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No Small Feat: Who Won the Health Care Case (and Why Did So Many Law Professors Miss the Boat)?

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DUNWODY DISTINGUISHED LECTURE IN LAW

NO SMALL FEAT: WHO WON THE HEALTH CARE CASE (AND WHY DID SO MANY LAW PROFESSORS MISS THE BOAT)?

*Randy E. Barnett** †

Abstract

In this Essay, prepared as the basis for the 2013 Dunwody Distinguished Lecture in Law at the University of Florida Levin College of Law, I describe five aspects of the United States Supreme Court's decision in *National Federation of Independent Business v. Sebelius* that are sometimes overlooked or misunderstood: (1) the Court held that imposing economic mandates on the people was unconstitutional under the Commerce and Necessary and Proper Clauses; (2) Chief Justice John Roberts's reasoning was the holding in the case, whether viewed from a formalist or a realist perspective; (3) the Court did not uphold the constitutionality of the individual insurance mandate under the tax power; (4) the newfound power to tax inactivity is far less dangerous than the commerce power advocated for by the Government and most law professors; and (5) the doctrine established by *NFIB* matters (to the extent that constitutional law doctrine ever matters). Finally, I turn my attention to the question of why so many law professors got this case so wrong. After providing a lengthy compendium of law professors' published opinions about the case, I suggest that most missed the boat because they have failed to appreciate the constitutional gestalt that informed the Rehnquist Court's New Federalism and carried over to a majority of the Roberts Court.

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INTRODUCTION

The legal challenge to the Patient Protection and Affordable Care Act¹ (ACA)—commonly known as Obamacare²—which I advocated as a law professor³ before representing the National Federation of Independent Business (NFIB) as one of its lawyers, was about two big things: saving the country from Obamacare and saving the Constitution for the country. To my great disappointment, we lost the first point in the Supreme Court’s 5–4 ruling to uphold the healthcare law. But to my enormous relief, we won the second.

Before the decision, I figured it was all or nothing. If we lost on Obamacare, it would mean the Government’s (and law professors’) reading of the Commerce and Necessary and Proper Clauses would prevail. If we won, it would be because the Court affirmed our theories of the Commerce and Necessary and Proper Clauses. But, as it happened, although we did not succeed in invalidating the ACA, five Justices affirmed our view of the Commerce and Necessary and Proper Clauses. And the reasons advanced by the Government, by most law professors, and by the four liberal Justices in Justice Ruth Bader Ginsburg’s concurring opinion for upholding the ACA were rejected.

So the question, “Who won the case?” is actually a complicated one to answer, as it depends on what might have been decided as distinct from what actually was decided. It depends on what you think the constitutional law baseline was before the decision. And it depends on how much you think constitutional law doctrine matters. In this Essay, I examine these issues. I then turn to the issue of why so many law professors so misjudged the legal reasoning that a majority of the Supreme Court adopted in this case.

1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119 (2010).

2. See, e.g., ORGANIZING FOR ACTION, I LIKE OBAMACARE, <http://www.barackobama.com/i-like-obamacare> (last visited Mar. 27, 2013).

3. See, e.g., Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581 (2010).

I. ECONOMIC MANDATES ARE UNCONSTITUTIONAL

This battle for the Constitution was forced upon defenders of limited government by Congress in 2010, when the Democrats in Congress insisted in the healthcare bill that it was constitutional to require all Americans to purchase insurance or pay a fine as a regulation of interstate commerce. This claim of power was literally and legally unprecedented.⁴ In the findings of the ACA, lawmakers argued that this mandate was justified by the Constitution's Commerce and Necessary and Proper Clauses.⁵ Had we not contested this power grab, Congress's regulatory powers would have been rendered limitless. They are not.

On that point, we prevailed completely. Indeed, the case has put us ahead of where we were before the ACA. Five Justices of the Supreme Court have now definitively ruled that the Commerce Clause, Necessary and Proper Clause, and spending power have limits; that the mandate to purchase private health insurance, as well as the threat to withhold Medicaid funding unless states agree to expand their coverage, exceeded these limits; and that the Court will enforce these limits. This was huge.

On the Commerce Clause, Chief Justice John G. Roberts Jr. and four dissenting Justices accepted all of our side's arguments about why the insurance mandate exceeded Congress's power. "The individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause," Chief Justice Roberts wrote.⁶ "That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it."⁷

Chief Justice Roberts adopted this view for the precise reason we advanced: granting Congress this power would gravely limit the liberties of the people. As he put it: "Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and—under the Government's theory—empower Congress to make those decisions for him."⁸

Regarding the Necessary and Proper Clause, supporters of the healthcare overhaul had invoked the power of Congress "[t]o make all

4. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, No. 11-393, slip op. at 18 (U.S. June 28, 2012) [hereinafter *NFIB*] (opinion of Roberts, C.J.) ("Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product.").

5. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501(a)(1), 124 Stat. 119 (2010) ("The individual responsibility requirement provided for in this section . . . is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2).").

6. *NFIB*, *supra* note 4, at 58 (opinion of Roberts, C.J.).

7. *Id.*

8. *Id.* at 21.

Laws which shall be necessary and proper for carrying into Execution the foregoing Powers,”⁹ seeing it as a constitutional carte blanche to adopt any means to facilitate the regulation of insurance companies that did not violate an express constitutional prohibition. Chief Justice Roberts squarely rejected this argument: “Even if the individual mandate is ‘necessary’ to the Act’s insurance reforms, such an expansion of federal power is not a ‘proper’ means for making those reforms effective.”¹⁰ Significantly, he did not rest this finding of impropriety on any express prohibition in the Constitution, but on the threat of this invocation of power to undermine the enumerated powers scheme that is the federalist “spirit of the Constitution”:

[W]e have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution. Such laws, which are not “consist[ent] with the letter and spirit of the constitution,” *McCulloch*, . . . are not “*proper* [means] for carrying into Execution” Congress’s enumerated powers. Rather, they are, “in the words of *The Federalist*, ‘merely acts of usurpation’ which ‘deserve to be treated as such.’” *Printz v. United States* . . . (alterations omitted) (quoting *The Federalist* No. 33, at 204 (A. Hamilton)).¹¹

From this, the Chief Justice concluded: “Applying these principles, the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms.”¹²

Tellingly, the Chief Justice soundly rejected the reasoning that, for two years, had been offered by the Government and academic defenders of the insurance mandate:

Indeed, the Government’s logic would justify a mandatory purchase to solve almost any problem. . . . To consider a different example in the health care market, many Americans do not eat a balanced diet. That group makes up a larger percentage of the total population than those without health insurance. . . . The failure of that group to have a healthy diet increases health care costs, to a greater extent than the failure of the uninsured to purchase insurance. . . . Those increased costs are borne in part by other Americans who must pay more, just as the uninsured shift costs to the insured. . . . Congress addressed the

9. U.S. CONST. art. I, § 8, cl. 18.

10. *NFIB*, *supra* note 4, at 30 (opinion of Roberts, C.J.).

