

# **Our Pending National Debate: Is Health Care Reform Constitutional?**

*This Article originated as a transcript of the remarks from the Hot Topic Panel Discussion on health care reform held at the Association of American Law Schools (AALS) meeting on January 7, 2011. After the panel discussion, the conversation has continued, and the Mercer Law Review is now publishing several noteworthy perspectives in various forms to provide the most complete picture of the debate. Contributions for this Article include: portions of the original transcript from the AALS panel discussion, a scholarly article by Professor Randy Barnett, a scholarly response to Professor Gillian Metzger's panel remarks by Professor David Oedel, and a Question and Answer session from the AALS panel discussion.*

*While the transcribed portions of the panel discussion have been lightly footnoted, the supplemental pieces have been edited as scholarly works in accordance with Mercer Law Review's standard editing procedures.*

## **Introduction of Speakers at the AALS Hot Topic Panel Discussion on January 7, 2011**

**by Brad Joondeph**

My name is Brad Joondeph, and I teach at Santa Clara University School of Law. It is my honor and distinct pleasure to moderate the panel this morning. This group represents a terrific lineup of panelists, several of whom have been directly involved in the litigation that is

currently ongoing throughout the United States. Before getting to the introductions, let me provide a quick summary.

There are currently about twenty cases being litigated in the lower federal courts that challenge—in some way, shape, or form—the constitutionality of the Patient Protection and Affordable Care Act,<sup>1</sup> as amended by the Health Care and Education Reconciliation Act of 2010,<sup>2</sup> also affectionately known as the ACA or “Obamacare.” Thus far, three district courts have dispositively ruled on the merits of the constitutional challenges: one from the Western District of Virginia,<sup>3</sup> one from the Eastern District of Virginia,<sup>4</sup> and one from the Eastern District of Michigan.<sup>5</sup> So we now have three cases that are essentially in the courts of appeals. There are in the neighborhood of fifteen other cases continuing to percolate in the district courts.

These challenges raise a number of constitutional issues, from the Takings Clause to commandeering to the free exercise of religion to the right to privacy. But there are two issues that have garnered the most attention and raise the most serious constitutional questions. The first concerns the constitutionality of the ACA’s so-called “individual mandate,” which requires almost every American to acquire “minimally adequate health coverage” by January 1, 2014.<sup>6</sup> The second concerns the ACA’s amendments to Medicaid, amendments that substantially expand the baseline scope of coverage every state participating in Medicaid must offer.<sup>7</sup> The states that are parties to the *Florida ex rel. Bondi v. U.S. Department of Health & Human Services*<sup>8</sup> litigation, which is currently pending in the Northern District of Florida, are challenging these changes to Medicaid as an impermissible intrusion on their constitutionally protected sovereignty—sovereignty protected by the Tenth Amendment, or perhaps the structural principles that the Tenth Amendment presupposes.

Our panelists will be addressing several of these issues—though, like the litigation generally, we will probably focus a great deal on the individual mandate. Let me now introduce the panelists in the order in which they will speak.

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1. Pub. L. No. 111–148, 124 Stat. 119 (2010).

2. Pub. L. No. 111–152, 124 Stat. 1029.

3. *Liberty Univ. v. Geithner*, No. 6:10-cv-00015-nkm, 2010 WL 4860299 (W.D. Va. Nov. 30, 2010).

4. *Virginia v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010).

5. *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010).

6. ACA § 1501(b).

7. *See, e.g.*, ACA § 2001(a)(1) (requiring participating states to expand Medicaid coverage to all non-elderly adults with incomes up to 133% of the federal poverty level).

8. No. 3:10-cv-91-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011).

First, Professor Randy Barnett is the Carmack Waterhouse Professor of Legal Theory at Georgetown University Law Center. He is the author, among many fine works, of *Restoring the Lost Constitution: The Presumption of Liberty*.<sup>9</sup> As directly relevant here, in addition to having delivered several lectures on the topic of today's panel, he has filed amicus briefs in *Virginia v. Sebelius*, *Florida v. HHS*, and, most recently, in *Thomas Moore Law Center v. Obama*, the case currently pending before the Sixth Circuit.

Second, Dean Erwin Chemerinsky is the founding Dean and a distinguished Professor of Law at the University of California-Irvine School of Law. He has been one of the nation's most authoritative commentators and scholars on constitutional law for nearly a generation, and he is the author most recently of *The Conservative Assault on the Constitution*.<sup>10</sup>

David Oedel is a Professor of Law at Mercer University School of Law. There, he heads a team of lawyers and economists exploring whether excessive partisanship in American political life could be reduced through independent redistricting. He is currently serving in special assignment as a Deputy Special Attorney General for the State of Georgia, appointed by Georgia Governor Sonny Perdue, to represent the State of Georgia, and the Georgia Governor in particular, as one of the plaintiffs in *Florida v. HHS*.

And last, but certainly not least, Gillian Metzger is a Professor of Law at Columbia Law School. She has authored several important articles in the field of constitutional law, including, most recently, *Ordinary Administrative Law as Constitutional Common Law*<sup>11</sup> and *Administrative Law as the New Federalism*.<sup>12</sup> Relevant to this morning's panel, she has co-authored amicus briefs defending the constitutionality of the minimum coverage provision, specifically addressing questions of Congress's taxing power, in *Virginia v. Sebelius* and *Florida v. HHS*.

Thanks to all four of you for joining us today, and thanks in particular to David Oedel for organizing this panel discussion. Without further ado, Randy, the dais is yours.

*(continued on next page)*

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9. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

10. ERWIN CHEMEKINSKY, *THE CONSERVATIVE ASSAULT ON THE CONSTITUTION* (2010).

11. Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010).

12. Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008).

## Turning Citizens into Subjects: Why the Health Insurance Mandate is Unconstitutional<sup>13</sup>

by Randy E. Barnett

In 2010 something happened in this country that has never happened before: Congress required that every person enter into a contractual relationship with a private company. I realize that writers make lots of factual claims that readers are wise to be skeptical about. I can prove, however, that an economic mandate like this one is unprecedented. If this mandate had ever happened before, everyone reading this passage would know all the contracts the federal government requires them to make, upon pain of a penalty enforced by the Internal Revenue Service (IRS). No reader, however, can recite any such mandate and neither could any reader's parents or grandparents because this has never been done before.

It is not as though the federal government never requires American citizens to do anything. They must register for the military (and serve if called), submit a tax form, fill out a census form, and serve on a jury. Additionally, they must join a posse organized by a United States Marshall. The existence and nature of these very few duties, however, illuminates the truly extraordinary and objectionable nature of the individual insurance mandate. Each of these duties is necessary for the operation of government itself, and each has traditionally been widely recognized as inherent in being a citizen of the United States.

Consider why in 1918 the Supreme Court of the United States rejected the claim that the military draft violated the Thirteenth Amendment,<sup>14</sup> which bars "involuntary servitude."<sup>15</sup> At first glance, conscription surely looks like a form of involuntary servitude. The Supreme Court, however, said that it could not see how "the exaction by government from the citizen of the performance of *his supreme and noble duty of*

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13. These remarks were prepared as testimony before the Senate Judiciary Committee hearings held on February 2, 2011 and a hearing held by the House Judiciary Committee's Subcommittee on the Constitution on February 16, 2011. Together with the Cato Institute, the Author has submitted amicus briefs in support of the challenges to the Affordable Care Act in *Virginia v. Sebelius* in the United States District Court for the Eastern District of Virginia and in *Thomas More Law Center v. Obama* in both the United States District Court for the Eastern District of Michigan and the United States Court of Appeals for the Sixth Circuit.

14. U.S. CONST. amend. XIII.

15. *Id.*

contributing to the defense of the rights and honor of the nation . . . can be said to be the imposition of involuntary servitude.”<sup>16</sup>

Keep that phrase, “supreme and noble duty” of citizenship, in mind. For this—and nothing less than this—is what is at stake in the fight over the constitutionality of the individual insurance mandate. Is it part of the supreme and noble duty of citizenship to do whatever the Congress deems in its own discretion to be convenient to its regulation of interstate commerce? If this proposition is upheld, the relationship of the people to the federal government would fundamentally change: they would no longer fairly be called “citizens,” instead, they would more accurately be described as “subjects.”

In Article III,<sup>17</sup> the United States Constitution distinguishes between citizens of the United States and subjects of foreign states.<sup>18</sup> What is the difference? In the United States, sovereignty rests with the citizenry. The government, including Congress, is not sovereign over the people but is the servant of the people. In *Yick Wo v. Hopkins*,<sup>19</sup> the Supreme Court reaffirmed that “in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.”<sup>20</sup> If Congress can mandate that citizens do anything that is convenient to its regulation of the national economy, however, then that relationship is now reversed, and Congress has the prerogative powers of King George III.

In essence, the defenders of this health insurance mandate are making the following claim: because Congress has the power to draft citizens into the military—a power tantamount to enslaving one to fight and die—it has the power to make citizens do *anything less than this*, including mandating that they send their money to a private company

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16. Selective Draft Law Cases, 245 U.S. 366, 390 (1918) (emphasis added).

17. U.S. CONST. art. III.

18. Compare U.S. CONST. art. III, § 2 (“The judicial Power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”), and U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”), with U.S. CONST. amend. XIV, §1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

19. 118 U.S. 356 (1886).

20. *Id.* at 370; see also *Chisholm v. Georgia*, 2 U.S. 419, 479 (1793) (Jay, J.) (affirming “this great and glorious principle, that the people are the sovereign of this country,” and “the people” consists of “fellow citizens and joint sovereigns.”), *superseded by constitutional amendment*, U.S. CONST. amend. XI; *Chisholm*, 2 U.S. at 456 (Wilson, J.) (referring to the people as “a collection of original sovereigns”).

and do business with it for the rest of their lives. This simply does not follow. The greater power does not include the lesser.

One way to justify so exceptional a power would be to find it in the Constitution itself. Does the Constitution expressly give Congress a power to compel citizens to enter into contractual relations with private companies, or can this power be fairly implied? The answer is no.

True, the Constitution does give Congress the power to impose taxes on the people to compel them to give their money *to the government* for its support.<sup>21</sup> Furthermore, it has long been assumed that Congress can appropriate funds to provide for the common defense and general welfare by making disbursements to private companies and individuals. Social Security and Medicare are examples of the exercise of such tax and spending powers.

Because the Supreme Court is highly deferential to Congress's use of its tax power, the primary constraint on the exercise of this power is political. That is, like the power to declare war or impose a military draft, legislators will be held politically accountable for their exercise of the great and dangerous power to tax. For this constraint to operate, however, at a minimum Congress must expressly invoke its tax power so it can be held politically accountable.

This is why it is of utmost significance that when Congress enacted the Patient Protection and Affordable Care Act (PPACA),<sup>22</sup> Congress did not refer to the penalty imposed on those who fail to buy insurance as a tax.<sup>23</sup> Instead, Congress called it a "penalty" to enforce the insurance mandate.<sup>24</sup> Although the penalty was inserted into the Internal Revenue Code (I.R.C.),<sup>25</sup> Congress expressly severed the penalty from the normal enforcement mechanisms of the tax code.<sup>26</sup> The failure to pay the penalty "shall not be subject to any criminal prosecution or penalty with respect to such failure."<sup>27</sup> Furthermore, the IRS "shall not . . . file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section" or impose a "levy on any such property with respect to such failure."<sup>28</sup> All of these restrictions undermine the claim that, because the penalty is inserted into the I.R.C., the penalty is a garden-variety tax.

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21. U.S. CONST. art. I, § 8, cl. 1.

22. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of Titles 26 and 42 U.S.C.).

23. *See id.* § 1501, 124 Stat. at 244-45.

24. *See id.*

25. 26 U.S.C. §§ 1-9834 (2006 & Supp. 2009).

26. *See* I.R.C. § 5000A(a)-(c) (West Supp. 2010).

27. I.R.C. § 5000A(g)(2)(A) (West Supp. 2010).

28. I.R.C. § 5000A(g)(2)(B)(i), (g)(2)(B)(ii) (West Supp. 2010).

Nor is this merely a matter of form. As Justice Souter explained in a 1996 case, “if the concept of penalty means anything, it means *punishment for an unlawful act or omission*.”<sup>29</sup> By contrast, Justice Souter described “a tax [as] a pecuniary burden laid upon individuals or property *for the purpose of supporting the Government*.”<sup>30</sup> When Congress identified all the revenue-raising provisions of the PPACA for the vital purpose of scoring the Act’s costs, however, Congress failed to include *any* revenues to be collected under the penalty.<sup>31</sup>

Rather than tax everyone to provide a direct subsidy to private insurance companies to compensate them for the cost of the new regulations being imposed upon them, Congress decided to compel the people to pay insurance companies directly.<sup>32</sup> Congress expressly justified the mandate, under the Commerce Clause,<sup>33</sup> as an exercise of its regulatory powers.<sup>34</sup> If the mandate to buy insurance is unconstitutional because it exceeds the commerce power, then there is nothing for the penalty to enforce, regardless of whether it is deemed to be a tax. Thus, the unprecedented assertion of a power to impose economic mandates on the citizenry must rise or fall on whether the mandate is within the power of Congress, under the Commerce Clause, “[t]o regulate Commerce . . . among the several States,”<sup>35</sup> or whether, under the Necessary and Proper Clause,<sup>36</sup> the mandate is both “necessary and proper for carrying into Execution” its commerce power.<sup>37</sup>

The government is not claiming that the individual mandate is justified by the original meaning of either the Commerce Clause or the Necessary and Proper Clause. Instead, the government and most law professors who support the mandate have rested their arguments exclusively on the decisions of the Supreme Court.<sup>38</sup> So what does existing Supreme Court doctrine say about the scope of the Commerce Clause and the Necessary and Proper Clause?

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29. *United States v. Reorganized CF & I Fabricators, Inc.*, 518 U.S. 213, 224 (1996) (emphases added).

30. *Id.* (emphasis added) (quoting *New Jersey v. Anderson*, 203 U.S. 483, 492 (1906)).

31. *See* §§ 9000-9023, 124 Stat. at 847-83.

32. *See id.* § 1501, 124 Stat. at 242-44.

33. U.S. CONST. art I, § 8, cl. 3.

34. § 1501, 124 Stat. at 243.

35. U.S. CONST. art I, § 8, cl. 3.

36. U.S. CONST. art I, § 8, cl. 18.

37. *Id.*

38. *See, e.g.,* Renée M. Landers, ‘Tomorrow’ May Finally Have Arrived—The Patient Protection and Affordable Care Act: A Necessary First Step Toward Health Care Equity in the United States, 6 J. HEALTH & BIOMEDICAL L. 65, 76-77 (2010).

