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Bad News for Mail Robbers:

The Obvious Constitutionality of Health Care Reform

Andrew Koppelman*

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

The constitutional objections are silly. But because constitutional law is abstract and technical, and 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

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decades. One lesson of *Bush v. Gore*, which, surveys showed, did no harm at all to the Court's prestige in the eyes of the public,¹ is that if there are any limits to the judges's 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 at least well enough understood for shame to have some effect on the Court.

The Patient Protection and Affordable Care Act of 2010 includes a so-called "individual mandate," actually a tax that must be paid by individuals who go without health insurance.² 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. That would bankrupt the entire health insurance system, because no one would be paying into the pools. Congress decided to charge those people for the costs they impose on their fellow citizens.

Two federal district judges have declared this provision unconstitutional. Their reasoning is bizarre and mischievous. The novel approach to constitutional law that they propose would

¹ See Herbert M. Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 *Judicature* 32 (2001).

² Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010). The individual mandate is § 1501(b) (to be codified at 26 U.S.C § 5000A).

misread the 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.

I. The obvious constitutionality

The "mandate" is clearly within Congress's power under Article I, section 8 of the Constitution to "regulate Commerce . . . among the several states." Under settled present law, some of it nearly 200 years old, Congress may regulate activity that has a substantial effect on interstate commerce. It may regulate local, noneconomic behavior, the Supreme Court recently held, 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."³ It thus as recently as 2005 upheld a federal ban on growing marijuana for personal consumption.

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, and England: everyone gets

³ Gonzales v. Raich, 545 U.S. 1, 23-24 (2005)(quoting United States v. Lopez, 514 U.S. 549, 561 (1995)).

insurance provided by the government, funded by general taxation. The American government already forces you to buy single-payer insurance against poverty in your old age. That's Social Security. A similar single-payer system of medical care makes a great deal of sense, but so many powerful interests were arrayed against it that it was never going to pass. 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.

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."⁴

Congress has the discretion to decide the best way to accomplish that. 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. The interpretation of this provision, which makes the health care

⁴ United States v. Southeastern Underwriters Ass'n, 322 U.S. 533, 540 (1944).

question an easy one, was settled in 1819 by Chief Justice John Marshall in *McCulloch v. Maryland*.⁵

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. The Constitution does not enumerate any power to create corporations. The Bank's opponents argued that the "necessary and proper" language permitted Congress only to choose means which were *absolutely* necessary to carry out those powers. Marshall rejected this reading, which would make the government "incompetent to its great objects."⁶ 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 render these operations hazardous, difficult, and expensive?"⁷ Without implied powers, Congress's power "to establish post offices" could not entail the ability to punish those who rob the mail, and might not even entail the power to carry letters from one post office to another. "It may be said with some plausibility that the right to carry the mail, and to punish

⁵ 17 U.S. (4 Wheat.) 316 (1819).

⁶ *Id.*

⁷ *Id.* at 408.

those who rob it, is not indispensably necessary to the establishment of a post office and post road.”⁸

The basic rule of *McCulloch* was reaffirmed by the Court as recently as May, 2010. 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.”⁹ 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 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.’”¹⁰ 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.¹¹

II. The purported constitutional limitations

A. The commerce power

⁸ *Id.* at 417.

⁹ *United States v. Comstock*, 130 S.Ct. 1499, 1506 (2010).

¹⁰ *Id.* at 1507, quoting *Burroughs v. United States*, 290 U.S. 534, 547-48 (1934).

¹¹ *Id.*

Opponents of the mandate claim that, even if Congress can regulate health care, it can't demand that you purchase private insurance. "Congress has never before mandated that a citizen enter into an economic transaction with a private company," writes Prof. Randy Barnett, "so there can be no judicial precedent for such a law."¹² But when Congress chartered the Bank of the United States, it had never done that before, either. The underlying principle is not novel at all. The Court declared it in *McCulloch*: a government which 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."¹³

The principal complaint about the mandate is that it is not a regulation of any activity. Two prominent critics, David Rivkin and Lee Casey, object that it will "apply to every American simply because they exist."¹⁴ But for reasons already explained, unless free riders are brought into the system, there is no way to insure everyone else. The Eastern Virginia judge, Henry Hudson, declared that in order to be subject to regulation by Congress, an individual had to engage in "some type of self-

¹² Randy Barnett, *Exceeding Congress's Authority*, New York Times Room For Debate, Mar. 28, 2010, <http://roomfordebate.blogs.nytimes.com/2010/03/28/is-the-health-care-law-unconstitutional/>.

