

## WHY CONGRESS DID NOT THINK ABOUT THE CONSTITUTION WHEN ENACTING THE AFFORDABLE CARE ACT

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### INTRODUCTION

Over the next few months, the Supreme Court will spend far more time thinking about the constitutionality of the Patient Protection and Affordable Care Act (ACA)<sup>1</sup> than Congress did when enacting the ACA. Lawmakers largely ignored the Constitution; congressional hearings never considered whether the Supreme Court would uphold the statute nor did lawmakers engage in constitutional fact-finding. Instead, consistent with the conclusions in my recent *Northwestern University Law Review* article, *Party Polarization and Congressional Committee Consideration of Constitutional Questions* (“*Party Polarization*”),<sup>2</sup> lawmakers were far more invested in advancing the partisan aims of their party than sorting out the constitutional implications of the signature legislative accomplishment of the 111th Congress.

In this Essay, I will provide a descriptive account of Congress’s general disinterest in the Constitution when enacting the ACA. In so doing, this Essay will serve as a case study that bolsters the claims and evidence in my *Party Polarization* article. This Essay is but one in a series on party polarization and committee behavior regarding the Constitution. In a forthcoming essay that will appear in the print pages of the *Northwestern University Law Review*, I will extend this Essay’s case study to make broader claims about the impact of party polarization on Congress’s interest in federalism, including congressional fact-finding on bills which implicate constitutional federalism.

This Essay will proceed in three parts. In Part I, I will provide a snapshot of my earlier *Party Polarization* article, explaining why party polarization is likely to deflate congressional committee consideration of

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<sup>1</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (to be codified as amended in scattered sections of 42 U.S.C.) (link).

<sup>2</sup> Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 NW. U. L. REV. 737 (2011) (link).

constitutional questions. This occurs, for example, when majority lawmakers will not allow minority lawmakers to use constitutional hearings as a vehicle to derail the majority party's legislative agenda.

In Part II, which is the heart of this Essay, I will examine the congressional hearings, committee reports, and congressional debates tied to the enactment of the ACA. While I will focus primarily on lawmaker consideration of the scope of congressional power under the Commerce Clause, I will also discuss congressional fact-finding. This section will put into context the Department of Justice's claims of "detailed findings" made by Congress establishing that the ACA was an appropriate "exercise of its commerce power."<sup>3</sup> In particular, this section will show that Congress never meaningfully considered the constitutionality of the ACA and that these "detailed findings" are largely smoke and mirrors which, more than anything, speak to the skill of Department of Justice lawyers in culling the Act's massive legislative history for useful references.<sup>4</sup>

Finally, Part III will discuss Congress's actions after enactment of the ACA, including holding the first round of hearings about the bill's constitutionality. By highlighting the role of the 2010 elections and post-enactment judicial rulings in Congress's decision to hold hearings, this section will provide a fitting conclusion that reinforces the idea that Congress is generally uninterested in constitutional questions. I will also highlight the costs of such indifference, arguing that the ACA would be on stronger constitutional footing if Congress had used the hearings process to take seriously its obligation to independently interpret the Constitution.

Needless to say, this Essay—like the *Party Polarization* article that preceded it—presents a negative portrait of Congress, at least with respect to its consideration of constitutional questions. At the same time, I am not suggesting that the ACA is unconstitutional. I do not think that there is such a thing as due process in lawmaking, such that Congress would be obligated to hold hearings, find facts in hearings, or follow other procedural requirements.<sup>5</sup> Moreover, I think that existing Supreme Court doctrine

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<sup>3</sup> Brief for Appellants at 2, *Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), cert. granted, 80 U.S.L.W. 3306 (U.S. Nov. 14, 2011) (Nos. 11-11021 & 11-11067) (link).

<sup>4</sup> For a somewhat competing account, see Rebecca E. Zietlow, *Democratic Constitutionalism and the Affordable Care Act*, 72 OHIO ST. L.J. 1367 (2011) (link). Professor Zietlow, looking at statements made on the floor of Congress about the constitutionality of the ACA, suggests that Congress did take the Constitution into account when enacting the ACA. See *id.* at 1395–1401. Professor Zietlow, however, does not examine the legislative process leading up to that floor debate. For reasons discussed both in this Essay and in *Party Polarization*, statements made in the *Congressional Record* are an inadequate measure of Congress's interest in the Constitution. See *infra* note 51; Devins, *supra* note 2, at 766–68. More than that, although Professor Zietlow does an excellent job showcasing the number of lawmakers who spoke about the constitutionality of the ACA, I nonetheless argue in this Essay that lawmakers were not particularly interested in constitutional questions when debating the ACA. See *infra* notes 51–56 and accompanying text.

<sup>5</sup> See Neal Devins, *Appropriations Redux: A Critical Look at the Fiscal Year 1988 Continuing Resolution*, 1988 DUKE L.J. 389, 400–06 (arguing that there is no "due process in lawmaking")

supports the ACA.<sup>6</sup> In other words, rather than call into question the constitutionality of the ACA, my true aim is to cast light on party polarization's pernicious impact on Congress's ability to independently interpret the Constitution.

## I. BACKGROUND: PARTY POLARIZATION AND CONGRESSIONAL COMMITTEE CONSIDERATION OF CONSTITUTIONAL QUESTIONS<sup>7</sup>

### A. *A Polarized Congress*

Congressional hearings and, more generally, the work of congressional committees, provide an important lens for understanding lawmaker interest in constitutional questions. Congressional committees, along with political parties, are one of the two "principal organizing structures of Congress."<sup>8</sup> Although the relative influence of committees and political parties has varied over time, it has always been the case that "[m]uch of the important work of Congress is done in committees."<sup>9</sup> "[T]he connections between public attention and hearings, and between hearings and statutes, strongly suggest the general sensitivity of the lawmaking process to public priorities."<sup>10</sup> Hearings, moreover, are a relatively accessible source of information about Congress. Unlike informal contacts among staffers, members, lobbyists, and agency officials, hearings are public events. For all of these reasons, hearings—especially hearings on landmark

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requirement that lawmakers must have an opportunity to review legislation before voting on it) (link). For additional discussion, see *infra* notes 58–61 (noting that ACA legislative history calls attention to the near impossibility of courts mandating due process in lawmaking).

<sup>6</sup> On how existing Supreme Court precedent supports the ACA (at least with respect to facial challenges to the statute), see *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 549 (6th Cir. 2011) (Sutton, J., concurring in part and concurring in the judgment) (link). I have previously written on whether the Supreme Court should defer to congressional fact-finding in the federalism context, concluding that Congress's interest in sorting the facts in federalism-related legislation is highly contextual and that the Court should embrace standards of review that allow it to look at that context before deciding whether deference is appropriate. See Neal Devins, *Congressional Factfinding and the Scope of Judicial Review*, 50 DUKE L.J. 1169, 1194–1200 (2001) (link). I have also written on the absence of a federalism constituency in Congress and, with it, the need for the Court to police federalism values through its decision-making. See Neal Devins, *The Judicial Safeguards of Federalism*, 99 NW. U. L. REV. 131, 135–39 (2004) (link). Finally, I have registered my view that existing Supreme Court doctrine supports the ACA by signing a law professor amicus brief. See Brief of Law Professors Barry Friedman, Matthew Adler, et al., as Amici Curiae in Support of Petitioners and Reversal on the Minimum-Coverage Provision Issue, *U.S. Dep't of Health & Human Servs. v. Florida*, cert. granted 132 S.Ct. 604 (2011) (No. 11-398), 2012 WL 160237 (link).

<sup>7</sup> Much of this section is drawn from my *Party Polarization* article, *supra* note 2.