Of course, given that economic mandates have never before been imposed on the American people by Congress, there cannot possibly be any Supreme Court case expressly upholding such a power. During the New Deal, however, the Supreme Court used the Necessary and Proper Clause to allow Congress to go beyond the regulation of interstate commerce itself to reach wholly intrastate activities that substantially affect interstate commerce.<sup>39</sup> In 1995, in *United States v. Lopez*,<sup>40</sup> the Supreme Court limited the reach of this power to the regulation of economic, rather than noneconomic, activity.<sup>41</sup> Barring Congress from regulating noneconomic intrastate activity keeps Congress from reaching activity that has only a remote connection to interstate commerce without requiring courts to assess what Alexander Hamilton referred to as “the more or less of necessity or utility” of a measure.<sup>42</sup> The existing Commerce Clause and Necessary and Proper Clause doctrines, therefore, allow Congress to go this far *and no further*.

The individual health insurance mandate, however, is not regulating any economic activity. The mandate is quite literally regulating *inactivity*. Rather than regulating or prohibiting economic activity in which a citizen voluntarily *chooses* to engage—such as growing wheat, operating a hotel or restaurant, or growing marijuana—the mandate is commanding that a citizen *must* engage in economic activity. It is as though the federal government had mandated Roscoe Filburn (of *Wickard v. Filburn*<sup>43</sup>) to grow wheat or Angel Raich (of *Gonzales v. Raich*<sup>44</sup>) to grow marijuana.

The distinction between acting and not acting is pervasive in all areas of law. Individuals are liable for their actions; however, absent some preexisting duty, they cannot be penalized for inaction. Thus, in defending the mandate, the government has been forced to offer a number of shifting arguments for why—despite appearances—insurance mandates are actually regulations of activity. The statute itself speaks

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39. See, e.g., *United States v. Darby*, 312 U.S. 100, 118-19 (1941) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)) (relying on the Necessary and Proper Clause case of *McCulloch v. Maryland* to justify reaching intrastate activities that affect interstate commerce).

40. 514 U.S. 549 (1995).

41. *Id.* at 567-68; see also *United States v. Morrison*, 529 U.S. 598, 611 (2000).

42. Alexander Hamilton, *Opinion of Alexander Hamilton, on the Constitutionality of a National Bank*, in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 95, 98 (M. St. Clair Clarke & D. A. Hall eds., Augustus M. Kelley Publishers 1967) (1832).

43. 317 U.S. 111 (1942).

44. 545 U.S. 1 (2005).

of regulating “decisions” as though a decision is an action.<sup>45</sup> Expanding the meaning of “activity” to include decisions not to act, however, erases the distinction between acting and not acting. This expansion would convert all decisions not to sell one’s house or car into economic activity that could be regulated or mandated if Congress deemed the expansion convenient to its regulation of interstate commerce.

The government also claims that it is regulating the activity of obtaining health care, which it says everyone eventually will seek.<sup>46</sup> While the government could try to condition the activity of delivering health care on patients having previously purchased insurance, the PPACA did not do this.<sup>47</sup> The fact that most Americans will seek health care at some point or another does not convert their failure to obtain insurance from inactivity to activity and so does not convert the mandate to buy insurance into a regulation of activity. For this reason, the government primarily relies not on the claim that decisions are activities or that Congress is regulating the activity of seeking health care but on a proposition that has yet to be accepted by a majority of the Supreme Court: Congress may do anything that it deems to be “necessary to a broader scheme” of regulating interstate commerce—in this case, the regulation of the insurance companies under the commerce power.

Yet there is no such existing doctrine. The government’s theory is based on a concurring opinion by Justice Antonin Scalia in the 2005 medical marijuana case of *Gonzales v. Raich*<sup>48</sup>—a lawsuit this Author brought on behalf of Angel Raich and argued in the Supreme Court.<sup>49</sup> Justice Scalia’s theory, in turn, rests on a single sentence of dictum in *Lopez*.<sup>50</sup>

Whenever a majority of the Supreme Court eventually decides to allow Congress to regulate noneconomic activity because doing so is essential to a broader regulatory scheme, the Supreme Court will need to limit this doctrine, to avoid an unlimited power in Congress. If that day comes, the Supreme Court need only look back to see that every exercise

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45. See § 1501(a)(2)(A), 124 Stat. at 243 (“The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.”).

46. See § 1501(a), 124 Stat. at 242-44.

47. See Pub. L. No. 111-148, 124 Stat. 119.

48. 545 U.S. 1 (2005).

49. See *id.* at 37 (Scalia, J., concurring) (“Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.”).

50. See 514 U.S. at 561 (noting that the Gun Free School Zone Act was “not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated”).

of the Commerce Clause and the Necessary and Proper Clause has involved the regulation of voluntary activity.<sup>51</sup> Barring Congress from reaching inactivity prevents it from exercising powers that are even more remote to the regulation of interstate commerce than is the regulation of noneconomic activity.

Look at what is happening here. Congress exercises its commerce power to impose mandates on insurance companies and then claims these insurance mandates will not have their desired effects unless it can impose mandates on the people, which would be unconstitutional if imposed on their own. By this reasoning, Congress would now have the general police power the Supreme Court has always denied it possessed. All Congress needs to do is adopt a broad regulatory scheme that will not work the way Congress likes unless Congress can mandate any form of desired private conduct.

What limiting principle is offered by the government to this new claim of federal power under the Necessary and Proper Clause? The government's only response, to date, is that health care is somehow different than other types of goods and services. This argument takes a number of different forms, but most commonly it is claimed that because everyone will one day need health care and may not be able to afford it when that day arrives, and because emergency rooms are obligated by law to provide care regardless of ability to pay, it is necessary to require that all persons purchase health insurance today to avoid shifting costs to others.

There are many serious factual problems with this analysis, but even if we assume it is entirely accurate, the government has not identified any *constitutional* principle to differentiate health care—or health insurance—from any other activity that Congress may want to mandate or conscript the American people to perform in the future. Without more, a factual distinction is not a constitutional principle. If the Supreme Court upholds the power to impose insurance mandates on the people, in the future the Supreme Court will never evaluate the next use of economic mandates to see if that circumstance is similar to or different from health care.

For nearly two hundred years, the Supreme Court has avoided making any such factual distinctions in favor of deferring to Congress's assessment of the facts. Lacking any limiting *constitutional* principle, once the power to conscript Americans to enter into contractual relations with private companies is accepted, it will be accepted for any circumstances that Congress deems convenient to its regulation of the national

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51. See, e.g., *Morrison*, 529 U.S. 598; *Lopez*, 514 U.S. 549.

economy. This would fundamentally reverse the relationship of American citizens to the federal government. Americans would no longer be citizens in the fullest sense of the word; they would be subjects.

Thus, whenever defenders of the insurance mandate say “health care is different,” this question should be asked: “What *constitutional* limitation are you proposing for this power?” If their only reply is the protection of liberty in the Due Process Clause,<sup>52</sup> then they have now avoided the question by changing the subject. They are actually claiming that the commerce power is limited only by guaranteed rights—the very same rights that limit the state’s plenary police power. This answer is like saying, “Well, the First Amendment<sup>53</sup> is a limit on the commerce power.”

Any answer based on due process or liberty is actually a refusal to provide any limit to Congress’s enumerated powers. Since a state’s police power is also limited by the Due Process Clause of the Fourteenth Amendment,<sup>54</sup> in reality, defenders of the mandate are claiming that the powers of Congress *are just as broad as the police power of the states*. That is, if the only limit on Congress’s power is the same as the limit on state power, then the two powers have the same scope. This, however, is a proposition that has always been rejected by the Supreme Court. As Chief Justice Rehnquist wrote in *Lopez*, “We start with first principles. The Constitution creates a Federal Government of enumerated powers.”<sup>55</sup> Chief Justice Rehnquist then quoted James Madison: “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”<sup>56</sup>

In addition, law professors know, even if the American people do not, that under current constitutional doctrine the Due Process Clause is not construed to be an open-ended protection of liberty. Instead, the Supreme Court now construes the Due Process Clause to protect only a very few specifically defined rights, none of which would apply to the right to refrain from doing business with private companies.<sup>57</sup> Therefore, when defenders of the mandate give this answer, what they are

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52. U.S. CONST. amend. V.

53. U.S. CONST. amend. I.

54. U.S. CONST. amend. XIV.

55. 514 U.S. at 552.

56. *Id.* (internal quotation marks omitted).

57. See generally Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479 (2008) (explaining how the Supreme Court avoids recognizing rights as “fundamental” so as to avoid protecting liberty under the Due Process Clause).

really saying is that the enumerated powers scheme in Article I of the Constitution<sup>58</sup> provides no constraint whatsoever on the powers of Congress.

Because this theory of Congress's implied power would lead to a general federal police power, it would, in the words of Chief Justice Marshall in *McCulloch v. Maryland*,<sup>59</sup> not "consist with the letter and spirit of the constitution," and would therefore be improper.<sup>60</sup> In *Florida ex rel. Bondi v. United States Department of Health & Human Services*,<sup>61</sup> Judge Vinson held that "the individual mandate falls outside the boundary of Congress' Commerce Clause authority and cannot be reconciled with a limited government of enumerated powers. By definition, it cannot be 'proper.'"<sup>62</sup> In other words, because the rationale offered to justify the mandate would lead to a general federal police power, such a law cannot be a proper exercise of congressional power.

This is but one reason why the insurance mandate, however necessary it might be, is an improper means to the regulation of interstate commerce. In 1997 the Supreme Court struck down a mandate that local sheriffs run background checks on purchasers of firearms as part of a broader scheme regulating the sale of guns that Congress enacted using its commerce power.<sup>63</sup> In *Printz v. United States*,<sup>64</sup> the Supreme Court held that this mandate on state executives unconstitutionally violated the Tenth Amendment<sup>65</sup> and the sovereignty of state governments.<sup>66</sup>

Writing for the Supreme Court, Justice Scalia rejected the government's contention that because the background checks were necessary to the operation of the regulatory scheme they were justified under the Necessary and Proper Clause.<sup>67</sup> After memorably calling the Necessary and Proper Clause "the last, best hope of those who defend ultra vires congressional action,"<sup>68</sup> Justice Scalia concluded, "When a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected" in the Tenth Amendment and other constitu-

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58. U.S. CONST. art. I.

59. 17 U.S. (4 Wheat) 316 (1819).

60. *Id.* at 421.

61. No. 3:10-cv-91-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011).

62. *Id.* at \*33.

63. *Printz v. United States*, 521 U.S. 898 (1997).

64. 521 U.S. 898 (1997).

65. U.S. CONST. amend. X.

66. *Printz*, 521 U.S. at 935.

67. *Id.* at 923.

68. *Id.*

tional provisions, “it is not a ‘La[w] . . . *proper* for carrying into Execution the Commerce Clause,’ and is thus, in the words of The Federalist, ‘merely [an] ac[t] of usurpation’ which ‘deserve[s] to be treated as such.’”<sup>69</sup>

Just as commandeering state governments is an unconstitutional infringement of state sovereignty, commandeering the people violates the even more fundamental principle of *popular* sovereignty. After all, the Tenth Amendment states, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*.”<sup>70</sup>

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. This makes a challenge to the insurance mandate more likely to succeed. If the Supreme Court strikes down the individual insurance mandate, however, the Supreme Court may also have to strike down the mandates imposed on insurance companies because the PPACA does not include the normal severability clause that would let the remainder stand if any part is invalidated. The very reasons why the government argues that the individual mandate is essential to implement the insurance regulations are why the mandate is not severable. Judge Vinson ruled as such in Florida.<sup>71</sup>

I am now increasingly coming to believe that if the administration fears that the legal challenge to the mandate might succeed, the administration will agree to its repeal and replacement before the constitutional challenge to the mandate reaches the Supreme Court. If the challenges do reach the Supreme Court during its next term, however, as now seems likely, I think there may well be five votes for the proposition that economic mandates are simply not within the limited and enumerated powers of Congress. The American people are not subjects who must perform any action that Congress deems convenient to its regulation of interstate commerce. They are citizens whose powers are as much reserved by the “letter and spirit” of the enumerated powers scheme as are the states. As you watch these lawsuits develop, you should remember that hanging in the balance is nothing less than the ultimate sovereignty of the American people.

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69. *Id.* at 923–24 (alterations in original).

70. U.S. CONST. amend. X (emphasis added).

71. *Bondi*, 2011 WL 285683, at \*39.

## **A Defense of the Constitutionality of the Individual Mandate**

**by Erwin Chemerinsky**

Under current constitutional law, I do not think this is a close question. It is quite clear that this law is constitutional because it exercises Congress's power. Lest this be taken as the observation of a liberal law professor, Charles Fried—whom no one would call a liberal law professor, former Solicitor General in the Bush Administration—said on Fox television that he had recently been to Australia and purchased a kangaroo hat, and he would eat that hat if the Supreme Court were to declare this law unconstitutional. While I do not find a hat made out of kangaroo skins to be politically correct, and I would be amused to watch Professor Fried eat the hat, I think he is going to be spared this indigestion. He is absolutely right that it is hardly a colorable claim that this law is unconstitutional.

Since 1937, the Supreme Court has struck down no major social program. In fact, you have to go back to when the Supreme Court was invalidating New Deal legislation. I do not think the Supreme Court is going to start here by striking down the health care legislation. In fact, to strike down the health care legislation would require the Supreme Court to pull the threads of many different aspects of post-1937 constitutional law. The temptation might be to say, "Well, there are five conservative Justices; maybe they are not willing to depart from much of post-1937 constitutional law." But remember, so much of the conservative rhetoric over the last several decades has been against judicial activism. It would be an enormous act of judicial activism to strike down this legislation.

I think the real objection to the individual mandate has nothing to do with the scope of Congress's power. It is really an objection to forcing people to buy insurance if they do not want to buy insurance. There is an unarticulated sense that individuals should have a liberty interest to not have health insurance if they do not want to. But not even the strongest opponents of the legislation make that argument, because in post-1937 constitutional law, that is not a colorable argument. The Supreme Court has made it clear in terms of due process that the government can regulate the economy so long as it has a rational basis for doing so. Certainly, Congress has a legitimate interest in making sure that everybody in the country has health care, and it is reasonable to require that everybody either purchase it or pay something to cover the costs.

The reality is everyone is going to need health care at some point in their life. If somebody has a communicable disease, the government can require that it be treated. If somebody is in an automobile accident, they will be taken to the local emergency room and provided treatment. So, requiring that everybody have health insurance is certainly reasonable to meet post-1937 due process requirements.