11. *Id.* at 28–29.

12. *Id.* at 29.

insurance problem by ordering everyone to buy insurance. Under the Government's theory, Congress could address the diet problem by ordering everyone to buy vegetables.¹³

He then continued:

People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.

That is not the country the Framers of our Constitution envisioned. . . . Congress already enjoys vast power to regulate much of what we do. Accepting the Government's theory would give Congress the same license to regulate what we do not do, *fundamentally changing the relation between the citizen and the Federal Government*.¹⁴

For these reasons, the Court held that economic mandates are unconstitutional under both the Commerce and Necessary and Proper Clauses.¹⁵

As for the spending power, while the Court has previously invalidated statutes that exceeded the Commerce Clause, not since the New Deal had it rejected a law for exceeding the spending power of Congress—until *NFIB v. Sebelius*. The Court invalidated the part of the ACA that empowered the Department of Health and Human Services to coerce the states by withholding Medicaid funding for existing programs unless the states accepted new coverage requirements.¹⁶

All of this represents a fundamental departure from how most law professors viewed constitutional law before this decision.¹⁷ Under the holding of *NFIB*, economic mandates are unconstitutional.¹⁸

13. *Id.* at 22–23 (citations omitted).

14. *Id.* at 23–24 (emphasis added); accord Barnett, *supra* note 3, at 583 (“A newfound congressional power to impose economic mandates to facilitate the regulation of interstate commerce would *fundamentally alter the relationship of citizen and state* by unconstitutionally commandeering the people.”) (emphasis added).

15. See *NFIB*, *supra* note 4, at 30, 32, 58 (opinion of Roberts, C.J.).

16. See *id.* at 56 (“[W]e determine . . . that § 1396c is unconstitutional when applied to withdraw existing Medicaid funds from States that decline to comply with the expansion.”).

17. See *infra* Part VI.

18. See *NFIB*, *supra* note 4, at 56, 58.

II. THE REASONING OF CHIEF JUSTICE ROBERTS'S OPINION IS THE HOLDING OF THE CASE

Chief Justice Roberts's ruling that economic mandates are unconstitutional based on his analysis of the scope of the Commerce and Necessary and Proper Clauses was the holding of the Court. In Part IIIC of his opinion, which was joined without dissent by the four liberal Justices, the Chief Justice writes: "The Court today *holds* that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity."¹⁹ Why the liberals concurred that this was the holding of the case is a matter of speculation, but vote for it they did.

Contrary to the assertion that Chief Justice Roberts did not need to reach the Commerce Clause issue, on his reasoning—which he alone controls—he clearly did. The Chief Justice not only held that the penalty could be justified as a tax; he also held that the penalty could be justified only under a "saving construction"²⁰ that eliminated the legal requirement to buy health insurance and replaced it with an option to buy insurance or pay the tax:

While the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful. Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. The Government agrees with that reading, confirming that if someone chooses to pay rather than obtain health insurance, they have fully complied with the law.²¹

One does not identify the holding of a case by substituting an alternative, narrower reasoning that the Court *might* have adopted but did not, but rather, by evaluating the reasoning that *was* adopted—in this case, by the deciding fifth vote in the case.

The fifth vote to uphold the rest of the ACA rested upon this rationale every bit as much as Justice Lewis Powell's fifth vote in *Bakke* rested on "diversity."²² As Chief Justice Roberts himself wrote, "[w]ithout deciding the Commerce Clause question, I would find no basis to adopt such a saving construction [of the penalty]."²³ The fact that the four dissenting conservative justices failed to formally join

19. *Id.* at 41–42 (emphasis added).

20. *Id.* at 44.

21. *Id.* at 37.

22. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) ("[T]he interest of diversity is compelling in the context of a university's admissions program . . .").

23. *NFIB*, *supra* note 4, at 44 (opinion of Roberts, C.J.).

Chief Justice Roberts's opinion (or even mention it) does not entail that his reasoning is mere dictum. If it did, then his ruling that conditioning all Medicaid funding on the states accepting the ACA's expansion of the program was unconstitutional would also be dictum.²⁴ After all, it was formally joined by just two other Justices, rather than by a majority, yet no one denies its legal effect.

But in addition to the "formalist" justifications for this being the holding, we have the "realist" fact that five Justices embraced the entirety of our Commerce Clause and Necessary and Proper Clause arguments. Critics can dismiss this as emanating from the leaderless Tea Party all they like.²⁵ But it is now embraced by "the rule of five." And even if the Tea Party played a role, we have long been told that this is how the "living Constitution"—by which is meant the Supreme Court's doctrine—evolves in response to social movements. So, unless it is "living constitutionalism for me, but not for thee" (if, that is, the outcome of this case was indeed impelled by popular constitutionalism), this would make it more rather than less legitimate on living constitutionalist grounds.

III. THE COURT DID NOT UPHOLD THE INDIVIDUAL MANDATE UNDER THE TAX POWER

So, if we prevailed on all of our arguments about economic mandates, how could the ACA be upheld? Some have claimed that the Chief Justice upheld the power to impose economic mandates under the tax power, and thus rendered the Commerce Clause and Necessary and Proper Clause parts of his analysis superfluous and without practical effect. As Justice Alito once responded, however, this is "not true."