<sup>8</sup> John H. Aldrich & David W. Rohde, *Congressional Committees in a Continuing Partisan Era*, in CONGRESS RECONSIDERED 217, 217 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 9th ed. 2009).

<sup>9</sup> Keith E. Whittington, *Hearing About the Constitution in Congressional Committees*, in CONGRESS AND THE CONSTITUTION 87, 87 (Neal Devins & Keith E. Whittington eds., 2005).

<sup>10</sup> BRYAN D. JONES & FRANK R. BAUMGARTNER, THE POLITICS OF ATTENTION: HOW GOVERNMENT PRIORITIZES PROBLEMS 263 (2005).

legislation—provide a lens into the level that Congress thinks about the Constitution when enacting legislation.

None of this is to say that hearings are a perfect measure of congressional interest in a subject. For example, Congress increasingly operates “without the benefit of hearings . . . [or even] deliberation in committee.”<sup>11</sup> This is particularly true today; reductions in committee staff and a shift towards centralized party control have diminished the overall importance of committee work. But even if hearings play a less prominent role in congressional deliberations, it is nevertheless true that hearings remain one of the most visible mechanisms for lawmakers to take “action in the public sphere.”<sup>12</sup> “In hearings,” Keith Whittington notes, “legislators put political relationships and concerns on display and establish the warrants of authority for legislative action.”<sup>13</sup>

With respect to constitutional questions, congressional practices changed dramatically between 1970 and 2010.<sup>14</sup> Although committees routinely considered constitutional questions for the first twenty years of that period, starting around 1990—and especially following the 1995 Republican takeover of Congress—there was a notable decline in the number of constitutional hearings. Indeed, while there were more than sixty constitutional hearings each year for most years between 1970 and 1985, there were fewer than forty constitutional hearings most years between 1995 and 2010.<sup>15</sup> During that same period, moreover, the House and Senate Judiciary Committees became the only committees to regularly conduct constitutional hearings. This meant that the Judiciary Committees held 72% of constitutional hearings between 1995 and 2010, compared to 46% during the 1970s.<sup>16</sup>

In making sense of these two trends, I think it is sensible to pay attention to the most obvious and recognizable development in Congress over the past forty years—the ever-growing polarization between the Democratic and Republican parties.<sup>17</sup> The Congress that enacted the ACA

<sup>11</sup> THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 217 (2006).

<sup>12</sup> Whittington, *supra* note 9, at 88 (quoting DAVID R. MAYHEW, *AMERICA’S CONGRESS: ACTION IN THE PUBLIC SPHERE, JAMES MADISON THROUGH NEWT GINGRICH* (2000)).

<sup>13</sup> *Id.*

<sup>14</sup> See Devins, *supra* note 2, at 741–53, for a detailed presentation of the data summarized in this paragraph.

<sup>15</sup> From 1985 to 1990, there was no overall decline. The sustained decline (reflecting growing polarization in Congress) begins around 1990. *See id.* at 743 fig.1.

<sup>16</sup> *Id.* at 750. From 1980 to 1994, Judiciary Committees held 56% of all constitutional hearings. Specifically, from 1985 to 1992, the Judiciary Committees held less than 50% of constitutional hearings, and the spike associated with the modern era begins around 1992 (again reflecting growing polarization in Congress). *See id.*

<sup>17</sup> For an excellent treatment of party polarization in Congress since the early 1970s, see generally SEAN M. THERIAULT, *PARTY POLARIZATION IN CONGRESS* (2008). In linking party polarization to

is much different than the Congress of 1970. In 1970, with a strong contingent of conservative Southern Democrats, Democrats occupied every ideological niche. Likewise, there were several liberal “Rockefeller Republicans.” Indeed, throughout the 1970s, there was no meaningful gap in the median liberal-conservative scores of the two parties. George Wallace thus justified his 1968 run for president by arguing that “there’s not a dime’s worth of difference” between the two parties.<sup>18</sup>

Today, however, the forces that pushed Democrats and Republicans toward the center have given way to an era of ideological polarization. After Ronald Reagan’s presidential victory in 1980, the moderate-to-liberal wing of the Republican Party began to disappear. “Ronald Reagan’s GOP” pursued a conservative agenda that simultaneously isolated the liberal wing of the Republican Party and appealed to right-leaning Southern Democrats, many of whom switched allegiance to the increasingly conservative Republican Party. Computer-driven redistricting further exacerbated emerging polarization by drawing district lines that essentially guaranteed each party would win particular seats in the House of Representatives. As a result, Democratic and Republican candidates sought to mobilize the more partisan bases that vote in party primaries, which pushed out moderates and rewarded candidates who were both more ideological and more loyal to their party. By 1990, Congress was transformed; a sharp, ever-growing divide between the parties replaced the equally sharp gap between Northern and Southern members of each party. This divide grew throughout the 1990s and 2000s. By 2009—and continuing through today—the ideological distance between the two parties was greater than at any time since Reconstruction.<sup>19</sup>

### B. *Depressed Constitutional Interest and Partisan Aims*

Party polarization has resulted in a basic shift of power away from congressional committees and toward party leaders. “As the views of members within [each] party become more alike, the costs of delegating

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changes in congressional constitutional hearing practices, I do not mean to suggest that party polarization is the only salient variable in the number and location of hearings. As I explain in *Party Polarization*, *supra* note 2, at 768–75, changes in the national policy agenda, changes in party leadership, court decision-making, and presidential action all impact congressional practices—so there is year-to-year variability in congressional practices. At the same time, party polarization explains the general decline in constitutional hearings and the related rise of the Judiciary Committees as the only committees to regularly hold constitutional hearings.

<sup>18</sup> Richard Pearson, *Ex-Gov. George C. Wallace Dies at 79*, WASH. POST, Sept. 14, 1998, at A1.

<sup>19</sup> Party polarization refers to the ideological distance between the average Democratic and Republican lawmakers based on roll call voting in the House and Senate. In calculating party averages, roll call votes are registered as liberal, conservative, or moderate. See Nolan McCarty et al., *Party Polarization: 1879–2010*, POLARIZED AM. (Jan. 11, 2011), [http://polarizedamerica.com/Polarized\\_America.htm#POLITICALPOLARIZATION](http://polarizedamerica.com/Polarized_America.htm#POLITICALPOLARIZATION) (link).

agenda power” to leadership diminishes.<sup>20</sup> Leadership, for example, exercises greater control of the agenda and jurisdiction of committees. Leadership has also slashed committee staff and engaged in other reforms that have diminished committee influence. Moreover, leadership has engaged in message politics—party efforts to use the legislative process to make symbolic statements to voters and other constituents.

The interface of these factors largely explains the decline in constitutional hearings.<sup>21</sup> With fewer staff resources and increasing intra-party agreement, lawmakers (outside of the Judiciary Committees) are likely to focus on policy issues that reinforce their party’s message and shy away from constitutional questions that cast doubt on the legality of their handiwork. More generally, lawmakers now have incentives to discount constitutional interpretation in favor of other pursuits—reelection, advancement within the party, and constituent service. By way of contrast, Congress was more apt to hold constitutional hearings in the less polarized 1960s and 1970s. At that time, committee chairs had both more incentive to consider constitutional questions and more discretion to pursue a broader range of issues in committee hearings. There was less pressure to pursue a party-defined message and substantially bigger staffs gave committees the resources to consider a broader range of issues in hearings. Significantly, committee chairs needed to reach out to minority party members to form coalitions, recognizing the fact that some members of their own party disagreed with their policy priorities, creating a greater incentive to pursue hearings in a bipartisan way and resulting in committees that were more likely to consider the constitutional foundations of legislation.