That, then, is not the basis for the challenge. As Professor Barnett says, the focus of the lawsuits has been on whether or not the individual mandate fits within the scope of Congress's authority. Like Professor Barnett, I want to talk about the Commerce Clause and the Necessary and Proper Clause, but I will come to a very different conclusion.

In terms of the Commerce Clause, I think the one thing that Professor Barnett and I can agree to is the test that the Supreme Court has followed since *United States v. Lopez*<sup>72</sup> in 1995, and it is one familiar to all of us. The Supreme Court there said that Congress can act under the Commerce Clause in three circumstances. First, Congress can regulate the channels of interstate commerce; second, Congress can regulate the instrumentalities of interstate commerce and persons or things in interstate commerce; and, third, Congress can regulate activities with a substantial effect on interstate commerce.<sup>73</sup> The Court clarified that Congress can regulate economic activities which, taken cumulatively, have a substantial effect on interstate commerce.

I want to focus initially, as Professor Barnett does, on the third prong of the test. The one thing that Professor Barnett omits, and which was also omitted by the federal district court in Virginia that struck down the plan, is that the Supreme Court has said that Congress can act under the Commerce Clause so long as it has a rational basis for believing that one of these three requirements is met. So, as to the third prong of the test, in *Gonzalez v. Raich*<sup>74</sup> the Supreme Court specifically said Congress may act so long as it has a rational basis for believing that it is regulating economic activities that substantially affect interstate commerce.<sup>75</sup> This tremendously lessens the burden on the government because the rational basis test is so deferential. And I find it striking that when the federal district court in *Virginia v. Sebelius*<sup>76</sup> granted summary judgment to the challenges, it did not mention this aspect of *Gonzalez v. Raich*. This language of Congress only needing a rational basis is not new to *Gonzalez v. Raich*. It goes back to cases like

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72. 514 U.S. 549 (1995).

73. *Id.* at 558-59.

74. 545 U.S. 1 (2005).

75. *Id.* at 2-3.

76. 702 F. Supp. 2d 598 (2010).

*Heart of Atlanta Motel, Inc. v. United States*<sup>77</sup> and *Katzenbach v. McClung*.<sup>78</sup>

So, the question is whether Congress has a rational basis for believing that an individual mandate is economic activity that has a substantial effect on interstate commerce? Is it economic activity? Professor Barnett, like the federal district court in Virginia, implicitly assumes that economic activity requires that there be an economic transaction. The implicit argument is that Congress can regulate only economic transaction activity, but that is just not so. Take *Gonzalez v. Raich*. There, the Supreme Court said growing a product that is part of a larger crop that is bought and sold in interstate commerce is economic activity.<sup>79</sup> *Gonzalez v. Raich* changed the law because it broadened what counts as economic activity. Economic activity includes Angel Raich growing marijuana for her own home consumption and use.

In fact, lower courts have consistently recognized, even since *Lopez*, that economic activity does not require an economic transaction. Take as an illustration the Federal Drug Free School Zone Act<sup>80</sup> that makes it a federal crime to have illegal drugs within 1000 feet of a school. Every federal district court found that this was constitutional, even after *Lopez*. Possessing drugs is economic activity because there is a relationship of drugs to the overall economy. As another example, the federal law prohibiting carjacking was adopted by Congress under its Commerce Clause authority. By definition, there is no economic activity in the sense of a commercial transaction, but every lower court that has considered the federal carjacking law<sup>81</sup> has held it to be constitutional.

From this broad perspective of what counts as economic activity, the individual mandate clearly fits within the definition. Whether a person purchases or does not purchase health care is economic activity. The act of purchasing health care is, by definition, economic activity. Congress, here, is compelling economic activity. Even the choice to not purchase health care is economic activity because if a person makes a choice not to purchase health care, the person is making the economic decision to purchase something else or save the money—it is still economic activity. Put simply, if Angel Raich growing marijuana for her own home consumption is economic activity, then certainly the choice whether to engage in an economic transaction to buy or not buy health care is economic activity as well.

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77. 379 U.S. 241 (1964).

78. 379 U.S. 294 (1964).

79. *Raich*, 545 U.S. at 25.

80. 21 U.S.C. § 860 (2006).

81. 18 U.S.C. § 2119 (2006).

The other part of the test is that the activity has to have a substantial effect on interstate commerce. The health care industry is about \$800 billion in the United States economy, and that says that what Congress is doing here clearly does have a substantial effect on interstate commerce. So, just as Angel Raich growing marijuana for her own consumption or Filburn growing wheat for his family to eat is economic activity that Congress can regulate, so is this.

Now, what Professor Barnett kept saying in his presentation and what was featured in the briefs of those challenges is that this law is unprecedented, that Congress for the first time is compelling economic activity. That is simply wrong. Consider, for example, the Civil Rights Act of 1964. Title II requires that hotels and restaurants not discriminate based on race. In other words, hotels and restaurants that do not want to accommodate or serve African customers, who want to refrain from economic transactions, are compelled to engage in an economic transaction. That law is compelling economic behavior, and, as you know, the Supreme Court in *Heart of Atlanta Motel, Inc. v. United States* and *Katzenbach v. McClung* upheld it as constitutional, and in every subsequent Commerce Clause case, the Court has sided with those decisions approvingly.

There are other instances where Congress has compelled economic activity. A case that I think is somewhat relevant here but that has not been cited is *Johanns v. Livestock Marketing Ass'n*.<sup>82</sup> Congress required that every cow producer pay a \$1.00 fee for every head of cattle into a fund to be used for commercial advertising to encourage beef consumption. Congress was forcing an economic transaction—paying in the money for the purpose of other economic transactions, commercial advertising. The Supreme Court upheld the law as constitutional. Think of the federal pollution control laws,<sup>83</sup> all of which were adopted by Congress under the Commerce Clause authority. Every time a business or industry is required to put pollution control devices in, they are forced to purchase the devices and engage in economic activity. So, it is just wrong to say that Congress never compels economic activity.

Professor Barnett invokes *Lopez* and *Morrison*, but this is far different from those cases. *Lopez* was about a gun near a school; *Morrison* was about a sexual assault. Those are far more removed from the American economy than an almost trillion-dollar industry, the health care industry. Here, as I said, there is an economic transaction going on, albeit one that is being forced by Congress.

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82. 544 U.S. 550 (2005).

83. 42 U.S.C. §§ 7401-7671 (2006).

I want to address, as Professor Barnett did, a second argument, the Necessary and Proper Clause. Professor Barnett quite correctly says that the Supreme Court has held since the 1940s that the insurance industry is interstate commerce. If that is so, then Congress can regulate the insurance industry to make sure that everyone in the country has health insurance. By definition, I think it would be found to be a legitimate government interest; maybe even a compelling government interest under strict scrutiny. If Congress can do that, then the Necessary and Proper Clause lets Congress take any steps that are reasonably related to carry out that objective.

As recently as June 2010 in *United States v. Comstock*,<sup>84</sup> the Supreme Court strongly reaffirmed the scope of Congress's authority under the Necessary and Proper Clause. The Supreme Court once more said Congress can take any actions that are reasonably necessary to carry out its authority. Congress can reasonably believe that requiring that every person have health insurance is reasonably necessary in order to achieve its goal of making sure that everybody has health insurance. Congress made elaborate findings that, unless everybody has health insurance or pays a fee, the system will not work. So, I think the Necessary and Proper Clause provides a separate independent basis to find that this is within the scope of Congress's authority. What is striking about this argument is it focuses more on the second prong of the *Lopez* test than the third because the second prong of the test says Congress may regulate activities in interstate commerce. The insurance industry is interstate commerce, and Congress can regulate it under the Necessary and Proper Clause.

There is yet another argument apart from the Commerce Clause, and that is Congress's authority for taxing and spending. Congress has required that everybody purchase health insurance or pay a monthly fee that is going to be collected by the IRS. I think there is a very strong argument that this is a tax rather than a penalty, and as a tax, it becomes permissible. Remember, since 1937 the Supreme Court has struck down no federal tax spending program as exceeding the scope of Congress's authority.

As I said, I think in order for the Supreme Court to find this law unconstitutional, it would have to unravel so much of post-1937 constitutional law, and there is no indication whatsoever that the Supreme Court is ready or willing or likely to do this.

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84. 130 S. Ct. 1949 (2010).

## Health Care Reform, the Spending Clause, and Dole's Restrictions

by David G. Oedel

I am here to discuss a constitutional problem with the Health Care Reform Act<sup>85</sup> that so far has gotten little attention and that has not yet been discussed by our other panelists. The question is whether the federal government's expansion of Medicaid is a coercive exercise of federal power in violation of the Spending Clause of the United States Constitution.<sup>86</sup> This is one of the two main arguments being pressed by the twenty states<sup>87</sup> in the Florida litigation challenging the constitutionality of health care reform.<sup>88</sup> It is an argument that I think you're likely to hear more of in the future. Although I am a deputy special attorney general for Georgia in that case, I speak here in my personal capacity as a constitutional law professor at Mercer University, and my views do not necessarily reflect those of any party.

Let me begin by outlining how Medicaid is being transformed by health care reform. Basically, eligibility for Medicaid under the Act is being expanded by millions of people and now will reach people who are substantially above the federally-specified poverty line.<sup>89</sup> Medicare is exclusively a federal program; Medicaid, on the other hand, is a joint program with the states. It is the occasion for the single largest slug of federal funding going to the states.<sup>90</sup> It is a sum that is larger than federal funding to the states for transportation and education combined. Under the Health Care Reform Act, the federal funding for Medicaid appears likely to soon be more than half of all federal funding to the states (it had been about 40% before health care reform). In 2010

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

86. U.S. CONST. art. I, § 8, cl. 1.

87. These states include Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Indiana, Idaho, Louisiana, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Pennsylvania, South Carolina, South Dakota, Texas, Utah, and Washington. *20 States Prepare for Day in Court Against Health Care Law*, FOXNEWS.COM (Sept. 13, 2010), <http://www.foxnews.com/politics/2010/09/13/states-prepare-day-court-health-care-law/>.

88. *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011).

89. Persons with incomes up to 133% of the "poverty" designation will be covered under the changes to Medicaid beginning January 1, 2014. Patient Protection and Affordable Care Act § 2001(a)(1), 124 Stat. at 271.

90. "Medicaid is the single largest Federal grant-in-aid program to the States, accounting for over 40[%] of all Federal grants to States." H.R. 985, 109th Cong. § 2(13) (2005), <http://www.gpo.gov/fdsys/pkg/BILLS-109hr985ih.pdf>.

Medicaid cost the federal government about \$289 billion according to the federal government's own estimates—more than an 11% increase from 2009, and these costs were incurred even before some of the costliest changes to Medicaid go into effect in 2014. So far health care reform seems to have had no dampening effect on Medicaid costs. Meanwhile, Medicaid is also a large and growing part of the typical state's own budget. On average in 2006, even before recent increases in the costs of Medicaid, states were spending about 17% of their own state revenues each year to fund their share of Medicaid.<sup>91</sup> Under health care reform, Medicaid's expansion will initially be funded by the federal government, but even if Medicaid were otherwise staying level (not growing by more than 10% a year because of lack of cost controls in the classic system), states will soon be spending more of their own revenues to fund 10% of the expansion or possibly more in six years, whatever that expansion turns out to be.

The twenty (now twenty-six) states in the Florida case are not arguing that some reform of Medicaid is unwarranted. Rather, the argument is about the unconstitutionally heavy-handed way the federal government chose to force these particular changes on the states. Those states are supposed to be partners in Medicaid, but they were basically shut out of the reform even though their own fiscs were already being depleted by Medicaid's runaway costs. Those fiscs are expected to be further raided by the federal government to help fund the new expansion of Medicaid.

Let me give you some of the deep constitutional background to the states' constitutional challenge to Medicaid. According to Article I, section 8 of the United States Constitution, "The Congress shall have Power [t]o . . . provide for the common Defence and general Welfare of the United States . . . ."<sup>92</sup> Throughout our nation's history, this clause has been understood to permit Congress the power only to spend for the "general welfare" of the nation as a whole and not for the benefit of some local state administrations to the exclusion of others. Justice Story, for

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91. Georgetown University Health Policy Institute Center for Children and Families, *Medicaid and State Budgets: Looking at the Facts*, GEORGETOWN UNIVERSITY, <http://ccf.georgetown.edu/index/cms-filesystem-action?file=ccf%20publications/about%20medicaid/nasbo%20final%205-1-08.pdf> (last visited Mar. 10, 2011). The Georgetown study indicates that 16.8% of the states' general fund budgets were devoted to Medicaid in 2006 and that Plaintiff States overall have similar characteristics, some devoting more and others less than average. Most recent data for 2010 suggests that the present level of state spending is 21% of state budgets overall. Peter Suderman, *ObamaCare and the Medicaid Mess*, WALL ST. J., Feb. 15, 2011, available at <http://online.wsj.com/article/SB10001424052748703843004576138682854557922.html>.

92. U.S. CONST. art. 1, § 8, cl. 1.

example, was insistent on this view of the Spending Clause in his Commentaries.<sup>93</sup>

Of course, the Spending Clause in Justice Story's day was not the major tool of congressional expansion it has become since the advent of the income tax by ratification of the Sixteenth Amendment<sup>94</sup> in 1913 and the expansion of federal spending during the New Deal. But the basic constitutional architecture with respect to congressional limits on spending has been left untouched. There was little occasion for testing the outer bounds of the Spending Clause until the New Deal, when key new areas of federal spending were upheld—social security in *Helvering v. Davis*<sup>95</sup> and unemployment insurance in *Steward Machine Co. v. Davis*.<sup>96</sup>

In upholding the federal spending on unemployment insurance in *Steward Machine*, Justice Benjamin Cardozo, writing for the Court, predicted that the spending power would reach its limit one day when the federal government's coercive use of the purse would allow the federal government to overrun the states.<sup>97</sup> In his eloquent words, Justice Cardozo called that the point at which “pressure turns into compulsion.”<sup>98</sup> The twenty states in the Florida litigation believe that a prime case of compulsion is now squarely confronting the nation, and the face of this compulsion is health care reform in the coercive design of the expansion of Medicaid.