Chief Justice Roberts, I noted above, upheld the ACA by rewriting the law's "individual responsibility requirement" so that it was no longer a *mandate* but merely an *option*: get insurance or pay a mild "tax" penalty. Contrary to the statute, he ruled that anyone who did not have to pay the penalty would have no legal duty to get insurance: "The Federal Government does not have the power to order people to buy health insurance. Section 5000A would therefore be unconstitutional if read as a command."²⁶ Moreover, he wrote, "the statute reads more

24. See *id.* at 56 ("[W]e determine . . . that § 1396c is unconstitutional when applied to withdraw existing Medicaid funds from States that decline to comply with the expansion.").

25. See, e.g., Charles Fried, *The June Surprises: Balls, Strikes, and the Fog of War*, SCOTUSBLOG (Aug. 2, 2012, 12:19 PM), <http://www.scotusblog.com/2012/08/the-june-surprises-balls-strikes-and-the-fog-of-war> (making five disparaging connections between the conservative justices and the Tea Party); *id.* ("Justice Kennedy's question in oral argument, faintly echoed in the Chief's opinion, should be dismissed as empty Tea Party rhetoric.").

26. *NFIB*, *supra* note 4, at 44 (opinion of Roberts, C.J.).

naturally as a command to buy insurance than as a tax”²⁷

Therefore, it is *because he does away with the mandate* by means of a “saving construction” that Chief Justice Roberts finds the “penalty” to be constitutional as a tax. Apparently, this is a difficult legal distinction to grasp, but one that matters nonetheless. In the ACA, the mandate was called an “individual responsibility requirement.”²⁸ To “save” the rest of the ACA, the Chief Justice essentially deleted the “requirement” part. So the mandate *qua* mandate is gone. What is left is a tax. What is the difference?

- Under the ACA as enacted, all Americans (who were not exempted) had to buy health insurance. Under the Supreme Court’s ruling, no American has to buy health insurance, though some Americans will pay a tax if they do not.
- Under the ACA, millions of Americans who did not have to pay the penalty because they did not pay any or enough income taxes were still required by law to get insurance or be a lawbreaker.²⁹ Under the Supreme Court’s revision, they do not.
- Under the ACA, those Americans who paid the penalty but did not get health insurance were still outlaws because they disobeyed the “requirement.” Under the Supreme Court’s ruling, if you pay the tax, you are cool with the feds.³⁰

Chief Justice John Roberts justified his recharacterization of the “penalty” in the ACA as a tax on the ground that the amount involved is so small as not to be coercive. It merely provided an “incentive,” like how “Cash for Clunkers” provided a \$4,500 incentive to trade in an old car.³¹ Millions kept their old cars and effectively lost \$4,500. In *New York v. United States*,³² he reasoned, “we interpreted the statute to impose only ‘a series of incentives’ for the State to take responsibility for its waste. We then sustained the charge paid to the Federal Government as an exercise of the taxing power. We see no insurmountable obstacle to a similar approach here.”³³

27. *Id.*

28. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501(a)(1), 124 Stat. 119 (2010).

29. *See NFIB*, *supra* note 4, at 37 (opinion of Roberts, C.J.) (“Indeed, it is estimated that four million people each year will choose to pay the IRS rather than buy insurance.”).

30. *Id.* at 38 (“Congress did not think it was creating four million outlaws.”).

31. *See* Kelsey Mays, *Cash for Clunkers Two Years Later*, KICKINGTIRES BLOG (Oct. 10, 2011), <http://blogs.cars.com/kickingtires/2011/10/cash-for-clunkers-two-years-later.html>; Jon Gabriel, ‘Cash for Clunkers’ Killed Jobs, Hurt the Environment, FREEDOMWORKS (Jan. 5, 2013), <http://www.freedomworks.org/blog/jongabriel/crash-for-clunkers>.

32. 505 U.S. 144 (1992).

33. *NFIB*, *supra* note 4, at 38 (opinion of Roberts, C.J.) (quoting *New York v. United States*, 505 U.S. at 169–74).

The Court's opinion implied that if this "tax" were so high as to coerce compliance, it would then be an unconstitutional penalty: "[W]e need not here decide the precise point at which an exaction becomes so punitive that the taxing power does not authorize it. It remains true, however, that the 'power to tax is not the power to destroy while this Court sits.'"³⁴ Those who think that this criterion is judicially unenforceable said the same thing about the *Dole* "coercion" test, which Chief Justice Roberts and four Justices applied to the Medicaid requirements being imposed on the states. As he did with the individual mandate, Chief Justice Roberts rewrote the statute to eliminate this coercive penalty on states.³⁵

But this is not what is most important about converting the individual insurance mandate into a tax on the failure to buy insurance. *Under the Court's ruling, Congress is not free in the future to supplement the monetary penalty with jail time.* Had the Court accepted the argument that the mandate was a constitutional regulation of interstate commerce under the Commerce Clause, future Congresses could jack up the amount of the penalty, and add prison time to boot.

Many believed that this would be inevitable because the penalties in the ACA are too low to effectively compel the performance of those who would be willing to violate the legal requirement to purchase insurance. Now, in the absence of any mandate, thousands—even millions—can opt to pay the tax rather than buy insurance, and Congress is barred from significantly increasing the "tax" as it could have increased the penalty had the view of the four liberal Justices prevailed.

If one does not yet appreciate the difference between the rationale urged by the government and most law professors and the one adopted by the Chief Justice, consider this: the constitutionality of the Controlled Substances Act is thought to be justified under the Commerce Clause.³⁶ If, however, it were only justified as a tax on activity, then we would have to open the doors of federal prisons across the country and release thousands of prisoners. And everyone in the United States could smoke marijuana completely legally under federal law—without risk, for example, of being disbarred—provided one paid a small, noncoercive tax. That would be an enormous difference from current public policy, and would constitute a substantial increase in

34. *Id.* at 43 (quoting *Okl. Tax Comm'n v. Tex. Co.*, 336 U.S. 342, 364 (1949) (quoting *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting))).

35. *See id.* at 56 ("[W]e determine . . . that § 1396c is unconstitutional when applied to withdraw existing Medicaid funds from States that decline to comply with the expansion.").

36. *Gonzales v. Raich*, 545 U.S. 1, 15 (2005).

individual liberty.³⁷

IV. THE BAD DOCTRINE THAT CHIEF JUSTICE ROBERTS MADE WAS NOT AS BAD AS THE ALTERNATIVES

Chief Justice Roberts's decision made bad law in two respects. First, he claimed the power to rewrite a law by giving it a "saving construction" to uphold it after he admitted this was not the best reading of what the law actually said.³⁸ This was bad because the statute that will now be implemented is not the law that was written by Congress, but is instead a law written by one Justice. The statute that is now being enforced did not command the assent of both houses of Congress and agreement by the President.