To make these points more concrete, consider the relationship between the majority and minority parties in defining the content of congressional hearings. In today’s polarized Congress, Democrats and Republicans vote along party lines, pursue different agendas, and seek to advance their own messages while undermining those of the opposing party. For this reason, the majority party is increasingly unwilling to allow opposition lawmakers to challenge the constitutionality of legislative proposals. While legislative majorities have always controlled the policies and agendas of committee hearings, party polarization has nevertheless resulted in further limiting minority access to hearings. In part, the majority party’s increasing homogeneity squelches competing views and thus makes hearings more one-sided. Committee chairs can count on party loyalists to stick together

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<sup>20</sup> David W. Rohde et al., *Parties, Committees, and Pivots: A Reassessment of the Literature on Congressional Organization* 12 (Aug. 22, 2008) (unpublished manuscript) (on file with the Northwestern University Law Review). For additional discussion, see Devins, *supra* note 2, at 756–59.

<sup>21</sup> The issues explored in this and the next paragraphs are drawn from *Party Polarization*, Devins, *supra* note 2, at 759–68. See also *id.* at 768–75 (noting that— notwithstanding the general decline in constitutional hearings—there are occasional spike-up years typically tied to presidential initiatives, court decisions, and changes in party control of Congress).

and, consequently, there is less reason to reach out to majority or minority party members who do not necessarily agree with the chair's agenda. When Republicans controlled Congress from 1995 to 2006, for example, Democratic lawmakers—shut out of the formal hearing process—held so-called “shadow” hearings to protest their inability to call witnesses or otherwise define the hearing agenda.<sup>22</sup> In all, with party leaders exercising greater control over the agenda and membership of committees, committee chairs have both less interest in and less freedom to pursue issues that are inconsistent with the interest of party leaders. Against this backdrop, policy and constitutional objections to committee initiatives will likely come from the minority party. Yet the majority party may not allow committee hearings to serve as a vehicle for airing such minority party objections.

The Judiciary Committees, like other committees, are also polarized along party lines. Judiciary Committee hearings are thus increasingly “stage-managed” and “orchestrated as political theater.”<sup>23</sup> Unlike other committees, however, the confluence of jurisdiction, member preferences, and interest-group pressure has resulted in the Judiciary Committees continuing to hold constitutional hearings—the Judiciary Committees now hold more than 70% of constitutional hearings in Congress. Most importantly, the Judiciary Committees cannot treat constitutional issues as second order, largely because they have jurisdiction over civil liberties, constitutional amendments, and federal courts (not to mention the Senate's power to confirm federal judges and Justice Department officials). Moreover, with the general decline in congressional consideration of constitutional questions, lawmakers increasingly look to the courts as the last word on constitutional questions. Other committees and party leaders, therefore, leave it to the Senate Judiciary Committee to advance party preferences through its confirmation power, either by advancing or blocking nominations.<sup>24</sup> Increasing acrimony between the parties over federal appellate court nominations highlights this development.

In summary, congressional committees increasingly use hearings to

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<sup>22</sup> See *id.* at 766–67.

<sup>23</sup> Richard E. Cohen, *Crackup of the Committees*, 31 NAT'L J. 2210, 2215 (1999) (link); ROGER H. DAVIDSON ET AL., *CONGRESS AND ITS MEMBERS* 220 (11th ed. 2008). For an examination of how party polarization transformed Judiciary Committee hearings so that each party would only call witnesses who would back up pre-defined party opinions, see Neal Devins, *The Academic Expert Before Congress: Observations and Lessons from Bill Van Alstyne's Testimony*, 54 DUKE L.J. 1525, 1539–45 (2005) (link). For a more detailed presentation of the issues raised in this paragraph, see Devins, *supra* note 2, at 776–82.

<sup>24</sup> Today's Congress—as Bruce Peabody found in his study of lawmaker attitudes toward Court-Congress relations—no longer thinks that the Court should defer to its constitutional judgments. Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959–2001*, 29 LAW & SOC. INQUIRY 127, 127 (2004) (link). On the issue of party polarization in judicial confirmation politics, see Sarah A. Binder & Forrest Maltzmann, *The Politics of Advice and Consent: Putting Judges on the Federal Bench*, in CONGRESS RECONSIDERED, *supra* note 8, at 241–62.

advance the partisan goals of the majority party.<sup>25</sup> With more intra-party agreement and fewer staff resources, committees generally focus on policy concerns and pay scant attention to the constitutional foundations of legislation. Correspondingly, the minority party is both more likely to raise constitutional objections to legislation and less likely to have access to these hearings. Outside of the Judiciary Committees, which continue to hold constitutional hearings, minority party members are most likely to express constitutional concerns through “shadow hearings,” floor statements published in the *Congressional Record*, and outreach efforts such as press releases and other public statements.

## II. CONGRESS, THE CONSTITUTION, AND THE AFFORDABLE CARE ACT

In Part I of this Essay, I explained why it is that party polarization has contributed to a decline in constitutional hearings outside of the Judiciary Committees. I suggested that those committees would explore policy questions, not constitutional questions, and that constitutional objections to legislation would most likely appear on the pages of the *Congressional Record*. In this Part, I will review congressional deliberations leading up to the passage of the ACA. In so doing, I will show that the enactment of the ACA tracks general trends in Congress.

To start, the 111th Congress held forty-four hearings about the ACA between its January 2009 opening and March 2010 enactment of the ACA. Lawmakers, however, did not hold any hearings to examine the bill’s constitutionality. Also, although Congress specifically found that the ACA’s individual mandate “is commercial and economic in nature, and substantially affects interstate commerce,”<sup>26</sup> it did not consider the linkage between the factual record it was assembling and applicable constitutional standards. Instead, lawmakers seemed largely indifferent to a potential constitutional challenge to the ACA. Given the political import of the ACA, the number of policy-related hearings held on the bill, and the advent of the Tea Party (whose questioning of the ACA’s constitutionality proved politically salient to the Republican Party),<sup>27</sup> the fact that the Constitution played no meaningful role in congressional committee consideration of the ACA is striking.

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<sup>25</sup> For discussions of majority party control of hearings (including the tendency of the majority party to call witnesses to support pre-defined party messages), see Devins, *supra* note 2, at 766–67; Devins, *supra* note 23, at 1542–45; see also *supra* text accompanying note 22 (discussing minority party use of shadow hearings to protest their inability to call witnesses or otherwise define the agenda of committee hearings).

<sup>26</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (to be codified at 42 U.S.C. § 18091) (link).

<sup>27</sup> For a discussion of the Tea Party and its attacks on the ACA, see sources cited *infra* note 49; see also Zietlow, *supra* note 4, at 1395–1401.



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Party polarization figures significantly in this story. First, for reasons discussed in Part I, party polarization has led to a diminution in congressional interest in the Constitution. Second, with Republican lawmakers uniformly opposed to the bill, majority lawmakers worked hard to keep their coalition together. To accomplish this feat, Democratic leaders focused on policy priorities; hearings about whether the bill was constitutional likely would have hurt, not helped, their cause. Specifically, Democratic lawmakers could not risk any defections among their rank and, consequently, had nothing to gain by having bill opponents cast doubt on the constitutional bona fides of the bill.<sup>28</sup>

The battle over the ACA was fiercely partisan.<sup>29</sup> No Republican voted for the final bill in either the House or Senate. As a result, Senate majority leader Harry Reid (D-NV) needed to craft a proposal that would be acceptable to all sixty Senate Democrats, so that the Democratic majority could invoke cloture and break Republican efforts to derail the bill through a filibuster.<sup>30</sup> On the House side, majority leader Nancy Pelosi (D-CA) needed to secure the votes of 218 out of 258 House Democrats. Facing some resistance from moderates within the party, Pelosi made compromises, including an agreement to allow pro-life Democrats and Republicans to vote on an amendment prohibiting the use of federal funds for abortion services except in cases of rape, incest, and danger to the woman's life.