Of course, the federal government has a different view, and I would like to summarize briefly here three of its key points while acknowledging that there is much more briefing on the subject. First, the federal government now in court says that the states are free to opt out of the Medicaid changes if they want, even if the statute itself makes no mention whatever about that theoretical possibility. Second, the federal government points out that no case of spending coercion has yet been

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93. Although Story sided with Hamilton over Madison on whether Congress could spend for some unenumerated purposes, Story simultaneously insisted that any such purposes still must be for “general,” not parochial “state administration,” purposes: “Have congress a right to raise and appropriate the public money to any, and to every purpose, according to their will and pleasure? They certainly have not. The government of the United States is a limited government, instituted for great national purposes, and for those only.” JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 692-93 (Charles C. Little & James Brown eds., 2d ed. 1851). According to Justice Story, on whom the defendants rely, Congress would be beyond its power “to apply money in aid of the state administrations, for purposes strictly local . . . .” *Id.* at 693.

94. U.S. CONST. amend. XVI.

95. 301 U.S. 619, 644-45 (1937).

96. 301 U.S. 548, 598 (1937).

97. *Id.* at 589-90.

98. *Id.* at 590.

decided either in general or in the specific context of prior expansions of Medicaid. Third, the federal government questions whether a coercion case can even be justiciable because it may implicate political questions.

Most of the argument in the twenty-state litigation about Medicaid is being framed by a case about Spending Clause limits that did reach the Supreme Court of the United States twenty-five years ago and is arguably the last word on the subject from the Court. That 1987 case was *South Dakota v. Dole*.<sup>99</sup> In *Dole* South Dakota challenged whether the federal government could threaten to withhold 5% of highway funding from South Dakota if it did not change its nineteen-year-old drinking age to a twenty-one-year-old drinking age.<sup>100</sup> The Court held that merely withholding 5% of an already modest allocation of highway funding was only a form of “relatively mild encouragement” and not coercive.<sup>101</sup>

In the Florida case, though, the states are facing a catastrophic 100% loss of all federal funding for Medicaid, by far the single largest federal transfer to the states. *Dole* is usually cited for a well-known dissent by Justice O'Connor about the degree of attenuation between the purpose of the funding and the condition that is being imposed,<sup>102</sup> but the twenty states are not primarily relying on that part of the opinion; rather, they are relying on the majority's general outline of the restrictions on the spending power. Justice Rehnquist, writing for the Court in *Dole*, quoted Justice Cardozo's prediction in *Steward Machine* about the possibility of persuasion turning into compulsion.<sup>103</sup> The Court in *Dole* made no mention of any justiciability problems with making such a declaration in an appropriate case someday. Moreover, the majority in *Dole* articulated four “general restrictions” on the spending power.<sup>104</sup>

The first of those general restrictions is that congressional spending must be for the general welfare.<sup>105</sup> Now, the Court in *Dole* recognized that Congress is usually in the position of defining what is in the general welfare. But that is not always the case. Sometimes Congress can go off on tangents that strain credulity on the subject and can

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99. 483 U.S. 203 (1987).

100. *Id.* at 205, 211.

101. *Id.* at 211-12.

102. *Id.* at 215 (O'Connor, J., dissenting).

103. *Id.* at 211 (quoting *Steward Mach.*, 301 U.S. at 590) (majority opinion).

104. *Id.* at 207.

105. *Id.* Professor Barnett and I recently wrote an op-ed in the *Wall Street Journal* that further elaborates on this argument. Randy E. Barnett & David G. Oedel, Op-Ed., *ObamaCare and the General Welfare Clause*, WALL ST. J., Dec. 27, 2010, <http://online.wsj.com/article/SB10001424052748703581204576033862848034544.html>.

become “arbitrary” in the words of Justice Cardozo.<sup>106</sup> It is not enough to say that the 1936 case of *United States v. Butler*,<sup>107</sup> in which the Supreme Court held that the spending power reaches subjects not otherwise in the enumerated powers of Congress, justifies substantially problematic conceptions by Congress of the general welfare.<sup>108</sup> Here is how Justice Cardozo described the problem:

[D]ifficulties are left when [a broader conception of the spending] power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large.<sup>109</sup>

Let me go forward from Justice Cardozo’s time to last year and the Cornhusker Kickback.<sup>110</sup> It was the unique deal offered to Nebraska if one of its senators would sign on to health care reform.<sup>111</sup> Every other state would eventually have to pay some unspecified additional amount for Medicaid’s changes, but Nebraska would get every dime of its increased costs paid.<sup>112</sup> There was outrage around the country about this provision, and it was eventually junked, but it is the kind of facially arbitrary provision that one could argue is unconstitutional because it is not within the “general” welfare. While all states were to get basically the same program, one state would have gotten a free ride when all others would have paid.<sup>113</sup> This is the kind of thing that Justice Story was talking about when he said that peculiar local benefits given to particular state administrations are not within the general welfare.<sup>114</sup> And Justice Story’s views are especially important on this point because he was also the authority that the Supreme Court relied on in *Butler*: in that case, Justice Story helped resolve the separate

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106. *Helvering*, 301 U.S. at 640.

107. 297 U.S. 1 (1936).

108. *Id.* at 85, 88.

109. *Helvering*, 301 U.S. at 640.

110. *See infra* note 113.

111. Robert Pear, *Deep in Health Bill, Very Specific Beneficiaries*, N.Y. TIMES, Dec. 21, 2009, [http://www.nytimes.com/2009/12/21/health/policy/21health care.html](http://www.nytimes.com/2009/12/21/health/policy/21health%20care.html).

112. *Id.*

113. In his final State-of-the-State address, California Governor Arnold Schwarzenegger got his biggest applause after mentioning Nebraska’s sweetheart deal in the proposed expansion of Medicaid, then saying that Senator Nelson “got the corn; we got the husk.” Steve Yeater, *Schwarzenegger: California Needs a ‘Sweetheart Deal,’ Too*, PRESCRIPTIONS: THE BUSINESS OF HEALTH CARE, N.Y. TIMES BLOG (Jan. 6, 2010, 4:04 PM), <http://prescriptions.blogs.nytimes.com/2010/01/06/schwarzenegger-california-needs-a-sweetheart-deal-too/>.

114. *See supra* text accompanying note 93.

controversy between Hamilton and Madison about whether the spending power could be used to effect purposes outside the enumerated powers.<sup>115</sup>

Furthermore, health care reform is more plainly justiciable because what passed was a sophisticated system of coercion that threatened to allow a majority of states to exploit any stray minority state and its citizens. That is different from the Cornhusker situation, in which a minority extracted something from the majority. To understand the coercive elegance of the final scheme of recent health care reform, note to begin with that every single state is already completely committed to Medicaid. This situation is unlike that in *Dole*, in which there were many states with different drinking ages, including the complaining state of South Dakota. To the contrary, in 2010 we already had 100% uniformity with respect to Medicaid prior to the passage of health care reform. Now recall that the federal government's first-line defense against the alleged coerciveness of the changes to Medicaid is that the states are supposedly perfectly free to opt out. However, if a state were to opt out, all the federal funding—more than \$5 billion for a median state—would completely disappear. Such a state would be unable to pay for its own poorer citizens' health care. Meanwhile, the funds of the U.S. taxpayers within the dissenting state would be used only to fund the poorer citizens of other states.

The coercive implications of this scheme are so obvious that even the *New York Times* admitted in an editorial that it would not be "practical" for any state to opt out of the changes to Medicaid.<sup>116</sup> Indeed, though we have twenty-plus states kicking and screaming about their objections to health care reform, not a single state has opted out. However, if any state did opt out, that action would reveal the unconstitutionality of the Act as being against the general welfare. In short, the all-in-or-all-out feature of Medicaid reform is really nothing more than a strong-arm tactic that effectively coerces every state to assent to the changes whether the state likes them or not.

Could the expansion of Medicaid have been structured constitutionally? Of course it could have: states wanting to opt out of the changes to Medicaid could have been given block grants for them to spend for the poor's health as they saw fit. We already have a system for rough justice in dividing Medicaid funding fairly among all fifty states, despite

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115. 297 U.S. at 66.

116. "It is true, as the suit contends, that it may not be practical for states to drop out of a Medicaid program that serves many of their poorest residents." Editorial, *The Legal Assault on Health Reforms*, N.Y. TIMES, Mar. 29, 2010, <http://www.nytimes.com/2010/03/29/opinion/29mon1.html?pagewanted=print>.

some differences in state incomes, under an elaborate calculus called the Federal Medical Assistance Percentage formula. But Congress did not want to give the states the chance to get their same rough share of Medicaid funding, because Congress knew perfectly well that many states would exercise the opportunity to design their own approaches to health care reform—approaches that would not continue Medicaid’s currently unbridled cost inflation and would not expand the classes of those entitled to use the most ill-conceived parts of the health care system.

As an aside, let me give you just one example of the federal government’s folly when it comes to Medicaid design—just one reason why it makes sense for states to resist expansion of Medicaid as both inhumane and inefficient. The *Journal of the American Medical Association* provides that it makes sense for people with HIV to get on the AIDS cocktail when their t-counts dip below 350. However, Medicaid makes them wait until their t-counts drop to 200, when full-blown AIDS is already there or near, and catastrophic expenses that could have been avoided are then incurred.

Let us get back to *Dole* and why its second so-called “general restriction” on the spending power is being violated by health care reform. Coming out of the *Pennhurst State School & Hospital v. Halderman*<sup>117</sup> case, which was specifically cited in *Dole*,<sup>118</sup> the second general restriction is whether a state can clearly identify its options with respect to any condition the federal government wants to encourage through its spending—in other words, this restriction is about whether any conditions imposed on the states by the federal government are clearly and unambiguously articulated.<sup>119</sup> You might have thought

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117. 451 U.S. 1 (1981).

118. 483 U.S. at 207.

119. *Halderman*, 451 U.S. at 17-18.

[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress’ power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the “contract.” There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Indeed, in those instances where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly.

that in the thousands of pages of text of health care reform, there would be some mention of what would happen to a state if it were to opt out of the changes to Medicaid. But I can assure you, as I am apparently one of the few people who actually read the Act, that there is simply no mention whatsoever of any possibility of opting out of Medicaid or what opting out might mean. Only in court does the federal government now say that a state can opt out (even if it would lose the single largest form of federal funding to the state and its citizens). Of course, it is completely pretextual to say that a state can opt out. Each state's acceptance is practically mandatory. But if we do credit the federal government's argument that any state's choice to buy into the changes to Medicaid is really a choice, then that choice can only be made knowingly if states can understand the alternative by reading the Act. And that is not currently possible.

Another of the general restrictions of *Dole* is whether other constitutional violations are implicated by the scheme of spending.<sup>120</sup> In *Dole* there was no question of general welfare or the clarity of the choice between an inconsistent drinking age and 5% of highway funding, and the Court also concluded that a twenty-one-year-old drinking age presented no other constitutional affront to anyone.<sup>121</sup>

But health care reform is a very different situation. If a state were to opt out of Medicaid, as the federal government insists that the states have a right to do under the Act, the citizens of that state would thereby be deprived of federal funding for health care within their state simply because of the happenstance of their state citizenship. This kind of discrimination against individual U.S. citizens merely because of their state citizenship would violate both the Equal Protection Clause and the Privileges or Immunities Clause of the Fourteenth Amendment.<sup>122</sup> There are constitutional affronts, too, to the Ninth Amendment<sup>123</sup> and Tenth Amendment,<sup>124</sup> as well as to the Guaranty Clause<sup>125</sup>—an inter-

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*Id.* (footnote omitted) (citations omitted); see also *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2495 (2009); *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 534 (2007); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); Nicole Huberfeld, *Clear Notice for Conditions on Spending, Unclear Implications for States in Federal Health care Programs*, 86 N.C. L. REV. 441, 453-56 (2008).

120. 483 U.S. at 208, 210.

121. *Id.* at 211.

122. U.S. CONST. amend. XIV, § 1, cl. 2, 4.

123. *Id.* at amend. IX.

124. *Id.* at amend. X.

125. *Id.* at art. IV, § 4, cl. 1.

esting suggestion made by the Supreme Court in the case of *New York v. United States*.<sup>126</sup>

Let me close with these simple observations. Back in the 1930s, when the limits on the Spending Clause were first sketched out by Justice Cardozo and his colleagues, no states were challenging the spending, and the general welfare was not disputed. Today, however, many states object and yet must still capitulate because they are being coerced by the threat that if they do not capitulate, the general welfare and the rights of their own citizens will be damaged to the point that their poorest citizens will die from lack of health care. The states simply have no choice but to assent to a plan that continues to harm their states in very serious ways, forcing them to choose to continue funding a runaway Medicaid system at ever-increasing costs to the states while teachers and police are being laid off. The states' hard budgetary choices in this era are being made in substantial part by the federal government, not by the state legislatures. And the federal government is telling the states to keep spending more and more of their own money on a wildly inefficient system of Medicaid.

This is a *prima facie* case of coercion and a Tenth Amendment violation. I respectfully suggest that it would be appropriate for courts to adjudicate disputes regarding the constitutionality of health care reform under the authority of *McCulloch v. Maryland*,<sup>127</sup> thus vindicating the principle of representation reinforcement suggested in *McCulloch* and refined by Professors Bickel and Ely.<sup>128</sup> These states and their citizens have been pressed upon perniciously by the federal government in an elaborately unconstitutional scheme. I have nothing personal against healthcare reform in theory or President Obama as a politician. I even voted for President Obama. However, this is a

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126. 505 U.S. 144, 185 (1992) (expressing sympathy with the view that “courts should address the merits of [Guaranty Clause] claims” in the context of Tenth Amendment concerns).

127. 17 U.S. 316 (1819). Even in that case, which is famed for stating a strong form of congressional power, Chief Justice Marshall was careful to note the difference between the exercise of congressional power for national rather than state-specific purposes, and he also warned that the judiciary must step in for representation reinforcement to rescue states from the threat of being treated differentially by the national government: “[T]he government of the Union . . . is the government of all; its powers are delegated by all; it represents all, and acts for all,” wrote the Great Chief. “Though any one state may be willing to control [the national government’s] operations, no state is willing to allow others to control them.” *Id.* at 405.

128. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-23 (1962) (judiciary as counter-majoritarian force); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87-88 (1980) (explaining the critical judicial role in representation reinforcement).

situation that transcends partisanship and is a critical constitutional moment for our nation, and our courts must intervene for reasons that go far beyond health care.

Thank you for this opportunity to sketch out why there may be more to the constitutional challenges to health care reform than may at first meet the eye.

*(continued on next page)*

## **Defense of the Constitutionality of Health Care Reform**

**by Gillian Metzger**

Along with the others, I want to thank David for organizing this panel. The great advantage of going last is that the terms of the debate over the Affordable Care Act's constitutionality have been established by the other panelists. As a result, I am going to target my remarks on a few key points, rather than walk through a full dress review of some of the arguments. Like the others, my focus is on existing doctrine. I completely agree with Dean Chemerinsky in thinking that the Supreme Court is not going to change the key parameters of existing analysis, but in any event, my point is that under existing doctrine the challenged provisions are constitutional.