The principal constraint on the tax power is political and, for political reasons, Congress could not enact the penalty as a tax. Now, the Court has enacted a law that the political process could not, which undermines the political process itself. Moreover, under this approach, Congress may now enact laws with the expectation that the Court will fix any constitutional problems the laws may have, an expectation that reduces any incentive Congress has to address constitutional issues itself.

Second, the Chief Justice allowed that Congress may impose an unprecedented tax on inactivity. But had he upheld *the mandate* under the tax power (as some claim he did) this would have been little different from upholding it under the Commerce Clause, though the remedy would be limited to a punitive fine, rather than imprisonment. Because the amount of the penalty was low enough to preserve the tax payer's "choice" to obey or pay, Chief Justice Roberts allowed the "penalty" to stand as a tax and held the mandate unconstitutional under any power. On his reasoning, even a punitive fine would be unconstitutional *under the tax power*.

Moreover, Congress always had the power to tax persons solely because of their status—which is called a "direct" tax—provided the tax was apportioned equally among the states.³⁹ Now, as a result of this ruling, Congress has the unprecedented power to tax inactivity without apportioning the incidence of such a tax equally among the states. But this new power to tax is limited to nonpunitive taxes that preserve the option of not acting as Congress desires.

37. See generally Randy E. Barnett, *The Harmful Side Effects of Drug Prohibition*, 2009 UTAH L. REV. 11 (2009).

38. *NFIB*, *supra* note 4, at 44 (opinion of Roberts, C.J.) ("[T]he statute reads more naturally as a command to buy insurance than as a tax . . .").

39. U.S. CONST. art. I, § 9 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.").

Both of these maneuvers made constitutional law worse by allowing a new power to tax inaction without apportionment among the states. But, as I see it, Chief Justice Roberts's opinion made the constitutional law implementing the Commerce Clause, Necessary and Proper Clause, and spending power better in more important ways. Together with the four conservative dissenters, Chief Justice Roberts provided a fifth vote for the propositions that the powers of Congress were limited by Article I of the Constitution; that the Supreme Court would enforce these limits; that the individual insurance mandate exceeded the powers of Congress under the Commerce Clause; that compulsion to engage in commerce was "improper" under the Necessary and Proper Clause; and that Congress could not use its spending power to withhold existing funding in an effort to coerce states into vastly expanding the Medicaid program. These are all positions that a majority of law professors had denied and argued against. But in the ACA challenge case, all of these positions were adopted by five Justices.

V. DOES THE DOCTRINE MATTER?

In the end, realistically, how much does this improvement in constitutional doctrine really matter? Does *NFIB* mean that the Supreme Court will uphold a federal law by hook or by crook? Would the Court adhere to this doctrine if it really made a difference in a big case? Is this not merely "symbolic federalism" at best? Although the answers to these questions require speculating about the future, to see why doctrine matters, let me offer the following thought experiment.

Suppose that, at the urging of insurance companies, Congress were now to amend the ACA to impose a criminal sanction on the failure to purchase health insurance, or decided to greatly increase the "tax" on the status of failing to have health insurance. Would law professors dismiss a constitutional challenge to these measures as "frivolous"? I doubt it. How would lower courts likely rule? I think it is obvious that most district court judges would invalidate enactments like these, and the circuit court of appeals would doubtlessly uphold their rulings. Would the Supreme Court even grant certiorari in such a case? I doubt it. Such is the significance of the holding of *NFIB*.

Doctrine certainly constrained us in our challenge to the ACA. We would have liked to contest the insurance company regulations as outside the bounds of the original meaning of the Commerce Clause. But we were definitively foreclosed from making such an argument by *United States v. South-Eastern Underwriters Association*.⁴⁰

Of course a change in the Justices could negate the importance of the *NFIB* decision, but that could happen with any doctrine. And this is as

40. 322 U.S. 533 (1944).

possible with an additional conservative Justice as it is with an additional progressive Justice. Supreme Court doctrine is always “living.” But ask any litigant whether doctrine matters so long as it survives, and I believe the answer will tell you that the doctrine established by the *NFIB* decision matters too.

I have heard some claim that the *NFIB* ruling is of marginal significance because the Court barred only economic mandates, which Congress has never before adopted and which Congress is unlikely to adopt in the future. Yet, as I insisted for two years in the face of claims that a ruling invalidating the ACA would undermine the entire edifice of federal programs, all such a ruling in our favor would have done was bar Congress from using economic mandates in the future. Here is how I usually closed my speeches on the implications of invalidating the ACA: “Should the Supreme Court decide that Congress may not commandeer the people in this way, such a doctrine would only affect one law: the PPACA. Because Congress has never done anything like this before, the Supreme Court does not need to strike down any previous mandate.”⁴¹

The true scope of our legal victory is measured by the constitutional theories we prevented the United States Supreme Court from adopting. While our failure to prevent the egregious Affordable Care Act from taking effect remains a bitter disappointment, this should not detract from what we accomplished:

- We fought this case to deny the federal government the power to compel citizens to engage in economic activity. On this we won.
- We fought this case to prevent the Court from adopting the argument that Congress may adopt any means, not expressly prohibited, when regulating the national economy. On this we won.
- We fought this case to prevent an end run around the limits on the Commerce Clause and Necessary and Proper Clause by using the tax power instead. On this we won a partial, but significant, victory.
- We fought this case to establish that the dictum in *South Dakota v. Dole*⁴² that conditions on federal spending that constitute compulsion on states are unconstitutional. On this we also won.

In sum, we prevailed in preserving the enumerated powers scheme of Article I, Section 8, as a protection of liberty. As the Chief Justice wrote:

41. Randy E. Barnett, *Turning Citizens into Subjects: Why the Health Insurance Mandate is Unconstitutional*, 62 MERCER L. REV. 608, 617 (2011).

42. 483 U.S. 203 (1987).

Today, the restrictions on government power foremost in many Americans' minds are likely to be affirmative prohibitions, such as contained in the Bill of Rights. These affirmative prohibitions come into play, however, only where the Government possesses authority to act in the first place. If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.