The fact that Reid and Pelosi made such compromises to hold their base together does not cut against claims made in Part I. While increasing homogeneity within each party is a hallmark of party polarization, party polarization does not foreclose some ideological variation within a party.

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<sup>28</sup> This failure, as Part III details, came at a cost. Constitutionally focused hearings may have strengthened the bill's constitutional foundation. See *infra* notes 69–71 and accompanying text. Moreover, for reasons detailed *infra* text accompanying notes 37–42, this failure was not simply about political expediency. Democratic lawmakers made no effort to use hearings to find facts that would help shore up the Act's factual suppositions; these hearings would not have directly addressed the Act's constitutionality and could probably have been pursued with little political cost. For this very reason, Congress's failure must be partially attributed to lawmaker disinterest in constitutional questions. For additional discussion, see *infra* notes 39, 42.

<sup>29</sup> For two excellent overviews of the legislative process tied to the enactment of the ACA, see *Health Care Overhaul Makes History for Obama, Democratic Congress*, in CQ ALMANAC 2010, at 9–3–9–5 (Jan Austen ed., 2010), available at <http://library.cqpress.com/cqalmanac/document.php?id=cqal10-1278-70363-2371661> (link); *Landmark Health Care Overhaul: A Long, Acrimonious Journey*, in CQ ALMANAC 2009, at 13–3–13–14 (Jan Austin ed., 2009), available at <http://library.cqpress.com/cqalmanac/cqal09-1183-59550-2251513> [hereinafter *Landmark Health Care Overhaul*] (link). All factual claims in this and the next two paragraphs are supported by these two articles.

<sup>30</sup> Indeed, with the election of Republican Scott Brown to fill Edward Kennedy's Senate seat after Kennedy's August 2009 death, Senate Democrats needed to enact the bill before Brown took office so that Democratic holdover appointment Paul Kirk could vote on the bill. As a result, Reid kept the Senate in session for twenty-five consecutive days—with the final vote on the bill occurring on Christmas Eve 2009.

Instead, party polarization speaks to the general conformity of opinion within each party, the growing ideological distance between the two parties, and the likelihood that party members will vote with their leadership and against the other party. No Republican voted in favor of the ACA; in fact, the party launched a nationwide campaign against what they derogatively called “Obamacare.” Democrats, on the other hand, overwhelmingly supported the measure and backed party leaders. Indeed, in the Senate, where all Democrats were needed to resist a Republican filibuster effort, the party voted as a unified block.

The diminished status of congressional committees in the enactment of the ACA also supports the claims in Part I about the linkage between party polarization and the ascendancy of party leaders at the expense of committee chairs. Pelosi deployed three House committees to work on the bill: Energy and Commerce, Education and Labor, and Ways and Means. In the Senate, Reid turned to the Finance Committee and the Health, Education, Labor, and Pensions Committee. Reid and Pelosi then “assembled their bills from the measures reported by their respective committees, selecting from among conflicting provisions and tweaking them again and again to corral voters.”<sup>31</sup> With respect to constitutional issues, it is telling that neither the House nor Senate Judiciary Committees played any formal role. Instead, policy-oriented committees—most notably, committees with jurisdiction over health and finance—pursued the bill.

To make the connections between Part I and the ACA case study more explicit, I will now turn to the hearings, committee reports, and legislative debates that culminated in the enactment of the bill. As I will show, congressional committees paid virtually no attention to constitutional questions in hearings or committee reports. While there were occasional comments about the Constitution in legislative debates, these comments highlight the fact that minority members were not allowed to air constitutional grievances in the committee process. In other words, the ACA case study reinforces points made in Part I and in my *Party Polarization* article; namely, party polarization has contributed to Congress’s declining interest in the Constitution. Republican lawmakers’ unified opposition to the ACA highlights polarization in Congress and

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<sup>31</sup> *Landmark Health Care Overhaul*, *supra* note 29. No doubt, party leaders in less polarized Congresses have also tweaked legislation in order to cobble together a majority. At the same time, the fact that neither Reid nor Pelosi could reach out to Republican members is a hallmark of party polarization. When Congress enacted the 1964 Civil Rights Act, for example, Democratic leadership worked together with Republican leadership, knowing that Southern Democrats stood together to block the legislation. See HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972*, at 132–49 (1990). Likewise (and consistent with claims made in Part I of this Essay), congressional committees were more likely to consider the factual suppositions of legislation when Congress was less polarized, including the question of whether Congress’s commerce power supported the enactment of legislation. See *id.* at 87–95.

explains why majority leadership needed to resist all efforts to derail the bill, including the need to limit opportunities for minority lawmakers to challenge the bill on constitutional grounds.

Twenty-two hearings tied to health care legislation were held in each chamber of Congress between January 20, 2009 and March 25, 2010, though none meaningfully considered the constitutionality of the ACA.<sup>32</sup> On the Senate side, the constitutionality of the statute was raised in only one hearing.<sup>33</sup> In that hearing, held in May 2009 by the Senate Finance Committee, Senator Orrin Hatch (R-UT) asked witness James Klein, President of the American Benefits Council, whether geographic variations in tax rates based on state of residence would be constitutional. Klein said that he did not know, but another witness—Edward Kleinbard, Chief of Staff of the Joint Committee on Taxation—said that he thought Congress could constitutionally permit regional variations in tax rates.<sup>34</sup> Kleinbard's constitutional analysis was not part of a prepared statement and takes up nine sentences in the hearing record.

House hearings tell an identical tale. No witness testimony focused on constitutional questions, and only one witness answered a member question about the constitutionality of the ACA. In a September 2009 hearing before a subcommittee of the House Committee on Oversight and Government Reform, Representative Dennis Kucinich (D-OH) asked Michael Cannon, Director of Health Policy at the Cato Institute, whether the Constitution's General Welfare Clause supported the enactment of the ACA.<sup>35</sup> Cannon's equivocal response takes up just seven sentences in the hearing record.

That Congress did not explicitly consider the ACA's constitutionality is only part of the story. Lawmakers also did not use the hearings as a vehicle to meaningfully engage in fact-finding that would strengthen claims that the ACA regulates economic activity pursuant to Congress's

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<sup>32</sup> My summer 2011 research assistant Brian Kelley prepared a memo listing each of these hearings, including an analysis of Congress's pursuit of constitutional issues in these hearings. His findings are summarized in Memorandum from Brian Kelley, Research Assistant, on Health Care Topic Two: What Congress Did in Enacting the Patient Protection and Affordable Care Act 22–29 (Aug. 4, 2011) (on file with the Northwestern University Law Review).

<sup>33</sup> *Roundtable Discussions on Comprehensive Health Care Reform: Hearings Before the S. Comm. on Fin.*, 111th Cong. (2009) [hereinafter *Roundtable Discussions*] (link). Outside of hearings on health care legislation, the only other reference in Senate hearings to the constitutionality of the ACA was a questionnaire submitted by Senator Tom Coburn (R-OK) to Health and Human Services nominee Kathleen Sebelius on whether Congress had constitutional authority to enact national health care legislation. In her written response, Sebelius expressed support for the bill without addressing the constitutional question. See *Nomination of Governor Kathleen Sebelius: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions*, 111th Cong. 92 (2009) (link).

<sup>34</sup> *Roundtable Discussions*, *supra* note 33, at 137 (testimony of Edward Kleinbard, Chief of Staff, Joint Comm. on Taxation).