¹³ *McCulloch*, 17 U.S. at 409-10.

¹⁴ David B. Rivkin, Jr. & Lee A. Casey, *Health Care Purchase Mandate: Unconstitutional and Likely to Be Struck Down by the Courts*, in *A Healthy Debate* at 99.

initiated action.”¹⁵ Roger Vinson, the Florida judge, similarly argued that failure to purchase health insurance is “inactivity,” and Congress cannot regulate inactivity.

Vinson acknowledges that there is no authority for this distinction, but quotes *United States v. Lopez*¹⁶ for the proposition that unless the commerce power is somehow limited, it would be “difficult to perceive any limitation on federal power.”¹⁷ If Congress can regulate inactivity, Vinson declared, it “could do almost anything it wanted,” and “we would have a Constitution in name only.”¹⁸ But there’s a big problem with citing *Lopez*: it imposed limits on federal power, and the law it struck down (a ban on possessing handguns near schools) did not regulate inactivity. *Lopez* itself shows that Congressional power can be limited without the activity/inactivity distinction. The authority on which Vinson relies completely 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 obviously an economic decision with economic consequences, but it still may not be economic *activity*, and a great deal of ink has been spilled on

¹⁵ *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F.Supp.2d 768, 782 (E.D. Va. 2010).

¹⁶ 514 U.S. 549 (1995).

¹⁷ *Fla. v. Dep’t of Health and Human Svcs.*, 2011 WL 285683 (N.D. Fla. 2011) at *42.

¹⁸ *Id.*

that question.¹⁹ It doesn't 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."²⁰

B. The necessary and proper clause

The deepest flaw in the analyses by Judges Hudson and Vinson is their complete failure to grasp the fundamental *McCulloch* principle. (I teach an introductory Constitutional Law class at Northwestern Law School. We read *McCulloch* in the first week.) Both supposed, nonsensically, that the commerce power is somehow a limit on Congress's power to choose appropriate means.²¹ (Two other district judges, in Michigan and the Western District of Virginia, were more sensible, and summarily threw out the challenges.²²)

¹⁹ See, e.g., David Kopel, *The Obamacare mandate is unconstitutional*, Daily Caller, Oct. 8, 2010, <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*, Volokh Conspiracy, Oct. 7, 2010, <http://volokh.com/2010/10/07/michigan-district-court-upholds-individual-mandate-against-challenge-by-the-thomas-more-law-center/>.

²⁰ *United States v. Comstock*, 130 S.Ct. 1949, 1957 (2010).

²¹ *Fla. v. Dep't of Health and Human Svcs.*, 716 F.Supp.2d 1120 (N.D. Fla. 2010)(refusing to dismiss challenge); *Fla. v. Dep't of Health and Human Svcs.*, 2011 WL 285683 (N.D. Fla. 2011)(invalidating law); *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F.Supp.2d 598 (E.D. Va. 2010)(refusing to dismiss challenge); *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F.Supp.2d 768 (E.D. Va. 2010)(invalidating law).

²² *Thomas More Center v. Obama*, 720 F.Supp.2d 882 (E.D. Mich. 2010); *Liberty Univ. v. Geithner*, 2010 WL 4860299 (W.D. Va. 2010).

"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."²³ By the same "logic," if I can't pick up a pencil with my brain, then it follows that I can't do it with my hand either. 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's analysis was even wilder. He acknowledges, and even quotes, 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."²⁴ And then he admits that, under the settled meaning of the commerce power, which he does not question,²⁵

²³ The sentence appears in both *Cuccinelli* opinions: 728 F.Supp.2d at 779, 702 F.Supp.2d at 611.

²⁴ Fla. v. Dep't of Health and Human Svcs., 2011 WL at *61, quoting *McCulloch* at 421.