....

The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions.

....

Our respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed. . . . And there can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits.⁴³

This is what we fought to preserve. Congress may not mandate or require activity. Under the holding of the Court, Congress may only encourage the activity by imposing a nonpunitive and noncoercive tax on inactivity while keeping the failure to engage in that activity completely legal. I consider this a victory for both the Constitution and for liberty.

VI. WHY WERE THE LAW PROFESSORS SO WRONG?

Most law professors believed that the individual insurance mandate in the Affordable Care Act was so obviously justified by the Commerce and Necessary and Proper Clauses that there could be no serious challenge to its constitutionality.⁴⁴ In a poll conducted by the American

43. *NFIB*, *supra* note 4, at 3, 6 (citations omitted).

44. See, e.g., *The Constitutionality of the Affordable Care Act: Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Walter Dellinger III, Douglas B. Maggs Professor of Law at Duke University) (“[T]here are so many ways that the minimum coverage requirement is an appropriate exercise of Congress’s power to regulate the national economy that it is difficult to know where to begin.”); Akhil Reed Amar, *Constitutional Showdown: A Florida Judge Distorted the Law in Striking Down Healthcare Reform*, L.A. TIMES (Feb. 6, 2011), <http://articles.latimes.com/print/2011/feb/06/opinion/la-oe-amar-health-care-legal-20110206> (“My students understand the Constitution better than [Judge Roger Vinson].”);

Bar Association, 85% of experts predicted that the Affordable Care Act would be fully upheld.⁴⁵ Indeed, some law professors went so far as to call any constitutional challenge “frivolous” and one even warned that he “fully expect[s] the lawyers who sign the briefs to face a motion for Rule 11 sanctions and, if they appeal to a federal court of appeals, for costs.”⁴⁶ Multiple amicus curiae briefs were submitted to the Supreme Court by professors in support of the ACA’s constitutionality, garnering 104, 20, 9, and 6 signatures respectively.⁴⁷ An open letter was also

Erwin Chemerinsky, *Health Care Reform is Constitutional*, POLITICO (Oct. 23, 2009, 4:59 AM), <http://www.politico.com/news/stories/1009/28620.html> (“Those opposing health care reform are increasingly relying on an argument that has no legal merit . . .”); Abbe R. Gluck & Gillian Metzger, *Just the Facts: Health Economics and Constitutional Doctrine*, SCOTUSBLOG (Aug. 4, 2011, 9:37 AM), <http://www.scotusblog.com/2011/08/just-the-facts-health-economics-and-constitutional-doctrine> (“[S]ince the New Deal, the Court has always deferred to the specifics of congressional regulatory choices when it has perceived that the overall context that Congress is regulating is an economic or commercial one.”); Rick Hills, Comment to *Is the Health Care Legislation Constitutional?*, PRAWFSBLAWG (Mar. 28, 2010, 10:22 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2010/03/the-health-care-legislation-is-constitutional-part-i-nec-proper.html> (“Randy and Ilya have been led astray by their love of libertarianism, reading into the doctrine of enumerated powers some implied ban on really coercive mandates on private individuals. But the doctrine, in both its letter and spirit, lacks any such ban.”); Aziz Huq, *Bad Law, Smart Politics in Constitutional Challenges to Healthcare Reform*, THE NATION (Apr. 15, 2010), <http://www.thenation.com/article/bad-law-smart-politics-constitutional-challenges-healthcare-reform> (“Highly speculative and doctrinally out-to-sea, these suits cannot be about the law. As their timing shows, they are a continuation of politics by other means.”); Dawn Johnsen, *The Simple Case for the Affordable Care Act’s Constitutionality*, SCOTUSBLOG (Aug. 3, 2011, 9:22 AM), <http://www.scotusblog.com/2011/08/the-simple-case-for-the-affordable-care-acts-constitutionality> (“Since 1937, following an infamous stretch of now-discredited opinions narrowly interpreting ‘commerce among the several states’ to invalidate progressive legislation, the Court nearly always has upheld federal statutes against challenges that they exceeded Congress’s authority.”); Timothy S. Jost, *Pro & Con: State Lawsuits Won’t Succeed in Overturning the Individual Mandate*, 29 HEALTH AFFAIRS 1225, 1225 (2010), available at <http://content.healthaffairs.org/content/29/6/1225.full.html> (“These challenges have no legal merit and are a serious distraction from the real work that lies before the states.”); Laurence H. Tribe, *On Health Care, Justice Will Prevail*, N.Y. TIMES, Feb. 8, 2011, at A27, available at <http://www.nytimes.com/2011/02/08/opinion/08tribe.html> (“Since the New Deal, the [C]ourt has consistently held that Congress has broad constitutional power to regulate interstate commerce. . . . By that standard, this law’s constitutionality is open and shut.”); Robert Schapiro, *Following Judge Sutton’s Rejection of the “Inactivity” Argument, the Supreme Court Can Take its Time*, SCOTUSBLOG (Aug. 5, 2011, 3:00 PM), <http://www.scotusblog.com/2011/08/following-judge-sutton%E2%80%99s-rejection-of-the-%E2%80%9Cinactivity%E2%80%9D-argument-the-supreme-court-can-take-its-time> (“The Court would have to create a new limitation on congressional power, a limitation that appears ungrounded, unclear, and unnecessary.”).

45. Steven D. Schwinn, *The Medicaid Expansion Issue*, 39 PREVIEW U.S. SUP. CT. CAS. 29, 32 (2012).

46. Brian D. Galle, *Why Tax Cheats Love the AG Suits Challenging Health Care Reform*, PRAWFSBLAWG (Apr. 3, 2010, 11:43 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2010/04/why-tax-cheats-love-the-ag-suits-challenging-health-care-reform.html>.

47. Brief for 104 Health Law Professors as Amici Curiae Supporting Petitioners

published by 130 law professors arguing that “[t]he current challenges to the constitutionality of this legislation seek to jettison nearly two centuries of settled constitutional law,” and that “there can be no serious doubt about the constitutionality of the minimum coverage provision.”⁴⁸

(Minimum Coverage Provision), *Dep’t of Health and Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398); Brief for Law Professors Barry Friedman, Matthew Adler, et al., as Amici Curiae Supporting Petitioners and Reversal on the Minimum-Coverage Provision Issue, *Dep’t of Health and Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398); Brief for Constitutional Law and Economics Professors as Amici Curiae Supporting Petitioners (Minimum Coverage Provision), *Dep’t of Health and Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398); Brief for Constitutional Law Scholars as Amici Curiae Supporting Petitioners (Minimum Coverage Provision), *Dep’t of Health and Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398).