<sup>35</sup> *Between You and Your Doctor: The Private Health Insurance Bureaucracy: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight & Gov't Reform*, 111th Cong. 139 (2009) (statement of Michael F. Cannon, Director of Health Policy Studies, Cato Institute) (link).

Commerce Clause power. Lawmakers made no effort to link committee fact-finding to Supreme Court decision-making. Moreover, while the evidence is more ambiguous, there is very little evidence in the hearing record that suggests lawmakers were interested in establishing a factual predicate for the idea of a national health insurance marketplace in which all groups and individuals must participate. Lawmakers, instead, were concerned almost exclusively with the technical provisions of the bill and how those would affect health care going forward.

The fact that lawmakers and their constituents are more interested in economic issues than constitutional issues is hardly surprising. It is nonetheless striking that lawmakers made no effort to use hearings to establish facts—closely linked to the subjects of the hearings—that would help shore up the ACA’s constitutional foundation. After all, with the rise of the Tea Party, majority lawmakers were on notice that there would be a constitutional challenge to the ACA.<sup>36</sup> The failure of congressional committees to use hearings to reinforce the ACA’s factual predicates therefore speaks to committee disinterest in the Constitution; a disinterest that tracks larger congressional trends. These trends, as detailed in Part I, are correlated with party polarization.

In examining congressional fact-finding, my research assistant Sam Mann and I looked at hearings in the 110th Congress (after Democrats took majority control of Congress in 2007 and held thirty hearings related to possible reforms of the health care system), and in the 111th Congress (from January 2009, when Obama took office, to March 2010, when Congress enacted the ACA).<sup>37</sup> As noted above, no hearing explicitly referenced constitutional standards or specifically sought to demonstrate that all individuals—whether or not they purchase health insurance—are part of the national health insurance marketplace.<sup>38</sup> Eleven hearings did, however, address the national marketplace, and we focused our attention there. Of the eleven, seven were held in the 110th Congress and four in the 111th Congress.

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<sup>36</sup> See *infra* notes 4949–51 and accompanying text.

<sup>37</sup> Sixty individual hearings were examined (the transcripts of some hearings were not available on any of the major databases). In other words, while our research is fairly comprehensive, there may be some limitations resulting from data availability. The research is summarized in Memorandum from Sam Mann, Research Assistant, on Fact-Finding on National Marketplace in ACA (Nov. 2011) (revised) (on file with the Northwestern University Law Review). All factual assertions in this paragraph are drawn from this memo.

<sup>38</sup> One witness alluded to the Constitution when discussing the feasibility of a plan that included the individual mandate. Dr. James Mongan, in testimony discussing Massachusetts’s experience with an individual mandate program, said the individual mandate was “tricky” business because “there are some on the right who attack it because they do not even want to mandate motorcycle helmets, let alone premium payments.” *Charting a Course for Health Care Reform: Moving Toward Universal Coverage, Hearing Before the S. Comm. on Fin.*, 110th Cong. 30 (2007) (testimony of James J. Mongan, M.D., President, Partners HealthCare) (link).

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The overall focus of all of these hearings was the need for Congress to reform health care. On the questions surrounding the national marketplace for insurance, there was very little direct fact-finding. Lawmakers were primarily concerned with issues such as Medicare, expanding coverage, achieving the support of insurers, and eliminating waste in the system.<sup>39</sup> In these eleven hearings that touched on the national marketplace, the committee members and witnesses often referred to subjects that may prove relevant to constitutional litigation over the ACA—including expanding participation pools, the notion of voluntary markets, the need for universal care, and the economic benefits that a new nation-wide system could provide.

There is some testimony regarding problems with the existing system of state regulation, such that establishing a national health insurance marketplace would benefit the health care system as a whole.<sup>40</sup> There is also testimony regarding the effect of decisions to opt out of the national market, usually made by the young and healthy, which leave the old and infirm still in the market with higher premiums.<sup>41</sup> However, there is no testimony regarding the connection between mandatory participation and a national market. In other words, there are only bits and pieces in these congressional hearings that address the need for a national health insurance marketplace in which the young and healthy cannot opt out. There is, however, no systematic effort to explore this question or, more generally, to consider whether those who opt out of health insurance nevertheless remain players in the national health care marketplace. These considerations are very much at the core of the current debate over the constitutionality of the ACA. Congress's failure to formally consider them—and, in so doing, shore up the ACA's constitutional foundation—suggests that constitutional

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<sup>39</sup> This is to be expected, given the power of the health insurers lobby and other economic interests impacted by the ACA. At the same time, Congress's failure to consider at all the Act's constitutional underpinnings is striking and highly suggestive of congressional disinterest in the Constitution. In particular, lawmakers could have asked witnesses to testify about the impact of the uninsured on the national health care marketplace. This testimony, for reasons noted in Part III, would have been useful to Department of Justice lawyers defending the statute. See *infra* notes 6969–71. Moreover, there is no reason to think that calling such witnesses would come at a cost to majority lawmakers. Even if minority lawmakers questioned their analyses, these witnesses—so long as their fact-finding was methodologically sound—should have been able to respond to such questioning.

<sup>40</sup> See *America's Need for Health Reform: Hearing Before the Subcomm. on Health of the H. Comm. on Energy and Commerce*, 110th Cong. 34, 49 (2008) (statement of Stephen T. Parente, Director, Medical Industry Leadership Institute) (link).

<sup>41</sup> See *Health Care Reform: Recommendations to Improve Coordination of Federal and State Initiatives: Hearing Before the Subcomm. on Health, Emp't, Labor & Pensions of the H. Comm. on Educ. & Labor*, 110th Cong. 46 (2007) (statement of Steven Goldman, Comm'r, New Jersey Department of Banking and Insurance) (link); *Roundtable Discussions*, *supra* note 33, at 542 (statement of Scott Serota, President & Chief Executive Officer, Blue Cross and Blue Shield Association).

issues did not register with lawmakers and their staff.<sup>42</sup>

Congressional committee reports similarly suggest that lawmakers paid scant attention to the Constitution when enacting the ACA. Not one of the twenty reports issued by the 110th and 111th Congresses formally addresses the constitutionality of the statute.<sup>43</sup> None of the four Senate Reports make any reference to the Constitution. In the House, institutional rules require a “statement citing the specific powers granted to Congress in the Constitution to enact the law proposed by the bill.”<sup>44</sup> Notwithstanding this requirement, eleven of sixteen House Reports make no reference to the Constitution. Of the five that do reference the Constitution, none does more than merely cite the House Rule and reference constitutional provisions that support enactment without substantive discussion.<sup>45</sup>

Furthermore, committee reports show very little congressional fact-finding overall, and they show no effort to link fact-finding to constitutional standards.<sup>46</sup> Of the seven reports issued by the 111th Congress, most mention economic research on the need for health care reform. One of the seven discusses the linkage between the costs of the uninsured and the national marketplace. That report, by the Senate Finance Committee, cites “countless studies” about the economic ramifications of the uninsured—that 23% of uninsured adults forego necessary care every year because of cost, and that the cost for those that do seek care is shifted to the insured.<sup>47</sup>

What is striking here is that the ACA is the signature bill of the 111th Congress—a bill that Democrats pushed once taking over Congress in 2007, a bill that builds upon the failed efforts of the Clinton administration to transform health care in the 1990s, and a bill that “Congressional Democrats and President Obama stake[d] their political fortunes on the

<sup>42</sup> Moreover, there is no reason to think this failure was at all calculated as an effort to steer clear of a politically volatile issue. For reasons noted *supra* note 39, majority lawmakers could have pursued this question with little or no political risk.