Let me begin with the arguments for the constitutionality of the requirement that individuals purchase health insurance, and in particular, the tax power argument which we have heard reference to, but not too much discussion of, so far.<sup>129</sup> That is an argument that several courts have rejected in the litigation. My view, however, is that the tax power offers a strong basis for the minimum coverage provision and that emphasizing the tax power angle is important because it clarifies how the provision operates. The provision really operates as a tax. Failure to obtain health insurance is not made unlawful. The only consequence is that anyone who fails to purchase health insurance—and who is not exempt from the requirement or does not have insurance through another route—becomes liable for an additional amount on his or her annual tax return. There is no other enforcement. Further, this additional amount is hardly punitive. It is capped in a variety of ways, but the maximum it can ever be is basically the amount that it would cost you to buy minimal insurance on a health exchange for yourself and your family. So, at the most, it is equal to the cost individuals are avoiding by not purchasing insurance.

It is well established that the tax power is quite broad and was made intentionally so when the Constitution was drafted. The tax power represents an independent basis of constitutional authority, and the requirements the Court has imposed for what is a valid tax are quite

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129. Greater elaboration of the tax power argument is provided in the briefs I have filed along with two other constitutional law professors in support of the constitutionality of the minimum coverage requirement. The latest version of the brief, filed in the Sixth Circuit, is available on the ACA Litigation Blog run by Bradley Joondeeph, at: <http://aca-litigation.wikispaces.com/file/view/Amicus+brief+on+constitutional+law+professors.pdf>.

minimal. To come under the tax power, a measure has to serve the general welfare, have some relationship to a revenue-raising purpose, be apportioned if a direct tax and uniform if an indirect tax, and not violate any independent constitutional prohibition. I think the minimum coverage provision meets these requirements.

The courts that have rejected the tax power argument have done so pretty much entirely on the grounds that Congress did not intend the provision to be a tax but instead intended it to be regulatory, a mechanism for forcing individuals to purchase insurance, and therefore, the tax power was not invoked. This conclusion is flawed in several ways.

First, this conclusion is at odds with governing doctrine. The fact that a measure has a primary regulatory purpose is simply not a sufficient basis to pull something outside of the end of the tax power. Even if the primary purpose of a measure is regulatory, it is still potentially a valid tax. No one disputes that the primary purpose of the minimum coverage provision is to encourage people to purchase insurance, but that alone cannot preclude it from being a tax. In addition, to the extent there are cases that have emphasized regulatory purposes to disqualify measures as taxes, those decisions go back to the *Lochner* era and, moreover, were instances in which a tax was being used to pull in a detailed scheme of regulation that was otherwise wholly outside of Congress's power. That is simply not the case here; instead, the detailed requirements imposed by the Affordable Care Act, even those that are closely connected to the minimum coverage provision, such as the prohibition on insurance companies taking preexisting conditions into account in providing coverage, are amply supported by Congress's commerce, spending, and tax powers.

Second, the argument that Congress did not intend to invoke the tax power represents a misreading of the record. There is actually a lot in the record suggesting that Congress did want to invoke a tax power. It is true that the amount due is called a penalty in the final version that was enacted. It had at other times been called a tax in the legislation, and other measures in the Act are called taxes. But the important point is that there is very well-established case law holding that in the tax area, labels are not determinative. Whether or not that should be the rule, whether we should put more emphasis on whether or not Congress calls a measure a tax, is a separate question. Given the case law, however, it is very hard to conclude from the labels Congress used that it did not intend to invoke the tax power because Congress had no basis on which to know that its choice of nomenclature would be determinative.

The bigger jurisprudential issue is that the courts are putting the burden on Congress to identify the basis on which it is enacting a provision. Although the district court in Florida expressly disavowed that it was imposing a clear statement requirement on Congress, I think that is the necessary lesson from rejecting the tax power argument on the grounds that Congress did not intend the minimum coverage provision to be a tax. Putting the burden on Congress is at odds with the ordinary presumption of constitutionality that congressional statutes enjoy and the assumption that Congress would intend to measure that in an act to be sustained under any available constitutional basis. The job of the courts is not to question Congress's motive in that regard, but to simply determine whether such a basis exists.

For these reasons, I think the tax power argument is strong. Most of the attention to date, however, has focused on Commerce and Necessary and Proper Clause arguments. Again, the terms of the debate have been nicely focused by the other panelists and the ongoing litigation. No one is denying that provision of health insurance generally, or health care services, represents economic activity that Congress can regulate. Instead, the claim is that Congress cannot regulate inactivity, and failure to purchase health insurance represents inactivity. I think both of those assertions are wrong. Although I agree with Dean Chemerinsky on Congress's ability to regulate inactivity, I want to focus on the assertion that the failure to purchase health insurance represents inactivity. A basic mistake with this assertion is that it assumes that the frame of analysis should center on the decision to purchase insurance or not in a given year, rather than the wider context of accessing health care services to which any decision to purchase insurance or not is intrinsically linked.

No one buys health insurance as a goal in and of itself. We buy it to access health care, and decisions to buy health insurance represent decisions about how and when to access health care services. The key point is that individuals who are foregoing health insurance are not foregoing health care services; on the contrary, they "actively" obtain health care services. Indeed, a big part of the problem is they are obtaining services that they often cannot pay for, with the costs of this uncompensated care then shifting costs onto the health insurance system as a whole and the government. A brief filed by health economists in the Florida case identifies 60% of individuals who do not have insurance as having used health care services in a given year. Plus, there are other economic activities connected to accessing health care that the uninsured engage in, like buying medicines over the counter.

In short, as soon as you widen the frame and realize that this provision is about accessing health care services, there is clearly activity

going on. The idea that this is about inactivity is simply a mistaken framing. More generally, realizing how easy it is to see activity at issue here calls into question whether the asserted distinction between activity and inactivity is a judicially-implementable or clear distinction. Instead, the distinction is quite artificial and manipulatable. For example, if Congress simply said, "Anyone in the past who has accessed health care services or who will in the next five years must purchase insurance," there would be no doubt Congress was targeting activity. In substance, I think that is not very different from what Congress did here, given the fact that it is quite uncertain whether any particular individual is going to need health care services in any given year.

Hence, the real question is not inactivity versus activity, it is who gets to determine the scope of congressional regulation for the purpose of a constitutional challenge. The plaintiffs are offering a very narrow framing. Congress adopted a broader framing; it focused on access to health insurance and health care services generally. That broader congressional framing is clearly rational, and the *Raich* case makes clear that courts should defer to Congress's rational determinations about the scope of regulation, as opposed to accepting the framing offered by the plaintiffs. I think that same principle applies. Once Congress's framing is accepted, the provision represents a regulation of economic activity that falls easily under the commerce power.

I have a couple of comments on the Necessary and Proper Clause. One point is that frame of analysis matters here, too. If you emphasize the Scalia concurrence in *Raich*, it makes clear that Congress can reach activities in areas that might fall outside of the commerce power when necessary to make effective a wider scheme of regulation. I do not think there is much dispute about the close relationship between the requirement that you purchase insurance and the problems of implementing the core requirements of the Affordable Care Act, such as the requirements that insurers have to issue insurance without regard to pre-existing conditions and have to use community rating to set premiums rather than individuals' circumstances. All those provisions are very integrally related to the minimum coverage requirement, given the realities of adverse selection and what will happen to insurance pools without this requirement. Again, all those requirements fall under the commerce power, and the Necessary and Proper Clause should sustain the minimum coverage provision as a means of making those clear commerce regulations effective.

It is also important to note that there cannot be anything inherently improper about the idea of Congress regulating inactivity, even assuming that is what Congress is doing here. It is generally acknowledged that, in some other instances, Congress legitimately regulates

inactivity. It requires you to file tax returns, for example, and you can be required to register for the draft. Those are different enumerated powers, and these measures do not represent Commerce Clause legislation. The key point, however, is that in regulating inactivity in these instances, Congress is also relying on the Necessary and Proper Clause; requiring individuals to file tax returns is a mechanism for enforcing Congress's tax power legislation. So, if there is anything inherently improper about requiring activity when it did not exist before, those measures should also fail.

I want to strongly echo a point that Dean Chemerinsky mentioned, that animating these challenges is a particular vision of individual liberty as freedom from regulation. The enumeration of powers in the Constitution is also about protecting liberty. But the key question is which visions of individual liberty we should see as protected by the Constitution. As Dean Chemerinsky very well put it, we have long rejected the idea that freedom from regulation is a strongly protected liberty for purposes of the direct provisions of the Constitution. It makes little sense that we would build that protection from regulation into the scope of Congress's powers.

Let me say a couple of comments on the Spending Clause challenge to the Medicaid expansion. I think the claims of coercion are a very hard sell, in part because of atmospheric, such as the fact that the federal government came through with substantial—nearly a hundred percent for the first ten years—funding of the expansion of the Medicaid rolls, the fact that in the Medicaid Act there is clear notice of Congress's ability to change the terms, and the fact that Congress in the past has dramatically expanded Medicaid. All of these make the claim of coercion a hard one to win as a factual matter, but I also think it is hard as an analytic matter.

The problem is that it is very difficult to come up with a judicially-manageable standard for when changes to a spending program go too far and become coercive. For example, why is this expansion in Medicaid coercive, but not prior expansions, such as adding SSI or pregnant women and children above the poverty line? Should we measure coercion by the percentage of funding under a program that is put at risk, or the absolute amount of federal funds at issue? Or should we measure by the percentage of a state's budget that the funding represents? These are all valid alternative metrics that lead to different determinations about whether coercion exists. Of course, for some states that have already expanded their Medicaid programs to 130% of the poverty line, this expansion with the funding that came along with it was hardly coercive at all. It was actually quite supportive of their choices. And then there is the question of how to factor in the fact that

different states have different political choices when it comes to their budget. It is interesting that Florida and a number of states in the twenty-state challenge do not have a state income tax. That is a choice about how they want to fund their budgets, but how do we factor in those choices in terms of deciding whether or not it is the change in federal funds that is coercing them or their own political choices?

These problems are why the appellate courts and the Supreme Court have rejected coercion claims of this kind. I read the courts as sticking to a formalistic insistence on acceptance of conditional spending as voluntary no matter what the felt reality of the states is precisely because they do not see how they could implement a distinction between legitimate and illegitimate spending conditions. Instead, the courts have left that to political constraints, and I think they will do the same here.

The last thing I want to say goes to this question of political constraints. I think we have ignored the role that they played in the Affordable Care Act, particularly in terms of, among other things, ensuring that there would be adequate funding of the expansion of Medicaid, also in terms of how the health exchanges were structured. I disagree with the suggestion that the states were shut out of the legislative process. The states actually had their interests acceded to in a variety of ways. In fact, if you look at the Act beyond the challenged provisions, it actually contains some very interesting federalism reinforcing aspects that unfortunately have not gotten as much federalism attention, given the focus on the litigation. Thanks very much.

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**Crossing the Constitutional Line in Spending  
From Persuasion to Compulsion:  
A Reply to Gillian Metzger**

by David G. Oedel

In her remarks at the 2011 Annual Meeting of the Association of American Law Schools (AALS),<sup>130</sup> Professor Gillian Metzger of Columbia University Law School offered an interesting critique of the Spending Clause<sup>131</sup> claim now being pursued by a majority of the states in the United States in the constitutional challenge to health care reform.<sup>132</sup> The states claim that the changes to Medicaid are beyond the power of Congress to effect constitutionally under the Spending Clause of the United States Constitution because the changes are coercive and also violate the “general restrictions” identified by the Supreme Court of the United States in *South Dakota v. Dole*.<sup>133</sup>

Professor Metzger’s overriding point that the Spending Clause claim will be a “very hard sell” has subsequently been borne out by Judge Roger Vinson. Though holding the individual mandate to be unconstitutional, Judge Vinson also ruled against the states’ Spending Clause claim in *Florida ex rel. Bondi v. U.S. Department of Health & Human Services*<sup>134</sup> on January 31, 2011.<sup>135</sup> When Professor Metzger made her remarks on January 7, 2011, days before Judge Vinson’s decision (the first decision on the merits of that claim by any court hearing a

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130. See *Our Pending National Debate: Is Health Care Reform Constitutional*, 62 MERCER L. REV. 633 (2011).

131. U.S. CONST. art. I, § 8, cl. 1.

132. See *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT, 2011 WL 285683, at \*1 & n.1 (N.D. Fla. Jan. 31, 2011). The twenty-six states collectively suing the federal government over health care reform are Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Indiana, Idaho, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming. *Id.* Their co-plaintiffs include two individuals and the National Federation of Independent Business. *Id.* at \*1. The twenty states that had been litigating the case in 2010 prior to the November 2010 elections were joined in January 2011 by Iowa, Kansas, Maine, Ohio, Wisconsin, and Wyoming. See *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1127 & n.1 (N.D. Fla. 2010) (noting the twenty original plaintiffs).

133. 483 U.S. 203, 207-08 (1987).

134. No. 3:10-cv-91-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011).

135. *Id.* at \*7, \*33. Judge Vinson’s order granting summary judgment, like many of the court papers in the most prominent challenges to health care reform, is conveniently collected on the ACA Litigation Blog, at <http://acalitigation.wikispaces.com/file/view/District+Court+final+opinion.pdf>.

challenge to health care reform), she correctly predicted the general outcome of the first judicial review of the states' Spending Clause claim. Professor Metzger argued that the coercion claim is undermined factually to the extent the costs of Medicaid's changes will be disproportionately shouldered by the federal government, not the states. Professor Metzger also suggested that the final design of health care reform reflected compromises that in some ways acceded to state interests and federalism, even if the states were not at the table. As to the latter point, however, she did not articulate specifically how health care reform acceded to state interests—perhaps because, with twenty-six states suing in this action alone, that is a tough case to make.

On more legal-analytical grounds, Professor Metzger observed that “it is very difficult to come up with a judicially manageable standard for when changes to a spending program go too far and become coercive.”<sup>136</sup> According to Professor Metzger, courts have so far declined to find any conditional federal spending to be coercive (whether in earlier challenges to prior changes to Medicaid or in other settings) because of that line-drawing difficulty.

The Spending Clause claim will presumably soon be the subject of an appellate review of Judge Vinson's decision in *Bondi*, in which twenty-six states lodged and joined. Those states will offer their own arguments after appeals are filed, as will the federal government. However, writing on February 28, 2011, only as a constitutional law scholar replying to Professor Metzger, not as counsel to Georgia in the litigation or as a commenter on Judge Vinson's own decision, the Author will briefly sketch some personal reactions to Professor Metzger's specific arguments offered at the AALS 2011 annual meeting.