48. Open Letter, Over 100 Law Professors Agree on Affordable Care Act’s Constitutionality, http://www.fcan.org/Health_care/law_professors_ACA.pdf. The following law professors signed at least one of the referenced documents: Libby Adler, Matthew Adler, Vikram Amar, Lori Andrews, George Annas, Paul Arshagouni, Frank Askin, Reuven Avi-Yonah, Richard Aynes, Ashutosh Baghwat, Jack Balkin, Ian Bartrum, W. Eugene Basanta, Joseph Bauer, Theresa Beiner, Peter Bell, Eric Berger, Micah Berman, Vincent Blasi, Eric Blumenson, Alfred Blumrosen, Richard Bonnie, Kathleen Boozang, Linda Bosniak, Dayna Bowen Matthew, Michele Bratcher Goodwin, John Britain, Karen Brown, Mark Brown, Rebecca Brown, Harold Bruff, Neil Buchanan, Kim Buchanon, Scott Burris, Patricia Cain, Steve Calandrillo, Emily Calhoun, Alexander Capron, Kathy Cerminara, Marguerite Chapman, Guy-Uriel Charles, Erwin Chemerinsky, Jesse Choper, Kimberly Cogdell Boies, David Cohen, Glenn Cohen, Steven Cohen, Thomas Colby, Carl Coleman, Michael Curtis, Richard Daynard, Walter Dellinger III, Neal Devins, John DiPippa, Janet Dolgin, Michael Dorf, Erica Eisinger, Einer Elhauge, Peter Enrich, Cheryl Erwin, Susan Estrich, Dan Faber, Daniel Farber, Linda Fentiman, Barbara Fick, Margaret Foster Riley, Jacqueline Fox, David Frankford, Barry Friedman, Howard Friedman, Lawrence Friedman, Barry Furrow, Lance Gable, Brian Galle, Cindy Galway Buys, Michael Gerhardt, Margaret Gilhooley, Leonard Glantz, Hazel Glenn Beh, Abbe Gluck, Lee Goldman, Robert Goldstein, Risa Goluboff, Laura Gomez, Thomas (Tim) Greaney, Henry Greely, Craig Green, Michael Greenberger, Abner Greene, Jamal Greene, Edwin Greenebaum, Kent Greenfield, Dan Greenwood, Ariela Gross, Sofia Gruskin, Mark Hall, Paul Hardin, Melissa Hart, Dean Hashimoto, Rick Hills, Christina Ho, Michael Hoffheimer, Allison Hoffman, Barbara Hoffman, Sharona Hoffman, Nicole Huberfeld, Wilson Huhn, Nan Hunter, Jonathan Hyman, Dawn Johnsen, Calvin Johnson, Vincent Johnson, Tim Jost, David Kairys, Kenneth Karst, Kenneth Katkin, Mark Kaufman, Gregory Keating, Fazal Khan, Neil Kinkopf, Eleanor Kinney, Heidi Kitrosser, Edward Kleinbard, Carlton Larson, Sylvia Law, Robert Leflar, Laurie Levenson, Hope Lewis, Ethan Lieb, Rory Little, Christine Littleton, Kristin Madison, Gregory Magarian, Wendy Mariner, William Marshall, Jerry Marshaw, Thaddeus Mason Pope, Anna Mastroianni, Thomas Mayo, Stephen McJohn, Mark McKenna, Maxwell Mehlman, Ajay Mehrotra, Alan Meisel, Michael Meltsner, Leslie Meltzer Henry, Saul Mendlovitz, Gillian Metzger, Kate Mewhinney, Frances Miller, Alan Morrison, Trevor Morrison, Scott Moss, Eric Muller, Gene Nichol, William Novak, Michele Oberman, Christiana Ochoa, Aviva Orenstein, David Orentlicher, Kevin Outterson, Efthimios Parasidis, Wendy Parmet, Sallyann Payton, Philip Peters, Andrew Pincus, Richard Primus, Vernellia Randall, Judith Resnik, Edward Richards, David Ritchie, Jessica Roberts, Gwendolyn Roberts Majette, Christopher Robertson, John Robertson, Patricia (Winnie) Roche, Marc Rodwin, Daria Roithmayr, Kermit Roosevelt, Mark Rosen, Sara Rosenbaum, Rand Rosenblatt, Karen Rothenberg, James Rowen, Theodore Ruger, Sallie Sanford, Richard Saphire, Richard Saver,

Although several law professors, such as Jack Balkin, thought the mandate could *also* be justified under the tax power,⁴⁹ no one who believed this publicly stated that it was *only* justified under the tax power and was unconstitutional under the commerce power. And only two professors I know of—Neil Siegel and Robert Cooter⁵⁰—saw that, to uphold it as a tax, Section 5000A would have to be rewritten to eliminate its express requirement that all Americans “shall” purchase private health insurance, though neither to my knowledge denied that it was within Congress’s commerce power.

Why did so many law professors miss the mark in predicting this reasoning? Part of the explanation is, of course, that law professors largely exist in an ideological bubble in which folks like me are either nonexistent or can be dismissed as marginal because we are so few in number. But that is not the whole story. After all, even some politically conservative law professors accepted the consensus view.⁵¹

I believe most law professors missed the boat in this case because they never properly understood the New Federalism of the Rehnquist Court. They share what my Georgetown colleague Larry Solum has called the same “constitutional gestalt” about the meaning of the so-called New Deal settlement.⁵² To oversimplify, they think the New Deal and Warren Court’s rulings established that the Commerce and Necessary and Proper Clauses give Congress a power to regulate the national economy at its discretion, subject only the express prohibitions in the Constitution and perhaps some selected unenumerated rights.