<sup>43</sup> Committee reports were identified through two separate searches, a Lexis-Nexis Search and a Lexis/ProQuest Congressional search. Some reports were listed in one search but not the other, and the analysis in this paragraph considers all potentially relevant reports, even if one or the other search did not list a particular report. In other words, if anything, I overstate congressional committee references to the Constitution. For additional discussion from which this paragraph is drawn, see Kelley, *supra* note 32; E-mail from Frederick W. Dingley, Reference Librarian, to author (Dec. 12, 2011) (on file with the Northwestern University Law Review).

<sup>44</sup> CONSTITUTION, JEFFERSON’S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED ELEVENTH CONGRESS, H.R. DOC. NO. 110-162, at 626 (2009) (House Rule XIII 3(d)(1)) (link).

<sup>45</sup> All five reference the Commerce Clause, three reference the Necessary and Proper Clause, and two reference Congress’s taxing power under the Sixteenth Amendment.

<sup>46</sup> Information in this paragraph is drawn from Mann, *supra* note 37.

<sup>47</sup> S. REP. NO. 111-89, at 2 (2009) (link). In the same report, the Senate Finance Committee references the “hidden health tax,” where health premiums are increased in order to mitigate the “estimated \$56 billion annually in uncompensated care to people without health insurance.” *Id.*

outcome.<sup>748</sup> It is not as if Congress rushed the bill through in the dark of night. On the contrary, lawmakers held more than seventy hearings over the course of the 110th and 111th Congresses, and issued twenty committee reports during this time. Moreover, congressional Democrats were well aware that the bill would be subject to a fierce constitutional attack both in the courts and on the campaign trail, where Republicans (buoyed by Tea Party opposition to the ACA) would trash the bill as unconstitutional governmental overreaching.<sup>49</sup> From July to September 2009, opinion pieces in the *Washington Post* and *Wall Street Journal*, and an online debate in *Politico* all flagged potential constitutional problems with the ACA.<sup>50</sup> Over the next several months, questions about the constitutionality of the ACA did anything but abate. Pieces focusing on the very same constitutional issues now before the Supreme Court appeared in many places, including law blogs, mainstream newspapers, and interest group reports.

Against this backdrop, the failure of congressional committees to either consider the bill's constitutionality or to formally engage in fact-finding designed to shore up the bill's constitutional foundation is stunning. At the same time, this failure is not surprising. The ACA exemplifies the ways that party polarization undermines congressional interest in the Constitution. The confluence of growing committee disinterest in the Constitution and the political necessity of holding the majority coalition together proved to be a perfect storm of the costs and consequences of party polarization.

Congressional debates over the ACA reinforce this conclusion. With no opportunity to use the committee process to attack the ACA's constitutional foundation, minority lawmakers turned to the floor of Congress to air their grievances. At the same time, declining lawmaker interest in the Constitution meant that policy—not constitutional—concerns

<sup>48</sup> *Landmark Health Care Overhaul*, *supra* note 29.

<sup>49</sup> For a discussion of Tea Party opposition to the bill, see John Fritze et al., *The Health Care Bill's 8 Key Moments*, USA TODAY, Mar. 25, 2010, [http://www.usatoday.com/news/washington/2010-03-25-health-care-moments\\_N.htm](http://www.usatoday.com/news/washington/2010-03-25-health-care-moments_N.htm) (link). For a discussion of Tea Party efforts to link their opposition to the ACA and other governmental programs with their vision of constitutional federalism, see Ilya Somin, *The Tea Party Movement and Popular Constitutionalism*, 105 NW. U. L. REV. COLLOQUY 300 (2011) (link), Zietlow, *supra* note 4, at 1367–68, 1395–97; Jill Lepore, *The Commandments: The Constitution and Its Worshipers*, NEW YORKER, Jan. 17, 2011, [http://www.newyorker.com/arts/critics/atlarge/2011/01/17/110117crat\\_atlarge\\_lepore](http://www.newyorker.com/arts/critics/atlarge/2011/01/17/110117crat_atlarge_lepore) (link); Adam J. White, *The Tea Party's Constitution*, WEEKLY STANDARD, Aug. 29, 2011, [http://www.weeklystandard.com/articles/tea-party-s-constitution\\_590449.html](http://www.weeklystandard.com/articles/tea-party-s-constitution_590449.html) (link).

<sup>50</sup> See JENNIFER STAMAN & CYNTHIA BROUGH, CONG. RESEARCH SERV., *REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS* (2009) [hereinafter CRS REPORT] (link); Andrew P. Napolitano, *Health-Care Reform and the Constitution*, WALL ST. J., Sept. 15, 2009, <http://online.wsj.com/article/SB10001424052970203917304574412793406386548.html> (link); David B. Rivkin, Jr. & Lee A. Casey, *Illegal Health Reform*, WASH. POST, Aug. 22, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/21/AR2009082103033.html?sub=AR> (link); *Healthcare: Is "Mandatory Insurance" Unconstitutional?*, POLITICO (Sept. 18, 2009), <http://www.politico.com/arena/archive/healthcare-reform-constitutionality.html> (link).

were the overwhelming focus of ACA legislative debates. Furthermore, to the extent that minority lawmakers invoke the Constitution, they do so to derail legislative initiatives that they oppose on policy grounds. These very same lawmakers conveniently ignore the Constitution when their party is in the majority.<sup>51</sup>

These debates over health care legislation spanned twenty-five days and totaled 790 pages.<sup>52</sup> Twenty-five entries explicitly discussed the constitutionality of the statute.<sup>53</sup> Sixteen of these entries take up substantially less than one page in the *Congressional Record*. Of the nine entries that take up more than one page, seven contain articles that were submitted to the *Congressional Record*. None of the twenty-five entries discussed congressional fact-finding. Separate searches for the terms “marketplace,” “unavoidable,” and “voluntary” only turned up a handful of lawmaker comments regarding the idea of a national marketplace for health insurance.<sup>54</sup>

Even though lawmakers spent virtually no time examining constitutional issues when debating health care legislation, it is nevertheless true that Republican lawmakers—largely shut out in the committee process—aired their constitutional grievances on the floor of Congress. Six House Republicans and four Senate Republicans questioned the bill’s constitutionality in floor debates.<sup>55</sup> The fact that so few Republican lawmakers spoke to the bill’s constitutionality (as compared to the very large number who spoke out against the bill in floor debates)<sup>56</sup> again highlights the currently polarized Congress’s disinterest in constitutional issues.

The Supreme Court should not find the ACA unconstitutional simply because Congress failed to hold constitutional hearings, formally engage in constitutional fact-finding, or meaningfully debate the constitutionality of the bill. The Constitution, as noted, does not impose “due process in

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<sup>51</sup> See Devins, *supra* note 2, at 746–47 (noting a decline in constitutional hearings irrespective of which party is in the majority); *id.* at 766–67 (noting that, in today’s polarized Congress, constitutional objections to the majority party’s legislative initiatives are made by minority party lawmakers).

<sup>52</sup> Information in this paragraph is drawn from Kelley, *supra* note 32; Mann, *supra* note 37.

<sup>53</sup> Entries refer to headings in the *Congressional Record*. Most entries feature comments by only one member but some entries feature statements by several members.

<sup>54</sup> See Mann, *supra* note 37. In defending the statute, the Department of Justice referenced these lawmaker comments as well as other available evidence from both the legislative record and from academic studies. See *infra* text accompanying note 71.