²⁵ He does suggest, as "an historical aside," that insurance contracts are not part of commerce under what he takes to be the original understanding, but he does not pursue the point. *Id.* at *23.

"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.²⁶ But, *three sentences later*, he declares: "The Necessary and Proper Clause cannot be utilized to 'pass laws for the accomplishment of objects' that are not within Congress's enumerated powers."²⁷ Has he so quickly forgotten that he admitted that the object was within Congress's enumerated powers?

Judge Vinson notes that the government has "asserted again and again that the individual mandate is absolutely 'necessary' and 'essential' for the Act to operate as it was intended by Congress. I accept that it is."²⁸ (Because the mandate was so necessary to the entire legislative scheme, he declared it nonseverable and invalidated the entire law.) In other words, *even if McCulloch had come out the other way*, the mandate would be authorized by the necessary and proper clause. But the mandate is nonetheless unconstitutional, because it "falls outside the boundary of Congress's Commerce Clause authority and cannot be reconciled with a limited government of enumerated

²⁶ Id. at *61-*62.

²⁷ Id. at *62.

²⁸ Id. at *63.

powers.”²⁹ But this is flatly inconsistent with the authority that he just quoted.

He suggests 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.³⁰

If, however, Congress has no power to address negative consequences that follow from its own statutory scheme, then Marshall was wrong about mail robbery after all. Mail robbery

²⁹ Id.

³⁰ Id. at *60.

is an adverse consequence of Congress's decision to establish a post office: had it not done that, all those valuable papers would not be gathered together in one place. But, you'll say, that's 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. But if, as Vinson admitted, Congress can also decide that people with preexisting conditions can be protected, then how can the cases be distinguished?

C. The taxing power

Even if you somehow suppose that the 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." 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."³¹ A claim that the tax is a "direct tax" forbidden by Article I, section 9 is even wilder, since the mandate is neither a general tax on individuals nor a tax on

³¹ United States v. Sanchez, 340 U.S. 42, 44 (1950).

real estate - the original targets of this obscure and now rarely invoked provision.³²

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. (It did not, however, expressly disclaim reliance on the taxing power.)³³ This reasoning would create two remarkable new doctrines: that federal courts have authority to police the public statements of politicians, and that Congress must expressly invoke all possible constitutional bases for legislation.³⁴ It is, however, long settled doctrine that federal statutes are presumed to be constitutional, and that, as the Supreme Court said in 1948, "The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."³⁵ Judge Vinson also suggested - I am not making this up - that whenever Congress does something it hasn't done before, its action is

³² The frivolousness of these arguments is further documented in Jack M. Balkin's contributions to *A Healthy Debate: The Constitutionality of an Individual Mandate*, 158 U. Pa. L. Rev. PENnumbra 93 (2009), available at <http://www.pennumbra.com/debates/pdfs/HealthyDebate.pdf>.

³³ *Cuccinelli*, 728 F.Supp.2d at 784-86; *Fla. v. Dep't of Health and Human Svcs.*, 716 F.Supp.2d at 1130-1144.

³⁴ This criticism of Judge Vinson's reasoning is made in Gillian Metzger & Trevor Morrison, *Health Care Reform, the Tax Power, and the Presumption of Constitutionality*, Balkinization blog, Oct. 19, 2010, available at <http://balkin.blogspot.com/2010/10/health-care-reform-tax-power-and.html>.

³⁵ *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948).

presumptively unconstitutional.³⁶ These new rules would, if consistently 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 broccoli revolution

Some of the law's opponents understand perfectly well that the law is permissible under presently prevailing interpretations of the Constitution. They know their claims are frivolous. They don't like the law that makes their claims frivolous.

What they really want is, not to invoke settled law, but to trash it - to replace the constitutional law we now have with something radically different.³⁷ They propose to limit federal powers with no regard for the purposes for which those powers are being used.

³⁶ Fla. v. Dep't of Health and Human Svcs., 716 F.Supp.2d at 1164 n.21 and 2011 WL at *39.