Nadia Sawicki, Richard Schragger, Robert Schwartz, Steve Schwinn, Paul Secunda, Ilene Seidman, Ted Seto, Jeffrey Shaman, Darien Shanske, David Shapiro, Suzanna Sherry, Sheila Shulman, Neil Siegel, Jessica Silbey, Ross Silverman, Joshua Silverstein, Lawrence Singer, Joseph Slater, Jessica Slavin, Jennifer Smith, Peter Smith, Robert Smith, Lloyd Snyder, Roy Spece, Carla Spivak, Ralph Michael Stein, Geoffrey Stone, Evelyn Tenenbaum, Nicolas Terry, Lance Tibbles, Jay Tidmarsh, Daniel Tokaji, Franita Tolson, Stacey Tovino, Paul Tractenberg, Laurence Tribe, David Trueman, Jonathan Varat, Walter Wadlington, Elizabeth Weeks Leonard, Joanna Weinberg, Deborah Weissman, Judith Welch Wegner, Lindsay Wiley, Norman Williams, Adam Winkler, Susan Wolf, Jean Wright Veilleux, Rebecca Zietlow.

49. Jack M. Balkin, *The Health-Care Mandate is Clearly a Tax—And Therefore Constitutional*, THE ATLANTIC (May 4, 2012, 3:10 PM), <http://www.theatlantic.com/politics/archive/2012/05/the-health-care-mandate-is-clearly-a-tax-0151-and-therefore-constitutional/256706>.

50. See Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195, 1246–47 (2012).

51. See, e.g., Orin Kerr, *Some Tentative Thoughts on the Constitutionality of the Individual Mandate Under Current Supreme Court Doctrine*, VOLOKH CONSPIRACY (Oct. 6, 2010, 2:25 AM), <http://www.volokh.com/2010/10/06/some-tentative-thoughts-on-the-constitutionality-of-the-individual-mandate-under-current-supreme-court-doctrine>.

52. See Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt 3* (Washington University Law Review, Georgetown Pub. Law Research Paper No. 12-152, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2152653.

When it was decided, *United States v. Lopez*⁵³ was thought to be heretical precisely because it seemed to threaten this gestalt. At the time, some dismissed it as an aberrational decision that ought to be reversed. Some still do. Others rationalized its distinction between “economic” and “noneconomic” activity as identifying the outer boundary of national economic regulation. Still others may have thought that this aspect of the New Federalism was abandoned by the Court in *Gonzales v. Raich*⁵⁴ case when Justices Kennedy and Scalia voted to uphold the Controlled Substances Act. Moreover, two of the three Justices in the dissent in *Raich* had been replaced by Justices with little or no pre-existing commitment to finding any limits on the enumerated powers of Congress, leaving only Justice Thomas open to the argument that the individual mandate exceeded the powers of Congress.

If a law professor held any of these views, the healthcare challenge was an easy case. After all, the ACA truly was a comprehensive scheme to regulate the national economy. The individual insurance mandate could be seen as both necessary to this scheme and not in conflict with any express prohibition of the Constitution. End of story. Anyone who suggested anything to the contrary was advocating the undoing of the New Deal Settlement and a return to the bad old pre-New Deal constitutional gestalt of the evil *Lochner* Era,⁵⁵ or even to *Dred Scott*.⁵⁶

53. 514 U.S. 549 (1995).

54. 545 U.S. 1 (2005).

55. See, e.g., Vikram D. Amar, *Reflections on the Doctrinal and Big-Picture Issues Raised by the Constitutional Challenges to the Patient Protection and Affordable Care Act (Obamacare)*, 6 FIU L. REV. 9, 9 (2010) (“[S]uch success [of the challenges] would either be revolutionary (in the way that Justice Clarence Thomas’ desire to return to nineteenth century cases concerning the scope of federal power would, if implemented, completely upend the current constitutional convention), or it would be tailored to reach a particular result on a particular contentious issue (in the way *Bush v. Gore* is viewed by many as a ruling good for only one day and one election.)” (footnotes omitted); Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825, 1829 (2011) (“Following the Court’s repudiation of *Lochner* jurisprudence, there is no conceivable basis to argue that the Constitution specially protects an individual’s freedom to be uninsured.”) (footnote omitted); Peter J. Smith, *Federalism, Lochner, and the Individual Mandate*, 91 B.U. L. REV. 1723, 1726 (2011) (“But because the objections to the individual mandate, though couched in federalism terms, have very little to do with federalism at all, it is difficult to see them as anything other than *Lochner* under a different guise.”); Jeffrey Rosen, *Are Liberals Trying to Intimidate John Roberts?*, NEW REPUBLIC (May 28, 2012), <http://www.newrepublic.com/article/politics/103656/obamacare-affordable-care-act-critics-response> (“[The challengers’] ambition was far more radical: to strike down regulations at the heart of the post New Deal regulatory state.”); Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 22–23 (2011), <http://yalelawjournal.org/2011/04/26/koppelman.html> (“Many in the legal community have regarded the constitutional objection to the mandate as a return to *Lochner*, but the ‘right’ that the mandate is supposed to violate was too much even for the *Lochner* Court.”) (footnote omitted); Trevor Morrison, *Alarmism and the ACA*,

But law professors missed the possibility of an alternate interpretation of the New Deal Settlement that comprises a third constitutional gestalt—the gestalt that informed our whole litigation strategy. It is this: for better or worse, all of the powers that were approved by the New Deal and Warren Courts are now to be taken as constitutional. But any claim of additional *new* powers still needs justification. Put another way, the expansion of congressional power authorized by the New Deal and Warren Courts established a new high-water mark of constitutional power. Going any higher than this, however, requires special justification.