<sup>55</sup> See 156 CONG. REC. H177–83 (daily ed. Jan. 19, 2010) (statements of Reps. Garrett, Foxx, Broun, Gohmert, and Bishop) (link); 155 CONG. REC. S13,821–29 (daily ed. Dec. 23, 2009) (statements of Sens. Hutchison, Ensign, Hatch, and Kyl) (link); 155 CONG. REC. H12,429 (daily ed. Nov. 5, 2009) (statement of Rep. Poe) (link).

<sup>56</sup> As noted earlier, legislative debates of the ACA took up 790 pages in the *Congressional Record*, nearly all of which focused on policy—not constitutional—issues.



lawmaking” obligations on Congress.<sup>57</sup> Indeed, legislative action leading up to the ACA—as well as findings in the ACA itself—highlight the impossibility of imposing due process demands on Congress. The legislative record, including witness statements and lawmaker comments, includes a handful of references to the national health care marketplace,<sup>58</sup> some of which suggest that the uninsured impact this marketplace. More than that, the bill enacted by Congress includes eight specific findings to support claims that the ACA’s individual mandate is “commercial and economic” and “substantially affects interstate commerce.”<sup>59</sup>

At the same time, for reasons I will detail in Part III, Congress could have improved the likelihood of a favorable decision by the Court if it had paid more attention to potential constitutional objections to the ACA. Instead, this ACA case study highlights both growing party polarization in Congress and one consequence of such polarization—the decline of lawmaker interest in the Constitution.

### III. WHY LAWMAKERS BECAME MORE INTERESTED IN THE CONSTITUTIONALITY OF THE ACA AFTER THE NOVEMBER 2010 ELECTIONS

The House and Senate Judiciary Committees held constitutional hearings on the ACA in February 2011,<sup>60</sup> about a year after enactment of the bill. Indeed, Congress showed greater interest in the constitutionality of the ACA when the 112th Congress was seated (around January 2011) than at any time leading up to its enactment.<sup>61</sup> This apparent upswing in

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<sup>57</sup> See *supra* note 5 and accompanying text.

<sup>58</sup> E.g., *Covering the Uninsured: Making Health Insurance Markets Work: Hearing Before the S. Comm. on Finance*, 110th Cong. 30 (2008) (testimony of Kim Holland, Oklahoma Insurance Comm’r) (link).

<sup>59</sup> See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (to be codified at 42 U.S.C. § 18091) (link). In its briefs defending the ACA, the Department of Justice points to these legislative findings—as well as roughly eighteen references to the national health marketplace in hearings, debates, and reports during the 110th and 111th Congresses—to assert that “the legislative record leaves no doubt that [the ACA’s individual mandate] . . . is a valid exercise of the commerce power.” See Brief for Appellants, *supra* note 3, at 25. Department of Justice lawyers deserve great credit for culling the legislative record to make as convincing a case for the ACA as possible. At the same time, the government’s brief (which intersperses academic studies along with legislative record material) is ultimately a “legislative collage” as opposed to legislative history. Its collection of legislative findings, debate statements, committee hearings, legislative memos, and academic studies makes the best case possible for the ACA but does not, for reasons detailed in this section, counter the overwhelming evidence that lawmakers were not meaningfully engaged in constitutional analysis or constitutional fact-finding.

<sup>60</sup> *Constitutionality of the Individual Mandate: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. (2011) (link); *The Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011).

<sup>61</sup> In addition to the two hearings explicitly about the constitutionality of the ACA, there were mentions of the ACA’s constitutionality in twenty other hearings from March 26, 2010 to December 31,

congressional interest, however, underscores the adverse consequences of both party polarization and the related decline in lawmaker interest in constitutional questions. More to the point, if lawmakers had shown this level of interest in constitutional questions before enacting the ACA, the bill would have a better chance of winning Supreme Court approval.

Lawmaker interest in the constitutionality of the ACA was initially spurred by both the 2011 Republican takeover of the House of Representatives and by two federal district court rulings (in December 2010 and January 2011) that the ACA overstepped Congress's power to regulate interstate commerce.<sup>62</sup> In part, Republican leadership in the House had incentive to use constitutional hearings as a mechanism to reinforce claims that theirs is the party of limited government, thereby criticizing the purported overreaching of the White House and congressional Democrats. During the 2010 election cycle, House Republican leadership embraced Tea Party calls for limited government by explicitly questioning the ACA's constitutionality and embracing a proposal requiring every bill to include language citing its constitutional authority. House Majority Leader John Boehner (R-OH) specifically attacked the "constitutionally suspect 'individual mandate'" and, relatedly, argued that a requirement that all bills cite specific constitutional authority could create a valuable "obstacle to expanded government."<sup>63</sup> Following the 2010 elections, House Republican leadership likewise made clear that it intended to continue its campaign to dismantle health care reform.

Constitutional hearings in the still-Democratic Senate, of course, cannot be explained by a partisan desire to call into question the legality of the ACA. These hearings, instead, reflect the personal interest of Judiciary Committee members in legal policy questions and the fact that two federal courts had invalidated the ACA. Also, and perhaps most importantly, the

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2011. This number was based on a search of the LEXIS CQ Transcription database and Federal News Service database. See Email from Frederick W. Dingley, *supra* note 43. During this same period, a search of the *Congressional Record* resulted in 220 hits. The search was: "(affordable care act and (constitution! Or unconstitution!) and section (house or senate and not digest)." For additional discussion of the specific questions asked in hearings and statements made on the floor of Congress, see Memorandum from Brian Kelley, Research Assistant, on Health Care Topic Three: What Congress did Post-Enactment (Aug. 18, 2011) (on file with the Northwestern University Law Review). Finally, Democratic leadership (in both the House and Senate, including leaders of committees of relevant jurisdiction) and more than one hundred Republicans joined one or more of several amicus briefs on the constitutionality of the ACA before the federal courts of appeal. See *id.*

<sup>62</sup> Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256 (N.D. Fla. 2011), *aff'd in part and rev'd in part sub nom.* Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011) (link); Virginia ex rel. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (2010), *vacated* 636 F.3d 253 (4th Cir. 2011).

<sup>63</sup> See *House Republicans Want All Bills to Cite Constitutional Authority*, FOX NEWS, Sept. 17, 2010, <http://www.foxnews.com/politics/2010/09/17/house-republicans-want-bill-cite-constitutional-authority/> (link). The rise of the Tea Party as a politically powerful Republican constituency propelled these constitutional arguments and initiatives. See Zietlow, *supra* note 4, at 1395–1401.

fact that the ACA was law made these hearings largely a post-enactment sideshow. In particular, although party polarization has resulted in a decline in constitutional hearings, lawmakers also schedule constitutional hearings in response to exogenous factors—most notably, changes in party leadership and court decisions.<sup>64</sup> This is especially true for the Judiciary Committees, as these committees are dominated by policy-oriented lawyers personally interested in constitutional questions.<sup>65</sup> Before the enactment of the ACA, for reasons spelled out Part II, Democratic leadership had no interest in constitutional hearings that might cut into the fragile majority coalition. After enactment of the ACA, however, there was little reason for Senate Democratic leadership to shut the Judiciary Committee out. Fears of derailing the bill gave way to the Senate Judiciary Committee's desire to pursue high-visibility constitutional hearings. With lawmakers increasingly leaving it to courts to settle constitutional disputes,<sup>66</sup> it is not surprising that party leaders would correspondingly acquiesce to Judiciary Committee hearings at a time when the ACA was before the courts and not the Congress.

