distinction. If the Supreme Court is going to invent new limits on the legislature, it should do so in a way that has a real chance of preventing actual abuses. Otherwise it is hamstringing the legislature for no good reason.

In the context of federalism, slippery slope arguments have an unpleasant history. When it struck down the first child labor law in 1918, the Supreme Court declared—in tones reminiscent of the Broccoli Objection—that if it upheld the law, “all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and, thus, our system of government be practically destroyed.”⁹⁵ The decision was overruled in 1941.⁹⁶ Our system of government was not destroyed. The real lesson of this episode is that the desire to rein in government power can create a slippery slope of its own, to a state of affairs in which collective action problems go unsolved.⁹⁷ What the Court actually accomplished in 1918 was to thwart democracy⁹⁸ and consign large numbers of children to the textile mills for two decades. Health care is another context in which the Court is at serious risk of ravaging the lives of large numbers of actual people. In both the child labor and health care contexts, opponents of reform flee from illusory dangers into the jaws of real ones.

If the law’s critics are right, we have an obligation to replace the well-functioning constitutional system we have inherited with one that is radically defective. Marshall was right. A construction that denied Congress the power to choose the most sensible method for carrying out its lawful purposes would be “so pernicious in its operation that we shall be compelled to discard it.”⁹⁹

94. See MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* (2002); MICHAEL POLLAN, *THE OMNIVORE’S DILEMMA: A NATURAL HISTORY OF FOUR MEALS 18-19* (2006).

95. *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918).

96. *United States v. Darby*, 312 U.S. 100, 115-17 (1941).

97. The fact that slippery slopes can go in both directions is noted in Schauer, *supra* note 91, at 381.

98. The law that the Court invalidated passed by a margin of 337-46 in the House and 52-12 in the Senate. See WOOD, *supra* note 79, at 56, 77.

99. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 416 (1819).

What really drives the constitutional claims against the bill is not arguments about the commerce power or the taxing power but an implicit libertarianism which focuses on the burden a law imposes on individuals and pays no attention at all to legitimate state interests.¹⁰⁰ A Heritage Foundation paper warns: “Mandating that all private citizens enter into a contract with a private company to purchase a good or service, or be punished by a fine labeled a ‘tax,’ is unprecedented in American history.”¹⁰¹ The Florida Attorney General argued for a substantive constitutional right “to make personal healthcare decisions without governmental interference.”¹⁰² Near the end of his opinion, in a dictum that evidently reveals what is really bothering him, Judge Hudson writes: “At its core, this dispute is not simply about regulating the business of insurance—or crafting a system of universal health insurance coverage—it is about an individual’s right to choose to participate.”¹⁰³

The Supreme Court rejected the purported “inherent right of every freeman to care for his own body and health in such way as to him seems best” in 1905, in *Jacobson v. Massachusetts*.¹⁰⁴ The claimant there asserted that mandatory smallpox vaccination violated his rights. It is true that vaccination is an imposition on one’s liberty. Dying of smallpox is also an imposition on one’s liberty.

Jacobson was decided the same year as the infamous *Lochner v. New York*,¹⁰⁵ in which the Court invented a right of employers to be free from maximum hours laws.¹⁰⁶ Many in the legal community have regarded the constitutional

100. The limits of libertarianism are further explored in ANDREW KOPPELMAN & TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE? HOW THE CASE OF BOY SCOUTS OF AMERICA V. JAMES DALE WARPED THE LAW OF FREE ASSOCIATION (2009).

101. Randy Barnett, Nathaniel Stewart & Todd Gaziano, *Why the Personal Mandate To Buy Health Insurance Is Unprecedented and Unconstitutional*, HERITAGE FOUND., 14 (Legal Memorandum No. 49, 2009), available at http://s3.amazonaws.com/thf_media/2009/pdf/lm_0049.pdf. Never mind that a ban on such a mandate would also invalidate George W. Bush’s proposed privatization of Social Security, which many Republicans continue to enthusiastically support. (As does the Heritage Foundation! See David C. John, *How To Fix Social Security*, HERITAGE FOUND. (Backgrounder No. 1811, 2004), available at http://s3.amazonaws.com/thf_media/2004/pdf/bg1811.pdf.)

102. *State Attorneys General I*, 716 F. Supp. 2d 1120, 1162 (N.D. Fla. 2010) (quoting Plaintiffs’ argument).

103. *Cuccinelli II*, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010).

104. 197 U.S. 11, 26 (1905).

105. 198 U.S. 45 (1905).

106. *Lochner* has continuing effects that are even more destructive than those of the child labor decisions. See WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR

objection to the mandate as a return to *Lochner*,¹⁰⁷ but the “right” that the mandate is supposed to violate was too much even for the *Lochner* Court. Was *Jacobson* wrong? Does the Constitution protect the smallpox virus?

This implicit libertarianism is pervasive in these arguments against the law, but it is intellectually incoherent, because the argument purports to apply only against the federal government, not the states.¹⁰⁸ It has not been explained where this individual right is supposed to come from—it happens not to be mentioned in the text of the Constitution—or why it does not also invalidate anything that the states might do to force people into insurance pools.

CONCLUSION

What will the Supreme Court do? There is no nice way to say this: the silliness of the constitutional objections may not be enough to stop these Justices from relying on them to strike down the law.¹⁰⁹ The Republican Party, increasingly, is the party of urban legends: that tax cuts for the rich always pay for themselves, that government spending does not create jobs, that government overregulation of banks caused the crash of 2008, that global warming is not happening. The unconstitutionality of health care reform is another of those legends, legitimated in American culture by frequent repetition.

If the Constitution were as defective as the bill’s opponents claim it is, a regime in which national problems must remain permanently unsolved, why would it deserve our allegiance?¹¹⁰ The sensible thing to do would be to try to

MOVEMENT (1991); William E. Forbath, *Courts, Constitutions, and Labor Politics in England and America: A Study of the Constitutive Power of Law*, 16 L. & SOC. INQUIRY 1 (1991).

107. See Simon Lazarus, *Jurisprudential Shell Game: Health Reform Lawsuits Sneak “Lochnerim” Back from Constitutional Exile*, NAT’L L.J., Dec. 20, 2010, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202476355698>; cf. Michael C. Dorf, *The Constitutionality of Health Insurance Reform, Part I: The Misguided Libertarian Objection*, FINDLAW, Oct. 21, 2009, <http://writ.news.findlaw.com/dorf/20091021.html> (recognizing the economic libertarian premise of objections to the health care law).
108. The Supreme Court has noted that if there were a valid rights-based objection to a federal statute, a state would likewise be prohibited from enacting that statute. See *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010).
109. For a prominent, and obviously strategic, effort to be nice and insist that of course they would never do such a thing, see Laurence H. Tribe, Op-Ed., *On Health Care, Justice Will Prevail*, N.Y. TIMES, Feb. 7, 2011, <http://www.nytimes.com/2011/02/08/opinion/o8tribe.html>.
110. See JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988).

get free of it, to try—by amendment or judicial construction—to nullify its limits so that we can live in a humanly habitable world. To continue to live with such a perverse Constitution would be mindless ancestor worship.

But the opponents of reform have been unfair to the Framers. Chief Justice Marshall was right when he said that the Constitution does not “attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.”¹¹¹ Instead, it provides a structure for us to govern ourselves. That is what Congress did when, at long last, it took on the spectacularly broken American system of health care delivery.

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111. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).