³⁷ 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. Another prominent opponent of the law is Richard Epstein, who thinks that the Civil Rights Act of 1964 is unconstitutional. See Richard Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (1995); Richard A. Epstein, *Impermissible Ratemaking in Health-Insurance Reform: Why the Reid Bill is Unconstitutional*, PointofLaw.com, Dec. 18, 2009, <http://www.pointoflaw.com/columns/archives/2009/12/impermissible-ratemaking-in-he.php>.

They claim originalist credentials,³⁸ but these are bogus. The framers' most important decision was to replace the weak Articles of Confederation with a central government strong enough to address common problems. According to those who claim that the law is unconstitutional, however, the problem of preexisting conditions can't be solved at all. A regime in which huge national problems can't be solved by anyone is precisely what the framers were trying to get rid of.

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 limited and enumerated powers goes out the window."³⁹ Judge Vinson worried that "Congress could require that people buy and consume broccoli at regular intervals."⁴⁰

The Broccoli Objection, as I will call it, rests on a simple mistake: treating a slippery slope argument as a logical one, when in fact it is an empirical one.

Frederick Schauer showed over 25 years ago that any slippery slope argument depends on a prediction that doing the

³⁸ These are particularly on display in *Fla. v. Dep't of Health and Human Svcs.*, 2011 WL at *2-3, 20-27.

³⁹ Rivkin and Casey at 99.

⁴⁰ *Fla. v. Dep't of Health and Human Svcs.*, 2011 WL at *46. Judge Hudson expressed a similar worry during argument, though his concern was asparagus. Kevin Sack, *Tea Party Shadows Health Care Ruling*, N.Y. Times, Feb. 2, 2011, at A16.

right thing in the instant case will in fact increase the likelihood of doing the wrong thing in the danger case.⁴¹ If there is in fact 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%, thereby wrecking the economy. But there's no slippery slope, because there is no incentive to do this, so it won't happen.

Similarly with the Broccoli Objection. The fear rests on one real problem: there are lots of private producers, including many in agriculture, who want to use the coercive power of the federal government to transfer funds from your pockets into theirs. But the last thing they want to do is impose duties on individuals, because then the individuals will know that they've been burdened. There are too many other ways to get special favors in a less visible way.

So Congress is never going to force you to eat your broccoli. On the other hand, you're probably already consuming more high-fructose corn syrup than is good for you. Subsidies for the production of corn have produced huge surpluses of the syrup, which in turn becomes a very cheap ingredient of mass-produced food, and turns up in a remarkable amount of what you eat. So consumers have to face obesity, diabetes, and dental caries - but no mandate! You and I are paying for this

⁴¹ Frederick Schauer, *Slippery Slopes*, 99 Harv. L. Rev. 361 (1985).

travesty, but in such a low-visibility way that many of us never realize that Dracula has been paying regular visits. The Broccoli Objection distracts attention from the real problem. And the judiciary hasn't got the tools to deal with that problem. 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.

IV. 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: "The scholarly argument against the mandate pretty much runs this way: (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."⁴²

⁴² Email from Prof. Steven Lubet, Dec. 14, 2010. For a prominent argument that comes close to saying exactly this, see Jason Mazzone, *Can Congress Force You to be Healthy?*, N.Y. Times, Dec. 16, 2010. It's actually very easy to think of other ones. There's the one rejected in *McCulloch*: 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. The only problem with them is that they are silly and 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.

More sensible limits, if one must devise some, are discussed in the text immediately following.

It's not at all clear that it's important to have 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.⁴³ *Lopez* imposed a new restriction, though its contours remain uncertain. If you think a line has to be drawn, however, you should focus on the one that the framers of the Constitution actually drew - a line that has nothing to do with the activity/inactivity distinction.

At Philadelphia in 1787, the Convention resolved that Congress could "legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation."⁴⁴ This was then translated by the Committee of Detail into the present enumeration of powers in Article I, which was accepted as a functional equivalent by the Convention without much discussion.⁴⁵ It includes the commerce and "necessary and proper" provisions.

⁴³ Andrew Koppelman, *How 'Decentralization' Rationalizes Oligarchy: John McGinnis and the Rehnquist Court*, 20 Const. Comm. 11, 20 (2003).

⁴⁴ Quoted in Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 177 (1996).

⁴⁵ "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." *Id.* at 178.