Professor Metzger is undoubtedly right that reasonable doubt shrouds the precise potential extent of federal raiding of the state fiscs under health care reform. She is also right that, whatever the degree of the statutorily preordained raiding of state fiscs (modest by Professor Metzger's predictions and standards), any raiding will inevitably hurt one state more than another. Some states may even view those raids to be sufferable in light of countervailing benefits.

Nonetheless, such questions are largely irrelevant to a determination of whether federal coercion of some states is occurring. One can detect the tangential, off-the-mark character of Professor Metzger's argument by recalling that it is no defense to a charge of theft that the accused stole only a little from a particular victim; a particular victim could afford to be robbed; the thief could have taken more; the thief was

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136. See Gillian Metzger, *Defense of the Constitutionality of Health Care Reform*, 62 MERCER L. REV. 633, 637 (2011).

planning to be generous with the proceeds of the theft; multiple victims may have had different circumstances both before and after the victimization; the victim might have gotten some side benefits from the victimization; or one “partner” may have consented to an intimate relationship, while another “partner” may not have consented to the same sort of relationship (with radically different legal results).

Coercion is the compulsion of another to engage in something against that other’s will, with the effect, in this constitutional setting (at least according to Justice Benjamin Cardozo), of “destroying or impairing the autonomy of the states.”<sup>137</sup> The more targeted question, therefore, unlike Professor Metzger’s question about whether the particular coercion is factually significant when even bigger things may be at stake, is whether the federal government’s changes to Medicaid have been forced upon these complaining states against their respective wills, leaving their autonomy impaired or destroyed.

These states claim that their respective wills lie trampled and impaired, yet even now the states defy the congressional act. Do they have a factually supportable claim? The fact that some states have seriously explored the possibility of opting out of the changes to Medicaid, but not a single state can see how it can responsibly opt out, suggests that the expansion of Medicaid is coercive. The fact that 100% of the states are compliant (because the states view it as such a fine program, according to President Barack Obama’s Administration’s strained characterization),<sup>138</sup> while more than 50% of that identical population of states is suing to stop the expansion, strongly suggests the presence of unconstitutional coercion. Another indication of strident state dissent is the fact that the majority of states are seeking waivers from the federal government concerning Medicaid’s expansions and cost burdens to the states after the passage of Medicaid “reform,” while the Obama Administration’s Department of Health and Human Services is questioning its own legal authority to grant waivers.<sup>139</sup>

To reiterate, because coercion is not a question of potentially modest or incidental future *effects* but instead a question of present *compulsion*,<sup>140</sup> the courts need to weigh the factual evidence of whether states

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137. Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 586 (1937).

138. See *Health Reform in Action*, WHITE HOUSE, <http://www.whitehouse.gov/health-reform> (last visited Mar. 27, 2011).

139. Sara Murray, et al., *Governors Scramble to Rein in Medicaid*, WALL ST. J., Feb. 28, 2011, <http://online.wsj.com/article/SB10001424052748704430304576170842026286166.html> (“More than half the states want permission to remove . . . people from the Medicaid insurance program. . . . [T]he Obama Administration . . . says it may lack the authority to allow such cuts.”).

140. See *Steward Mach.*, 301 U.S. at 586.

today have any meaningful choice to opt out of Medicaid's expansion when all fifty states are capitulating, yet more than twenty-six of the states are suing to stop the expansion.<sup>141</sup> That stark juxtaposition by itself strongly suggests that there is, as a factual matter, no meaningful choice for the complaining states. Furthermore, the juxtaposition suggests the presence of compulsion in an indirect form of the death penalty for citizens of those states that would have the temerity to opt out. The Obama Administration has insisted repeatedly in the Florida litigation that Medicaid clearly and unambiguously requires that no federal funding will be offered for the poor and sick of any state opting out of the changes.<sup>142</sup>

As to Professor Metzger's legal-analytical objection that there is no judicially manageable standard for distinguishing between coercive spending and other constitutionally acceptable forms of spending, Professor Metzger has at least one very strong point: No court has so far made such a ruling. This suggests that there exists a longstanding native judicial caution in the area of constitutional limits on the spending power. However, courts are generally accomplished at line-drawing—for instance, in distinguishing between unconstitutional conditions imposed by states in connection with things like public employment,<sup>143</sup> unemployment benefits,<sup>144</sup> and land use.<sup>145</sup> Courts are quite capable of drawing such lines in other settings as well—for example, allowing duress to negate a conclusion of guilt in criminal cases despite the existence of *mens rea* (as in criminal law);<sup>146</sup> distinguishing between commandeering instead of providing real options for state legislatures and executive officers (as in Tenth Amendment<sup>147</sup> jurisprudence),<sup>148</sup> and judging the difference between duress and hard bargaining (as in classic contractual analysis).<sup>149</sup> There seems to be nothing categorically different about line-drawing in this setting of the spending power than in many other parallel legal settings.

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141. See *Bondi*, 2011 WL 285683, at \*1 n.1.

142. See, e.g., Memorandum in Support of Defendants' Motion to Dismiss, *McCollum*, 716 F. Supp. 2d 1120 (No. 3:10-cv-91-RV/EMT), 2010 WL 2663348 at \*20-22.

143. See, e.g., *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

144. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963).

145. See, e.g., *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834-36 (1987).

146. See, e.g., *Dixon v. United States*, 548 U.S. 1, 7 (2006).

147. U.S. CONST. amend. X.

148. See, e.g., *New York v. United States*, 505 U.S. 144, 161-62 (1992) (commandeering of state legislature); *Printz v. United States*, 521 U.S. 898, 904-05 (1997) (commandeering of local law enforcement officers).

149. See, e.g., *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 300-03 (1942).

In fact, the federal government has itself firmly pressed the notion that duress involving the federal government is an appropriate subject for the Supreme Court to judge. In *United States v. Bethlehem Steel Corp.*,<sup>150</sup> the federal government urged the Court to weigh the federal government's own claim that it had been subjected to contractual duress in shipbuilding contracts with Bethlehem Steel entered into long before the First World War.<sup>151</sup> That case lies in fascinating juxtaposition to the present case of the expanded Medicaid "partnership" between the federal government and the states. In *Bethlehem Steel*, the Supreme Court rejected, on its face, the federal government's factual claim that it was coerced by a single corporation much smaller than the federal government itself (somewhere between a sixth and a quarter of the federal government's financial might).<sup>152</sup> Conversely, a court today might well take judicial notice that the federal government has exercised its relative muscle to coerce individual states, which on average have far less the financial size of the federal government (and even less in terms of practical might, as the states cannot engage in deficit-spending), into accepting the Medicaid expansion.

The factual financial-power disparities today between the individual states and the federal government far outstrip the disparities that gave rise to the federal government's claim of duress and coercion in *Bethlehem Steel*. During World War I (the time of the federal government's ship-building contracts in *Bethlehem Steel*),<sup>153</sup> Bethlehem Steel was considerably more financially mighty than the typical state today, as gauged by the relative size and power of such a counter-party or "partner" compared to the federal government at the respective times—Bethlehem Steel had revenue of \$2.96 million in 1917,<sup>154</sup> which was 15% of the total budgeted spending of the federal government during that war year and 27% of the budgeted tax receipts for the federal government that same year (\$1.10 billion).<sup>155</sup>

In stark contrast, in 2010, during another period of national financial exigency involving a great recession and two wars, the total budgeted spending of the federal government was \$3.55 trillion, and its revenues

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150. 315 U.S. 289 (1942).

151. *Id.* at 294-95.

152. *Id.* at 301.

153. *Id.* at 292.

154. *Bethlehem Earnings: Gross Sales for 1917 Reach Total of \$296,000,000*, N.Y. TIMES, Jan. 30, 1918, available at <http://query.nytimes.com/mem/archivefree/pdf?res=F-70617FD3B5B11738DDDA90B94D9405B888DF1D3>.

155. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, HISTORICAL TABLES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2012, at 21 (2011), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/hist.pdf>.

were \$2.38 trillion.<sup>156</sup> Meanwhile, in 2010 the average state's revenue (29.5% of which was made up of federal transfers, chief among them being transfers for Medicaid) was \$29.6 billion.<sup>157</sup> In other words, the average state today has revenue (much of that revenue from the federal government) that is about 1.2% as much as overall federal revenue and about 0.8% of federal spending. Not counting federal transfers, state revenues in 2010 were, on average, \$20.72 billion per state, which was about 0.9% of federal revenue and about 0.6% of federal spending.<sup>158</sup>

When the Court decided *Bethlehem Steel* in 1942, the federal government argued that it had been coerced under duress by an entity much smaller than itself.<sup>159</sup> Today, states (that are, on average, roughly 1% the financial size of the federal government) insist, more plausibly, that it is facially coercive for the federal government to threaten to withhold 100% of Medicaid funding from any state that might dare stray from the federal order to expand Medicaid radically. States are making this claim because federal Medicaid funding is the single largest transfer from the federal government to the states, and its disappearance could well mean death for thousands of state citizens. If the federal government could seriously press the issue that it was being coerced by Bethlehem Steel (which was threatening to cut off nothing from the federal government other than Bethlehem Steel's possible future services in building steel ships) in 1942,<sup>160</sup> then the federal government in 2011 cannot reasonably claim that the judiciary is incapable of evaluating the claims of these individual states that they have been threatened by the federal government with a coercive scheme of all-in-or-all-out Medicaid expansion.

The great, prescient Justice Benjamin Cardozo saw this sort of potential lying latent in the arguments about the federal government of his own day. Justice Cardozo clearly anticipated that the Court might one day be forced to draw a line against federal coercion of the states, even though he ruled with the Court that the questions of his day—for instance, whether federal spending on state unemployment insurance was coercive, and whether spending on social security was within the general welfare—did not necessitate an articulation of those constitution-

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156. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, A NEW ERA OF RESPONSIBILITY: RENEWING AMERICA'S PROMISE 114 (2009), available at <http://www.gpo.access.gov/usbudget/fy10/pdf/fy10-newera.pdf>.

157. See NAT'L ASS'N OF STATE BUDGET OFFICERS, 2009 STATE EXPENDITURE REPORT 92-95 (2010), available at <http://www.nasbo.org/LinkClick.aspx?fileticket=w7RqO74lEW%3d&tabid=38>.

158. See *id.*

159. *Bethlehem Steel*, 315 U.S. at 294-95.

160. *Id.* at 295, 300-01.

al bounds. Justice Cardozo's own thoughtfully chosen words in both *Steward Machine Co. v. Davis*<sup>161</sup> and *Helvering v. Davis*<sup>162</sup> make plain that Justice Cardozo, at least, felt that the line-drawing exercises, both as to the idea of spending coercion and as to the related concept of the "general" welfare, might someday be unavoidable.<sup>163</sup>

In *Steward Machine*, Justice Cardozo wrote about taxing and spending for unemployment insurance as follows:

There must be a showing . . . that the tax and the credit in combination are weapons of coercion, destroying or impairing the autonomy of the states. . . . To draw the line intelligently between duress and inducement, there is need to remind ourselves of facts. . . .

. . . .  
Who then is coerced through the operation of this statute? Not the taxpayer. He pays in fulfillment of the mandate of the local legislature. Not the state. Even now she does not offer a suggestion that in passing the unemployment law she was affected by duress. . . . Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation. Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree, at times, perhaps, of fact. The point had not been reached when Alabama made her choice. We cannot say that she was acting, not of her unfettered will, but under the strain of a persuasion equivalent to undue influence, when she chose to have relief administered under laws of her own making, by agents of her own selection, instead of under federal laws, administered by federal officers, with all the ensuing evils, at least to many minds, of federal patronage and power. There would be a strange irony, indeed, if her choice were now to be annulled on the basis of an assumed duress in the enactment of a statute which her courts have accepted as a true expression of her will. . . .

[I]nducement or persuasion does not go beyond the bounds of power. We do not fix the outermost line. Enough for present purposes that wherever the line may be, this statute is within it. Definition more precise must abide the wisdom of the future.<sup>164</sup>

On the same day that the Court decided *Steward Machine*, Justice Cardozo, in *Helvering*, made parallel arguments in the context of a general-welfare discussion concerning Social Security:

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161. 301 U.S. 548 (1937).

162. 301 U.S. 619 (1937).

163. See *Steward Mach.*, 301 U.S. at 586-91; *Helvering*, 301 U.S. at 640-41.

164. *Steward Mach.*, 301 U.S. at 586-91.

Congress may spend money in aid of the 'general welfare.' There have been great statesmen in our history who have stood for other views. We will not resurrect the contest. It is now settled by decision. The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison, which has not been lacking in adherents. Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law. 'When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.'<sup>165</sup>

Justice Cardozo recognized that although line-drawing about coercive spending—like line-drawing about the meaning of the general welfare in spending—may be difficult to do in the abstract, those difficulties would melt away in the presence of facts showing coercion or facts showing that spending would be devoted to particular states' welfare instead of the general welfare of all states. The failure of coercion to have factually been shown in *Steward Machine* was clear to Justice Cardozo (writing for the Court) specifically because neither Alabama nor any other state was a party to the litigation, and all states appeared to enthusiastically welcome the unemployment insurance funding.<sup>166</sup> In the present-day

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165. *Helvering*, 301 U.S. at 640-41 (citations omitted) (quoting *United States v. Butler*, 297 U.S. 1, 67 (1936)).

166. *Steward Mach.*, 301 U.S. at 590. The Court in *Steward Machine* considered some issues common to the present challenge to health care reform, but that case is distinguishable on a number of critical fronts. The Social Security Act's, 42 U.S.C. §§ 301-1397jj (2006 & Supp. III 2009), unemployment provisions, which were challenged by a private employer in *Steward Machine*, merely "authorized an appropriation for aid to the states for the administration of their [unemployment insurance] laws. No conditions of any great moment had to be met to entitle a state law to recognition for tax-offset purposes, other than that all of the unemployment compensation funds had to be actually used for payments to unemployed workers." Edwin E. Witte, *Development of Unemployment Compensation*, 55 YALE L.J. 21, 32 (1945). As all states willingly and quickly accepted the federal funds, there was no need for a citizen from a non-accepting State to apply directly to the federal trust fund. The Court in *Steward Machine*, however, considered that alternative prospect to have been viable, unlike here as to Medicaid participation, which is all-or-nothing. Moreover, unlike here, no states in *Steward Machine* challenged the unemployment spending law, which Justice Cardozo noted carefully in his decision for the

Medicaid expansion, by contrast, there is “no reasonable possibility”<sup>167</sup> that the general welfare could be advanced if the federal government were to strip selected U.S. citizens of every dime of federal funding for Medicaid simply because their financially desperate state disagreed with the expansive nature of Medicaid reform.