Party polarization figures prominently in this story. In particular, polarization contributes to both declining legislative interest in constitutional questions and increasing lawmaker acceptance of judicial supremacy—both of which would cut against hearings before but not after enactment of the ACA.<sup>67</sup> Polarization also contributes to minority party efforts to cast constitutional doubts on majority party initiatives (so that the majority would resist constitutional hearings unless the issue—voting rights, for example—clearly implicated the Constitution and, with it, the Judiciary Committees). It was therefore expected that a change in party control of the House and two federal court rulings that the ACA was unconstitutional would spur the House and Senate Judiciary Committees to hold hearings about its constitutionality.<sup>68</sup>

Expected, yes, but also unfortunate. At the risk of understatement, Congress would be better served thinking about the constitutionality of its handiwork pre-enactment, not post-enactment. Not only will enacted legislation have a stronger constitutional foundation if lawmakers consider possible constitutional objections, lawmakers also send important signals to the Court when they seriously consider a bill's constitutionality before enactment. They signal, for example, that courts should adhere to the

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<sup>64</sup> See Devins, *supra* note 2, at 770–75. These exogenous factors, as discussed in *Party Polarization*, do not explain the general decline in constitutional hearings. Instead, they call attention to both reasons why hearings are held and why, on occasion, the number of hearings spike-up in some years. See *id.* at 768–75; see also *supra* notes 17, 21.

<sup>65</sup> See Devins, *supra* note 2, at 778–79.

<sup>66</sup> See *id.* at 763–64.

<sup>67</sup> See *supra* notes 21–24.

<sup>68</sup> The general rise in lawmaker interest in the constitutionality of the ACA, discussed *supra* note 61 is also tied to these factors.

presumption of constitutionality.<sup>69</sup> They also signal a greater commitment to their bills and a greater willingness to resist perceived judicial encroachments on their authority. In my forthcoming essay in the print version of the *Northwestern University Law Review*, I will elaborate on these claims of congressional signaling. For the remainder of this Essay, however, I will explain why the ACA would have been a stronger bill if Congress had paid more attention to its constitutional underpinnings.

To start, even though the ACA is likely constitutional under existing Supreme Court standards,<sup>70</sup> government lawyers nonetheless would have an easier time defending the statute if Congress purposefully engaged in constitutional analysis, including constitutional fact-finding. For example, if lawmakers had held hearings to document that the uninsured are inevitably part of the national health insurance marketplace, and then wrote a committee report that referenced those hearings, then government lawyers would have had a much richer legislative record from which to build their case. Instead, government lawyers defending the ACA made use of a collage of academic studies and brief references to the legislative record (including floor statements in the absence of formal reports and insightful committee hearings).<sup>71</sup>

Furthermore, although Congress made several important findings to support claims that the bill is “economic” and “substantially affects” interstate commerce, lawmakers could have made additional findings to strengthen its constitutional foundation. There are no specific findings on the costs that the uninsured impose on the national health care marketplace.<sup>72</sup> Likewise, apart from the question of whether the individual mandate is economic in nature, there are no findings that the ACA requirement that individuals purchase health insurance is “necessary and proper” to a well-functioning national health insurance system.<sup>73</sup>

<sup>69</sup> Consider, for example, Justice Scalia’s attack on the presumption of constitutionality in the face of (what Justice Scalia thought was) shoddy legislative drafting. For Justice Scalia, “if Congress is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the Constitution,” then “perhaps th[e] presumption [that acts of Congress are constitutional] is unwarranted.” Stuart Taylor, Jr., *The Tipping Point*, 32 NAT’L J. 1810, 1811 (2000), available at <http://nationaljournal.com/magazine/judiciary-the-tipping-point-20000610> (link).

<sup>70</sup> See *supra* notes 5–6 and accompanying text.

<sup>71</sup> For a discussion of the Department of Justice’s arguments, see *supra* note 59.

<sup>72</sup> The ACA does include findings that the individual mandate will “broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums” and, in so doing, create “effective health insurance markets.” Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (to be codified at 42 U.S.C. § 18091(2)(G)) (link). On the question of whether Congress could have made additional findings, including the estimated costs of “lost productivity due to the diminished health and shorter life span of the uninsured” and the potential relevance of such findings to Supreme Court decision-making, see CRS REPORT, *supra* note 50, at 8.

<sup>73</sup> This type of finding would correspond to Justice Scalia’s invocation of the Necessary and Proper Clause in a 2005 ruling upholding a federal ban on medical marijuana in *Gonzales v. Raich*, 545 U.S. 1,

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Congress's seeming indifference to the bill's constitutionality is underscored by the fact that the bill makes no reference to the Commerce Clause, the Necessary and Proper Clause, or Congress's taxing power. Lawmakers never examined these three sources of congressional power in congressional hearings—though they did make their way into some House committee reports.<sup>74</sup> And while Congress was under no obligation to formally cite these powers (since congressional findings, lawmaker statements, and congressional reports make clear that Congress was relying on these sources of authority),<sup>75</sup> Congress should have made explicit mention of them. It cannot help the bill's chances when its defenders—academic amici and the Department of Justice—must invest substantial effort in explaining why, for example, “the Taxation Clause does not require Congress to use any particular labels or expressly invoke the taxation power.”<sup>76</sup>

Congress's failure to engage constitutional issues when enacting the ACA is a troubling consequence of party polarization. Majority leaders in Congress worked hard to keep their coalition together. They could not risk committee hearings that called into question the bill's constitutional underpinnings. The fact that these hearings might have reinforced the bill's constitutional foundation did not matter.<sup>77</sup> More generally, for reasons detailed in Part I of this Essay, party polarization depresses congressional committee interest in the Constitution. The ACA debates exemplify this phenomenon.

In this respect, lawmakers are getting what they asked for. The Supreme Court will soon settle the constitutionality of the ACA. For their

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36 (2005) (Scalia, J., concurring) (link). For a discussion of the link between Justice Scalia's *Raich* concurrence and the ACA, see CRS REPORT, *supra* note 50, at 8 & n.41.

<sup>74</sup> See *supra* note 43 and accompanying text (noting that Senate Reports made no references to sources of constitutional authority and that some—but not all—House Reports referenced sources of congressional power).

<sup>75</sup> See, e.g., Brief for Appellants, *supra* note 3, at 25–32, 53; Brief of Constitutional Law Professors as Amici Curiae in Support of Defendant-Appellant at 16–21, *U.S. Dep't of Health & Human Servs. v. Florida*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted* 132 S.Ct. 604 (2011) (Nos. 11-11021 & 11-11067), 2011 WL 1461597.

<sup>76</sup> *Id.* at 16.

<sup>77</sup> I have suggested some ways that Congress could have improved the ACA's chances through additional fact-finding or the explicit invocation of the constitutional sources of congressional power. Hearings, moreover, might have called attention to other ways that Congress could have enacted a bill more resilient to constitutional attack, including, for example, the use of tax incentives instead of penalties, the use of the Spending Power, and the use of its taxing power to levy a tax and use the revenues to provide health insurance to the uninsured. Some of these options were mentioned in the CRS REPORT, *supra* note 50, at 2–3. Of course, these options may well have been politically untenable (even if they were clearly constitutional). See Adam Liptak, *Some Common Ground for Legal Adversaries on Health Care*, N.Y. TIMES, Sept. 30, 2011, <http://www.nytimes.com/2011/09/30/us/health-care-adversaries-have-common-ground.html> (noting that both sides of the litigation agree that Congress could constitutionally impose a tax and disperse revenues to provide nation-wide health insurance) (link).

part, lawmakers have filed numerous amicus briefs regarding the Act's constitutionality. And while such jawboning is understandable, lawmakers may have influenced the Court more profoundly by paying attention to the Act's constitutionality ex-ante rather than ex-post. The fact that majority party lawmakers thought the risks too great to pursue such a strategy is a sad and fitting end to an Essay about the costs of party polarization on congressional constitutional deliberation.