This gestalt can be summarized as “this far and no further”—provided “no further” is not taken as an absolute, but merely as establishing a baseline beyond which serious justification is needed.⁵⁷ As Chief Justice Rehnquist observed in *United States v. Morrison*,⁵⁸

BALKINIZATION (Mar. 25, 2012, 10:01 PM), <http://balkin.blogspot.com/2012/03/alarmism-and-aca.html> (“Ultimately, these folks are manifestly not concerned with helping the Court but are instead interested in using alarmist rhetoric to advance a very different project: returning Congress’s regulatory power to its pre-New Deal state, and perhaps even pre-*McCulloch v. Maryland*, state.”); Steven Schwinn, *The ACA and the Tenth Amendment*, SCOTUSBLOG (Aug. 5, 2011, 1:38 PM), <http://www.scotusblog.com/2011/08/the-aca-and-the-tenth-amendment> (“These arguments are novel and ahistorical, representing nothing less than a bald-faced attempt to rewrite the Constitution in a libertarian image.”); Patricia J. Williams, *Judges With a Clear Agenda*, N.Y. TIMES (Mar. 26, 2012, 1:43 PM), <http://www.nytimes.com/roomfordebate/2012/03/25/on-the-health-care-law-is-the-court-being-thoughtful-or-partisan/activist-judges-with-a-clear-agenda> (“Limiting the [C]ommerce [C]ause in the fashion pressed by these appellants would also undo the legal grounding for . . . well, everything: the Social Security Act . . . the Occupational and Safety Health Act, the Clean Air Act, all federal disaster relief, the Anti-Trust Act, the Equal Pay Act, and all jurisprudence relating to public accommodations, including the Civil Rights Act of 1964.”); cf. *Stanford Univ. Hosts Debate on Affordable Care Act* (C-SPAN television broadcast Mar. 12, 2012), available at <http://www.c-span.org/Events/C-SPAN-Event/10737428979> (“I would cite . . . what Justice Scalia says to people like me about *Bush v. Gore*: ‘Get over it!’ The New Deal settlement is not going away.”); Ronald Dworkin, *Why the Mandate is Constitutional: The Real Argument*, N.Y. REV. OF BOOKS (May 10, 2012), <http://www.nybooks.com/articles/archives/2012/may/10/why-mandate-constitutional-real-argument/?pagination=false> (“[If the Court rules the ACA unconstitutional], we would have to accept that our eighteenth-century constitution is not the enduring marvel of statesmanship we suppose but an anachronistic, crippling burden we cannot escape, a straitjacket that makes it impossible for us to achieve a just national society.”). Note that none of the law professors cited in this footnote are listed in *supra* note 44.

56. See Amar, *supra* note 44 (“In 1857, another judge named Roger distorted the Constitution, disregarded precedent, disrespected Congress and proclaimed that the basic platform of one of America’s two major political parties was unconstitutional. The case was *Dred Scott vs. Sanford* . . . History has not been kind to that judge. Roger Vinson, meet Roger Taney.”).

57. For a similar assessment of the Rehnquist Court’s New Federalism, see John Valauri, *Baffled by Inactivity: The Individual Mandate and the Commerce Power*, 10 GEO. J.L. & PUB. POL’Y 51, 63 (2012) (describing the “‘thus far’ method and justification of constitutional line drawing”).

58. 529 U.S. 598 (2000)

“*thus far* in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where the activity is economic in nature.”⁵⁹ This is why the general acceptance of our claim that the individual insurance mandate was “unprecedented” was so crucial to the unexpected legal success we enjoyed. Accepting our claim that the mandate was unprecedented placed the burden of justification on the government.

Which brings me to a second tenet of the constitutional gestalt of the New Federalism: Any purported justification that would lead to an unlimited reading of Congress’s Article I, Section 8 powers would improperly contradict what Chief Justice Rehnquist called the “first principles” of our constitutional law.⁶⁰ This is why the claim that “healthcare is a national problem” and other similar rationales offered by the government and by many law professors fell on five deaf ears. All these rationales, if accepted, would lead to a national police power qualified only by the Bill of Rights (as are state police powers). And this was contrary to the constitutional gestalt of the Rehnquist Court’s New Federalism.⁶¹

CONCLUSION: THE GRAVITATIONAL FORCE OF ORIGINALISM

Even if you accept this description of the Rehnquist Court’s constitutional gestalt, you may still object: Why this far and no further? Why draw the line at this point? Is this not arbitrary? Besides, where is all of this in the Constitution?

Here is where the growth of originalism since the 1980s enters the picture. Unlike *District of Columbia v. Heller*,⁶² which was argued and decided on originalist grounds,⁶³ in our challenge to the ACA we made no originalist claims whatsoever. But the original meaning of the Constitution still played a role because it lies behind the Rehnquist Court’s New Federalism, exerting a gravitational force that also now extends to the Roberts Court. By “gravitational force,” I am not making a Dworkinian claim about the analytic force or pull of legal reasoning, but instead making a socio-cultural claim about the influence of originalist interpretation on even nonoriginalist doctrinal construction.⁶⁴

59. *Id.* at 613 (emphasis added) (citation omitted).

60. *United States v. Lopez*, 514 U.S. 549, 552 (1995).

61. To be clear, I am merely identifying what I think that gestalt is. When it comes to the Article I, Section 8 powers of Congress (but not civil rights and liberties), I favor the pre-New Deal gestalt of attempting, however imperfectly, to hold Congress to the scope of powers defined by the original meaning of the “Powers herein granted.” U.S. CONST. art. I, § 1.

62. 554 U.S. 570 (2008).

63. *See id.* at 576–619.

64. *Cf.* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 121 (1977) (“If [Hercules] classifies some event as a mistake, then he does not deny its specific authority but he does deny its gravitational force, and he cannot consistently appeal to that force in other arguments.”).

But the ideas are similar.

Simply put: During the New Deal era, Americans acquiesced to an enormous expansion of federal power and the United States Supreme Court eventually expanded its interpretation of federal power accordingly. This expansion is now settled precedent. But with respect to the Article I, Section 8 powers of Congress, the powers upheld by the New Deal, Warren, and Burger Courts violated the original meaning of the Constitution. Because this expansion was illegitimate on originalist grounds, any further expansion must be justified, and any purported justification that would essentially eliminate the enumerated powers scheme in the original Constitution is unacceptable or improper.

Of course, many if not most law professors reject the “this far and no farther” gestalt in favor of the gestalt that interprets the New Deal as establishing something like a “national problems power” in Congress. And many also reject the analysis of the Commerce and Necessary and Proper Clauses in Chief Justice Roberts’s opinion and in the opinion of the four dissenters. But I think if we are to understand the *NFIB* decision and the New Federalism cases that preceded it, we cannot do so accurately unless we take into account the alternate reading of the New Deal Settlement that animated the Rehnquist Court, and that we now know also animates the Roberts Court.

Given that the actual holding in *NFIB* is that Congress may never again impose an economic mandate on the people by means of its commerce power—something Congress had never done before—this may be the most important legal implication of *NIFB v. Sebelius*: The New Federalism’s constitutional gestalt still has five votes. Achieving that in this case was no small feat.