The twenty-six state health care reform case is radically different by the precise factual measure used by Justice Cardozo in *Steward Machine*.<sup>168</sup> Though twenty-six states are suing to stop Medicaid expansion, despite those states supposedly having volunteered for the expansion (at least according to the Obama Administration), not one state has opted out.

Back in 1937, Justice Cardozo was willing to leave the question of coercion to the “wisdom of the future.”<sup>169</sup> Seventy-four years later that future has arrived. It falls on the successors to Justice Cardozo in the judiciary to say that this exercise of national power has gone beyond the line of a meaningfully discrete spending power.

In the Florida litigation, the Obama Administration seized on selective parts of Justice Cardozo’s statements cited above, in particular those suggesting that the courts should generally defer to Congress on spending and determinations of the general welfare.<sup>170</sup> The Obama Administration, however, over-reads those lines about presumptions and squeezes them for much more. The Obama Administration would have it that any and all questions about coercion and the general welfare are, categorically, political questions immune from judicial review.

The federal government’s retreat to the political question doctrine seems like a dubious gambit given the more recent history of the Court as to political questions. The political question doctrine has rarely been followed by the Court in its modern era, beginning with *Baker v. Carr*.<sup>171</sup> Despite a long prior history of repeatedly holding redistricting

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5-4 majority:

Who then is coerced through the operation of this statute? . . . Not the state. Even now she does not offer [such] a suggestion. . . . We cannot say that she was acting, not of her unfettered will, but under the strain of a persuasion equivalent to undue influence, when she chose to have relief administered under laws of her own making, by agents of her own selection, instead of under federal laws, administered by federal officers. . . .

In ruling as we do, we leave many questions open.

301 U.S. at 589-90.

167. *Helvering*, 301 U.S. at 641 (quoting *Butler*, 297 U.S. at 67).

168. *See Steward Mach.*, 301 U.S. at 589-90.

169. *Id.* at 591.

170. *See Memorandum in Support of Defendants’ Motion to Dismiss*, *supra* note 142, at \*38-39.

171. 369 U.S. 186 (1962).

to be a political question, the Court, beginning in *Baker*, embarked on a careful, evolving search for ever-more-perfect tests for redistricting—line-drawing in a rather literal sense.<sup>172</sup>

Whether one believes that the Court should have applied the political question doctrine in a case like *Bush v. Gore*,<sup>173</sup> even a casual Supreme Court observer can fairly note that the Court views its general role as appropriately being able to enter even the most political of thickets, especially in extreme situations in which the political process appears to have broken down. After the notoriously fractured procedure leading to the enactment of health care reform, together with the more particular sense that the states were largely excluded from any meaningful participation in deciding whether or how to expand Medicaid, it seems unlikely that the political question doctrine will prove to be an independent bar to judicial consideration of the extent of the spending power.

This prediction may be especially credible at a time when the public and the majority of states seem sour, bitter, and spitting about federal spending that may have outstripped the nation's native ability to fund that spending. In other words, it would not likely be seen by the public as fundamentally illegitimate for the Court now to suggest that Congress may finally have gone beyond its constitutional bounds in this latest congressional paroxysm of entitlement spending, especially when Congress relied in part on unwilling states to fund expansion of the Medicaid entitlement and when those states under almost any predictive scenario will have to make painful cuts in other areas to accommodate Medicaid's expansion. This is far afield from the rushed, partisan backdrop to *Bush*. Here, in the context of health care reform, the public would more likely applaud the Court for attempting to fulfill its intended role of deliberately reminding the political branches that the Constitution is not a license to obliterate the autonomy of the states through creative—more accurately, destructive—use of the spending power.

The careful, knowledgeable Professor Gillian Metzger makes good, safe points about legal precedent and has already predicted well in this emerging constitutional controversy. What she has not done quite as well is make room for the broader sweep of history that is now unfolding in the American constitutional firmament. Meanwhile, a seemingly manic and manipulative national government has gone past its own political and financial abilities to tax and spend, resorting to pressing the states to fund and follow the federal bidding against the wills of a majority of those states.

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172. *Id.* at 210-11.

173. 531 U.S. 98 (2000).

True, the states' Spending Clause argument is a sobering one—something unprecedented in the case law and something that will shift congressional practice going forward if the states' view is credited. For all its novelty though, the states' argument has deep roots, not only in specific words like “provide for,” “general welfare,” “[c]ommerce,” and “necessary and proper,”<sup>174</sup>—chosen so carefully by the brilliant framers in that hot summer of 1787—but also in the subtle, eloquent predictions of the judiciary's later luminaries like Justice Cardozo.

Contrary to its own assertions and practice, even the modern Congress does not have a blank check, payable to anyone for anything Congress might crave. Congress cannot constitutionally crowd out the autonomy and potential alternative visions of the states. The framers imagined (and the ratifiers likely expected) that they were imposing real, practical limits on federal spending. They all deeply respected the potential of states to add to the national experiment without being bullied into bankruptcy or pauper-hood by a central authority like King George—or Queen Fed-Med.

This case tests the federal spending limits. The states can and will win this challenge in the end, but only if judges and justices like Benjamin Cardozo rise to fulfill their roles in helping the nation think through and resolve one of the most central constitutional challenges of our own time.

*(continued on next page)*

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174. See U.S. CONST. art. I, § 8, cl. 1, 3, 18.

### AALS Hot Topic Panel Question & Answer Session

*PROFESSOR JOONDEPH:* We would now like to open this discussion for questions, and I will be repeating them for purposes of the podcast.

*AUDIENCE QUESTION:* I have a question on economic activity. Erwin suggested that Randy was implicitly relying on a transaction test for activity and that something was economic activity only if it involved an economic transaction. So I'd like to ask Randy whether or not that is, in fact, an implicit premise of his argument. The second question relates to the idea that framing is important. The question is whether or not the approach that any framing for which Congress could have a rational basis is consistent with the outcomes in *Lopez* and *Morrison*, given that Congress could rationally have seen *Lopez* as about the economics of education at large, and given that in *Morrison* they could have seen the statute as framed in relationship to the economics of women's role in the economy and their ability to use transportation and travel freely.

*PROFESSOR JOONDEPH:* The first question, to Randy in particular, is whether, under his view of "economic activity," that category only includes activities involving an economic transaction. And the second question is to everyone: whether the rational basis test really applies across the board in light of *Lopez* and *Morrison*.

*PROFESSOR BARNETT:* No, transaction is not a word that enters into the doctrine at all; activity is the word that's used time and time again in every single case involving this sort of thing. In the case of *Raich*, Angel was certainly engaged in activity when she possessed medical marijuana and when she used it and when it was grown for her. It is not all that difficult a distinction to make. In fact, we make it all the time. I realize that, as law professors, we're used to questioning the act-omission distinction, the difference between doing something and not doing something. It's something we're accustomed to doing in class, but in the real world, we make this distinction all the time. It's really essential to moral responsibility. We're responsible for what we do; we're not responsible for what we don't do unless we have a pre-existing duty that we must do something.

So, that is a pretty fundamental distinction. It's the difference between telling Angel that she cannot engage in an activity—the activity of cultivating cannabis for her own use—and telling her that she must grow cannabis for her own use. I think you have to go to law school to

not understand this distinction. Even the Supreme Court should get this one.

That's the first thing I would say, and then I would use that as a springboard to something that Gillian said about the military draft. She said, "Well, of course we've mandated activity before—we can draft you." Well, stop and think about the implications of that argument. Because Congress has the power to draft you to defend the country, they have the power to make you do anything else that they wish you to do as long as there is a rational basis for thinking it's related to the regulation of the national economy? Seriously? Do you believe that?

Drafting you into the Army is really the functional equivalent of enslaving you, and there is a prohibition against that in the Constitution. So what was the way around that? When this was litigated, what did the Supreme Court say was the reason why the Thirteenth Amendment did not apply to the draft? The answer the Court gave was that there is a fundamental duty of citizenship to defend the country in return for the benefits and protections the country affords you. It's a fundamental duty of citizenship. So, it's an exceptional power that they have. There are very few such duties that American citizens owe to the government. Part of what defines us as American citizens is the fact that we have a limited number of duties to the government that are essential to our citizenship.

If this principle is recognized and accepted as law, it will mean that as a citizen you owe a duty to Congress to do anything that Congress has a rational basis for thinking is necessary for the regulation of the national economy. And that is a very sweeping claim of power indeed. That's one of the reasons why it's never been done before.

And I just want to make one further clarification. Erwin offered a very nice summary of the arguments that would be argued in the Supreme Court opinion, but there is one little mistake in what he said. You can decide for yourself who is right about this, but I don't believe that, under the *Raich* test, Congress can do something if it rationally *believes* that it is regulating economic activity. I think *Raich* says that Congress can do something if it has a rational *basis* for regulating economic activity. It is still a judicial matter as to whether something is economic activity or not. The Court will not defer to Congress to determine whether it's economic activity, only whether there is a basis for regulating it if it *is* an economic activity. It's a small disagreement, but I think some of Erwin's argument turns on it.

**PROFESSOR METZGER:** On your second question, whether or not one of the things we are seeing in *Lopez* to *Morrison* to *Raich* is an emergence of how we are going to do the economic activity analysis, and

whether we could go back to *Lopez* and see that as having actual economic activity there. That is a question people have argued and debated. The more important point is that the Court has made clear that economic activity remains an overall limit, so the scope of the regulation and the nature of the activity matter. And as Randy mentioned, the Court is going to do an independent assessment of whether the nature of that activity is economic or not. So, going back to your point about *Lopez* versus this case, I do not think that there is any doubt that the overall context here is one of economic activity, whereas in *Lopez* the Court rejected the idea of an educational effect as being enough to create economic activity. The other thing that was different about *Lopez* is that you did not have this very broad regulation and activity as a whole. As Professor Oedel alluded to in his remarks, the provision is just one part of an incredibly elaborate bill, and I think that matters for how the Court copes with the question of the level at which you judge the scope of congressional regulation. Those are obvious distinctions between the two cases.

Professor Barnett, on your point about the draft and that there is no limit to what the government can require you to do if they can require this: it cannot be that only law professors could ignore the act-omission distinction, and I think that only law professors could come up with some of the absurd hypotheticals that have come up in this area about things Congress might do as showing the need for this kind of limit because otherwise all hell will break loose. I resist these hypotheticals for a variety of reasons, one of which is that Congress is not doing some of the extreme measures that have been articulated—like requiring individuals to buy GM cars and eat our vegetables and so forth. And it is not doing that for a very important reason that has nothing to do with activity and inactivity. Congress could mandate that, if you are going to buy a car—that is, engage in activity—you must buy a GM car. Congress is not imposing that requirement in large part because of political constraints, and we should not ignore those because they are quite potent. In addition, there are individual liberty constraints that have been recognized under the Constitution—protections against intrusions into bodily control and individual liberty. So, there are absolutely limits on Congress here that matter.

The key point is that the activity/inactivity limit really does not work. It is not much of a limit at all. I also do not think that it is one that the Court is going to go off on. Most likely, the Court is going to take the broader framing and see this as actually a part of regulation of economic activity—even though I think that if the Court reached the question, it would say that Congress could regulate inactivity.

*DEAN CHEMERINSKY:* Let me try to address both parts of the question. In response to the first, once it is conceived that economic activity does not require a transaction, then the broad definition of economic activity shows that this clearly fits within the scope of Congress's Commerce Clause power. Once you raise the status that growing marijuana for home consumption is regarded as an economic activity, then surely the economic transaction of purchasing, or the economic decision not to purchase, health care insurance fits within economic activity.

Imagine that it costs \$100 a month to either buy health care or pay the penalty. The choice of whether to spend that \$100 for health care is an economic choice, which fits within the broad definition of economic activity. Or another way to think of it is to imagine if Congress had decided to have a national health care plan—a single-payer plan—and raised everyone's taxes by an amount necessary to pay for that. Is there anyone who would doubt that Congress would have the authority to do that? Well, Congress has essentially done exactly the same thing here by requiring everyone to purchase health care or pay an amount of money that can easily be seen as a tax, so as to subsidize it.

It is here that *Johanns v. Livestock Marketing Ass'n*<sup>175</sup> becomes important. That is the case where Congress said that everybody who produces cattle has to pay a \$1.00 per head fee, and this was challenged as unconstitutional. The Supreme Court said Congress could impose a tax just on cattle, and if Congress wants to then spend that money for advertising for beef consumptions, it is permissible. This seems to parallel the health care legislation.

Now, the second part of the question. Professor Barnett and I have a slight disagreement over how Justice Stephens is using the rational basis test under the third prong of the *Raich* test. I think what the Court is saying here is, so long as Congress has a reason to believe, a rational basis to believe, this economic activity has a substantial effect on interstate commerce, then Congress can regulate it. I think what *Lopez* and *Morrison* stand for is the proposition that those situations were too attenuated for economic activity to fit even within the rational basis test. A gun near a school seems too far away from economic activity. Sexual assault is too far away from economic activity. But this, as I said, is a trillion-dollar industry.

Now, keep in mind, *Lopez* and *Morrison* are 5-4 decisions, *Gonzalez v. Raich* is a 6-3 decision, and what we have in *Gonzalez v. Raich* is that some of the dissenters from *Lopez* and *Morrison* now are in the majority,

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175. 544 U.S. 550 (2005).

so it is not surprising that *Gonzalez v. Raich* has the rational basis language that *Morrison* and *Lopez* do not. But it is a language that precedes *Raich*; it goes back to much earlier cases, and I think the Court would say Congress can certainly reasonably believe this is within the scope of Congress's authority.

*PROFESSOR OEDEL*: Far be it for me to take issue with one of our leading constitutional case scholars. I use Erwin's book in my constitutional law class. However, I do want to take issue with a couple of things that I think are factually problematic in Erwin's citations. I think these factual details are meaningful for our present purposes.

Erwin said that Roscoe Filburn was just growing wheat on his farm and that it was just an activity that is almost like inactivity, economically speaking. Actually, if you look at the factual record in the case of *Wickard v. Filburn*,<sup>176</sup> Roscoe Filburn was taking subsidies from the agricultural price support program. He was looking to get handouts from the federal government and then also wanted to go over the allotment to raise wheat above the agricultural limit that he was supposed to reach. Erwin also said that after Title II of the Civil Rights Act of 1964 was passed, people who were engaged in providing public facilities were required to serve all people. Well, that's true, but that's only true for people who are engaged in that activity. As a factual historical matter, the guy who lost the case of *Heart of Atlanta Motel*,<sup>177</sup> guess what he did after that case? He shut the Heart of Atlanta Motel down. He, a reprehensible fellow no doubt, chose to be outside of that activity, but he was not required to go ahead. I think there's a mischaracterization going on of the actual cases that we're looking at.