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. This language was accepted without objection for good reasons. In an important recent study, Jack 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."⁴⁶ If health care markets involve such effects or problems, then the mandate presents, once more, a very easy case. 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 possession of handguns near schools that the Supreme Court struck down in *Lopez*, exceeds the commerce power. But the national health care insurance market is not a purely local matter.

One thing that the framers did not anticipate was the spectacular advances of the past 200 years in our capacity to

⁴⁶ Jack M. Balkin, *Commerce*, 109 Mich. L. Rev. 1, 6 (2010). Once upon a time, more sober Republicans advocated a similar 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 (1995).

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.

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. Any state that mandates insurance for pre-existing conditions will attract sick people and drive away healthy ones. That is why only Massachusetts has managed to do it. (Seven other states tried to protect people with pre-existing conditions without mandating coverage for everyone. The results ranged from huge premium increases to the complete collapse of the market.⁴⁷) The 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 were separately incompetent. It is precisely the kind of problem that the framers intended the Federal government to be able to address.

V. Radical libertarianism

⁴⁷ See Brief Amici Curiae of March of Dimes Foundation et al, Virginia ex rel. Cuccinelli v. Sebelius, at 4-8, available at http://www.nsclc.org/areas/federal-rights/amicus-brief-in-support-of-health-reform-1/at_download/attachment.

If the bill's critics are right, we have an obligation to replace the well-functioning constitutional system we have inherited with one that is radically defective. It is mysterious why any sane person would want to do that. Marshall was right. A construction which 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."⁴⁸

What really drives the constitutional claims against the bill is not arguments about the Commerce Clause or the taxing power, but an implicit libertarianism that focuses on the burden a law imposes on individuals and pays no attention at all to legitimate state interests.⁴⁹ 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."⁵⁰ (Never mind that this would also invalidate George W. Bush's proposed privatization of Social Security, which many Republicans continue to enthusiastically support.) The Florida Attorney General frankly argued for a substantive constitutional

⁴⁸ *McCulloch*, 17 U.S. at 416.

⁴⁹ The limits of libertarianism are further explored in Andrew Koppelman with 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).

⁵⁰ Randy Barnett, Nathaniel Stewart, and Todd Gaziano, *Why the Personal Mandate to Buy Health Insurance is Unprecedented and Unconstitutional*, Heritage Foundation Legal Memorandum, Dec. 9, 2009, available at <http://www.heritage.org/research/reports/2009/12/why-the-personal-mandate-to-buy-health-insurance-is-unprecedented-and-unconstitutional>.

right "to make personal healthcare decisions without governmental interference."⁵¹ Near the end of his opinion, almost as an afterthought, 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's about an individual's right to choose to participate."⁵²

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*.⁵³ 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*,⁵⁴ in which the Court invented a right of employers to be free from maximum hours laws. The right that Republicans are now asserting was too much even for the *Lochner* Court. Was *Jacobson* wrong? Does the Constitution protect the smallpox virus?

⁵¹ Fla. v. Dep't of Health and Human Svcs., 716 F.Supp.2d at 1162, quoting plaintiff's argument.

⁵² *Cuccinelli*, 728 F.Supp.2d at 788.

⁵³ 197 U.S. 11, 26 (1905).

⁵⁴ 198 U.S. 45 (1905).

This implicit libertarianism is pervasive in the arguments against the law, but it is intellectually incoherent, because it is intended to apply only against the federal government, not the states.⁵⁵ 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 doesn't also invalidate anything that the states try to 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 judges from relying on them to strike down the law. The Republican party, increasingly, is the party of urban legends: that tax cuts for the rich always pay for themselves, that government spending doesn't 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.

⁵⁵ The Supreme Court recently made clear that if there were a rights-based objection to a federal statute, that would imply that a state would likewise be prohibited from enacting that statute. *Comstock*, 130 S.Ct. at 1956.

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? The only sane thing to do would be to try to 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."⁵⁶ Instead, it provides a structure for us to govern ourselves. That is precisely what Congress did when, at long last, it took on the spectacularly broken American system of health care delivery.

⁵⁶ *McCulloch*, 17 U.S. at 415.