*PROFESSOR JOONDEPH*: And the next question?

*AUDIENCE QUESTION*: I'm interested in what role, if any, the word "regulate" in the Commerce Clause plays, either as a limit on federal power or as a justification for federal power. Everybody uses the word here in passing, but there hasn't been any focused attention on what role the meaning of the word has in the larger question you're debating.

*PROFESSOR JOONDEPH*: So the precise question concerns the import of the word "regulate" in Article I, section 8, clause 3.

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176. 317 U.S. 111 (1942).

177. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

*PROFESSOR BARNETT:* As a matter of doctrine, it has very limited implications. The reason is that, even though the original core meaning of the word “regulate” was to make regular or to subject to a rule, it has also been, from the very beginning, thought to include a power of prohibition as well as regulation. In fact, Madison used the phrase “prohibitory regulation.” It shows that the word “regulate” basically does include prohibition because you have to add prohibitory regulation to it. But, nevertheless, that’s part of it.

Second, almost nobody thinks, with respect to the mandate, that Congress is directly exercising its power to regulate commerce among several states, which is what it is doing under *Southeastern Underwriters*<sup>178</sup> when it is regulating the insurance company by telling it how it should go about doing its business. Here, Congress is purporting to reach activity that is *not* commerce among several states, but which it claims it may reach because it is “necessary” to regulating commerce, even if this may not itself fit the definition of “regulation.” I just don’t think that, under the current doctrine, the meaning of “regulate” has much bite.

*PROFESSOR JOONDEPH:* Next question?

*AUDIENCE QUESTION:* We all use the roads and the instrumentalities of interstate commerce, but would Congress have the power to require us each to spend 100 hours a year working on the roads under the commerce power? This is somewhat in relation to Randy’s distinction of this mandate from the draft.

*PROFESSOR JOONDEPH:* The question goes to extending the logic of this argument and whether Congress could force all Americans to work on the nation’s roads.

*PROFESSOR METZGER:* My short answer to that is going to be, to the extent there is any limit on Congress’s ability to do that, it clearly is not about activity, because, as you said, we all use the roads.

*AUDIENCE QUESTION:* It would not be economic activity?

*PROFESSOR METZGER:* Right. I assumed you were focusing on forcing individuals to work on the roads. It is connected in that way to activity, so that is not what is doing the limiting. There are plenty of

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178. *United States v. Southeastern Underwriters Ass’n*, 322 U.S. 533 (1944).

things that we could call upon to prevent that. A big one is political checks. I think there are actually very potent political checks against that being required, one coming in the form of unions of highway workers, so I am really not too worried about that one. But, you know, we have the political checks. We also have individual liberty protections. Those kinds of questions really show the point that Professor Chemerinsky made about understanding the liberties that are actually at stake, and maybe we should focus our attention on those issues rather than on these questions of congressional power.

*DEAN CHEMERINSKY:* I am going to echo Professor Metzger. I do think, as we always teach our students, that there are two separate questions here. One is whether this is within the scope of Congress's power, and second, does it violate some constraint, some liberty interest? I think what is really animating your question is the latter. The sense is that we should have a liberty interest in not being forced to work on the roads. As a matter of congressional power, I think this is an easy question without ever getting into the Commerce Clause. If you look at the law that created the interstate highway system, it was actually done by Congress as part of national defense. The title of the Highway Act includes national defense. If Congress wanted to say that, in order to get the highways ready for national defense, we need to have work on the infrastructure done, and it is the Necessary and Proper Clause that provides a way of doing that, or Congress's ability specifically under a different clause of Article I section 8 to provide for roads and post offices, I think Congress under the Necessary and Proper Clause could do so.

Now, I am, like Professor Metzger, not troubled by that hypothetical because the political realities would keep it from coming about, but it does animate the question, like it animates so much of the objection to the federal health care law as a liberty interest that I do not think would work as a successful basis for challenge either.

*PROFESSOR BARNETT:* I want to say a little bit about the political constraints in the context of the tax power theory. There is a lot to be said about it, and more than I can say now, but it is generally true that the principal constitutional constraint on the exercise of the tax power is political. But for the political constraints to kick in, there must be a clear exertion of the tax power that would then draw political attention to the fact that it's being exercised, and that would provide the political constraint. This is not simply putting a burden on Congress to somehow have a clear statement generally. Rather, if you are going to rely on a political constraint, you've got to have the assertion of the power. In this law, none of the rationales that were given for this power were tax-

power related. They were all regulatory. They all dealt with the Commerce Clause.

Other provisions of the bill, as Gillian noted, are called excise taxes; this wasn't one of them. And in a very important part of the bill—which was very important to Congress because it had to do with how you scored the bill for purposes of the CBO so you could get its costs under a trillion dollars—there is a listing of all the revenue provisions of the bill. But the money that would be gained by the penalty is not listed among the remedy-raising provisions of the bill. There is a substantive definition, and a modern one, by Justice Souter that distinguishes between a “penalty” and a “tax.” This particular measure fits Justice Souter’s definition of a “penalty,” which is a sanction imposed for the failure to perform a duty that exists, or a legal duty, which is what this really was. So, the “penalty” enforcing the mandate is not a tax, based on the substantive definition of a tax, and the fact that it wasn't clearly identified as a tax, together with *why* it was not clearly identified as a tax: precisely to avoid political accountability for having exerted the tax power because doing so would have violated the President’s pledge not to raise taxes on persons making below \$200,000. The President had some interest in not violating that pledge, as did the other senators who drafted this bill. As you know, on television the President denied this was a tax in response to George Stephanopoulos’s challenge that he had violated his pledge, to which he replied, “No, I haven’t. It’s not a tax.” So, if the principal constraint on the tax power is political, then it does make a difference whether this is called a “penalty” or a “tax.”

Finally, in every one of the New Deal cases and the post-New Deal cases that upheld the use of the tax for regulatory purposes, Congress was expressly asserting its tax power. In these cases, the Court stated that it would not look behind an expressed assertion of the tax power to see whether Congress had a regulatory purpose beyond its powers to regulate. By the same token, the Court will not look behind an assertion of a Commerce Clause power to state that the measure *could have been* recast as a tax precisely because doing it this way evades the political constraint on the tax power, which is the only constraint that exists.

*PROFESSOR JOONDEPH:* Next question?

*AUDIENCE QUESTION:* First, if a so-called tax is set at such a high rate that it passes the optimal revenue rates, so it’s actually revenue-depleting in its terms, would that still count as a tax? It can have a regulatory purpose, but if the amount that you pay is above the optimum revenue rate, wouldn’t that just be a clear regulation? Second, if this is

a tax, is it a “direct” or “indirect” tax? It doesn’t look like the normal excise tax. It’s not clear what transaction is being taxed. And if it’s a direct tax, is it apportioned? Obviously, the answer to that is no.

*PROFESSOR JOONDEPH:* The first question, if I’ve understood it correctly, is whether a tax rate that everyone admits is higher than necessary, and indeed so high that it reduces the revenue generated by the exaction, is really a regulation and not a tax. The second question is whether such a tax, if it is a tax, is a “direct tax,” and therefore subject to the apportionment requirements set out in Article I.

*PROFESSOR METZGER:* Your first point relates to the idea of whether a punitive rate, among other things, can show a tax to be regulatory. And you are right, that does matter. When you look at the case law on the tax power, what has emerged as, perhaps, the most instructive case in terms of whether or not we look behind a measure’s being called a tax is the *Kurth Ranch*<sup>179</sup> case. *Kurth Ranch* involved a state measure that was called a tax, and the question was whether or not it was really a criminal penalty sufficient to trigger double jeopardy. And the punitive amount of the penalty was one of the factors that was emphasized there. So, you are right, that does matter.

But the key point is that the inquiry is into whether what is going on is an effort to avoid constitutional protections by circumventing criminal procedure protections by calling something a tax which is really a criminal penalty. The fact that it is called a tax does not matter and underscores my point that labels have not been definitive here. In terms of regulatory purpose as a whole, I think the Court has said in the *Bob Jones* decision, any distinction we used to have between regulating and regulatory taxes is cast aside.<sup>180</sup>

In terms of direct apportionment, after you look at the case law about what is a direct tax, this really does not fall into that box. Going back to very early on, in 1796, in the *Hylton* decision,<sup>181</sup> the Court read direct tax quite narrowly as including only a capitation tax or a tax on real property, and then expanded it in the *Pollack* case to include personal property.<sup>182</sup> But it has never been read to apply to taxes beyond that. This is not that kind of a tax. This is not a tax on people because they exist; this is a tax on an event, the decision to forego insurance. There are also many exemptions for people who do not have

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179. Dep’t of Revenue v. Kurth Ranch, 511 U.S. 767 (1994).

180. Bob Jones Univ. v. Simon, 416 U.S. 725, 741 n.12 (1974).

181. Hylton v. United States, 3 U.S. 171 (1796).

182. Pollock v. Farmers’ Loan & Trust Co., 158 U.S. 601 (1895).

insurance, yet are not liable for the tax for a variety of reasons. As the provision is neither a capitation tax nor a tax on property, I do not think the apportionment requirement is an issue.

I want to respond briefly to the point that Professor Barnett made about political constraints and the importance of policing Congress. First, I think there is much more evidence in the record that Congress intended to use the tax power here than the opponents and the district courts have acknowledged. I love this use of the President's statements to determine a congressional intent, but more importantly, there certainly are also statements by members of Congress invoking the tax power. The bigger issue here, however, is the jurisprudential one about requiring it to invoke the basis on which it acts. Again, there are ways of limiting Congress that involve objectively assessing whether or not something falls within a power that do not involve this kind of second guessing of a possible basis for valid enactment. The clear statement requirements that courts have used in the past have been used to narrow the scope of an enactment. They are not used to question whether or not it comes under a particular basis. So, I think the effort to use a clear statement requirement here would be a dramatic change from how such requirements have been used in the past. It is something that could be imposed; but, again, given the case law holding that labels are not determinative and no requirement of a clear statement so far, it would be a change in existing law.

*PROFESSOR BARNETT:* I want to move to category three constitutionality, whether there are five votes. I'm moving away from the others on the tax power question. My view is that if there are five votes to uphold this law, it will never be on a tax power theory. It will be under a (unintelligible) theory. One reason I feel confident about that is they have Erwin's theory they can use, so they don't have to go to the tax power. And why would they not want to do that? For the first time in American history, Congress would have the power to mandate or compel and actually order Americans to do anything at all as long as it limits the sanctions of a monetary fine that is collected by the IRS. It would be essentially unlimited police power that would be subject to no constraints whatsoever. I can't imagine the Court willing to go down that road if they have five votes. If they have a theory of a kind that Erwin said, which I think has its own problems, and obviously I don't agree with it, but given the availability of that, I can't believe they would do that. If they were unpersuaded by Erwin's theory, I don't think they will be persuaded by the tax power theory. I think it's a very good reason why even the lower courts that turned away the challenge have rejected a tax power theory. I just predict that's what will happen under

category three, rightly or wrongly.

*DEAN CHEMERINSKY*: If there is any place where the Supreme Court since 1937 has been very deferential to government at all levels, it is when it comes to taxing and spending. Let me address the first part of the question. If the tax is greater than what is necessary for revenue, will it then be deemed a penalty? I think what the Court is likely to say is, the line at which the tax generates more revenue than is necessary and becomes a penalty is one in which there has got to be great deference to Congress. How is the Court going to ever calculate how much health care is going to cost in the United States? In *United States v. Butler*,<sup>183</sup> which even precedes the change in the Court, the Supreme Court says Congress can tax and spend so long as it believes it serves the general welfare.

As to the second question, whether it is direct or indirect, I agree with what Professor Metzger said. Imagine that Congress said the following: "Everyone is going to need health care in their life. We want to make sure that everybody has health insurance. Therefore, everybody must pay a tax if we are going to subsidize the program, but if you purchase your own health insurance, you can opt out of the tax." Wouldn't that be constitutional? If that is constitutional, then isn't this, as Professor Metzger says, just a choice of the labels to be used? I do not have a prediction on whether the Court is going to uphold this under the Commerce Clause or the taxing power. I think that in both instances the precedents are clear that Congress can do this and it fits within the scope of federal authority.

*PROFESSOR BARNETT*: I just want to say, and maybe we'll end on a point of agreement here, that if Medicare is constitutional, then Medicare for everyone is constitutional. I don't think there is any question under existing doctrine, that if Medicare, a tax and spending program, is constitutional, then putting everyone into a Medicare program is constitutional. Perhaps extensions from that program could be put into effect of the kind that Erwin described and as some people favor, for example, Social Security. But Congress would have to do that. Erwin calls these mere labels, but I don't think that they are mere labels. I think the Constitution has certain rules, and Congress has to follow the rules, and particularly when there are ways for Congress to accomplish its purposes under the rules, they need to follow the rules for doing so. Why? Precisely because of the political constraints Gillian is

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183. 297 U.S. 1 (1936).

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talking about. And why didn't they? Because there were not the votes to adopt a Medicare-for-everyone program. Most of my colleagues who are health care regulation advocates wanted Medicare for everyone. They wanted a single-payer plan, but there were not the votes for that, so Congress decided to go this way. Instead of taxing the people, as Medicare does, Congress decided to make people give their money directly to insurance companies for the first time ever.

Let me just close on a thought experiment. If this had never been done before, if the American people as a whole had never been mandated to engage in economic activities under the Commerce Clause power, each and every one of you in this room would be aware of that fact because you would know about the economic mandates to which you must conform your conduct. You all are witnesses to the fact that there are federal mandates. You know you have to file a tax return and sign up for Selective Service, and you know you might have to respond to a census form. But other than that, you don't know of any economic mandates on yourself or that have ever been imposed on your parents or your grandparents. That's the sense in which I mean this is unprecedented. Can the Supreme Court uphold this for the first time ever? Well, they've upheld expansions of power, and maybe there are five votes to do so this time. But they would be doing something new and different, and they would have to do so knowingly. I suspect that there are not five votes to do this because the doctrine has never been stretched this far. They are certainly not compelled to allow this the way they would be by the doctrine, for example, that allows Congress to regulate the insurance companies, which I remind you has not been challenged by anyone in this litigation.