

THE UNEASY CASE FOR THE AFFORDABLE CARE ACT

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I

INTRODUCTION

Dean Erwin Chemerinsky says the Patient Protection and Affordable Care Act (ACA)¹ is “clearly constitutional”—that the case is “easy,” and “not even . . . close.”² If you doubt that Congress can require everyone to buy health insurance, he suggests, you likely have a “political ideology” hostile to the law.³ The real question facing the Supreme Court isn’t whether the ACA conforms to the Constitution, but whether the Republican-appointed Justices will “transcend the partisanship”⁴ and save the Act, along with “many other federal laws,” from invalidation.⁵

I disagree. The case for the mandate may end up winning, but it won’t be easy. The very existence of this symposium (and the conference dedicated to it⁶) suggests that the legal issues aren’t trivial. In fact, it’s hard to follow the debate over the individual mandate—and the many court decisions it has produced—and conclude that there is nothing going on here but raw politics.

The mandate raises deep issues of the scope of federal power, the reach and correctness of existing doctrine, and the right way to interpret the Constitution. The intellectual discomfort the mandate has generated isn’t just partisan posturing, even if it’s more widespread (as one should expect) among the ACA’s political opponents. And striking down the mandate would hardly have the earth-shattering consequences Chemerinsky predicts, unless the decision provokes a much broader—and, to many people, welcome—reexamination of current doctrine.

Broadly speaking, the mandate orders every taxpayer to buy health insurance. If you don’t, you pay a “penalty,” which the IRS then collects along

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

2. Erwin Chemerinsky, *Political Ideology and Constitutional Decision-Making: The Coming Example of the Affordable Care Act*, 75 LAW & CONTEMP. PROBS., no. 3, 2012 at 1, 2–3.

3. *Id.* at 2.

4. *Id.* at 15.

5. *Id.* at 2.

6. Symposium, *Constitutional Challenges to the Affordable Care Act*, Duke Univ. School of Law (Sept. 16, 2011).

with income taxes.⁷ Though the current legal challenges face a variety of procedural barriers,⁸ the ACA's defenders usually rest on three substantive grounds: the taxing power, the commerce power, and the Necessary and Proper Clause. But the case for the mandate, under existing doctrine, is uneasy on each of these grounds. More importantly, there are good reasons for doubting whether existing doctrine gets it right—and those reasons have more to do with constitutional theory than political preference.

II

THE ARGUMENTS

A. The Taxing Clause

Chemerinsky's first reason for considering the mandate "an easy question" is that Congress could have reached the same result by enacting a different law. Here, Congress simply ordered everyone to buy health insurance⁹—and then, in a separate provision, imposed a "penalty" on some of those who disobey.¹⁰ Alternatively, it could have used its power "[t]o lay and collect Taxes"¹¹ to buy health insurance for those without it.¹² From the perspective of the "bad man" who only cares how much he must pay,¹³ there's not much reason to complain.

But the law doesn't take that perspective. Labels matter in the law because they matter in life. Congress can punish "espionage" as harshly as "treason,"¹⁴ but the Constitution treats treason as special.¹⁵ And a civil penalty might be more fearsome than a criminal fine, but the latter still needs proof beyond a reasonable doubt.¹⁶

The line between taxes and commands-backed-with-penalties is blurry, but it still exists, and courts still enforce it. Speeding tickets may raise revenue, but they're not taxes. And even if Congress can tax speeding, that doesn't mean it can write a nationwide code of moving violations.¹⁷ In fact, courts have traditionally given greater deference to self-described "taxes" where self-

7. See generally I.R.C. § 5000A (Supp. IV 2010).

8. See, e.g., *Seven-Sky v. Holder*, 661 F.3d 1, 21–22 (D.C. Cir. 2011) (Kavanaugh, J., dissenting as to jurisdiction) (finding the challenge barred by the Anti-Injunction Act); *Liberty Univ., Inc. v. Geithner*, No. 10–2347, 2011 WL 3962915, at *6 (4th Cir. Sept. 8, 2011) (same); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 556, 564 (6th Cir. 2011) (Sutton, J., concurring in part and concurring in the judgment) (distinguishing between facial and as-applied challenges).

9. I.R.C. § 5000A(a).

10. *Id.* § 5000A(b).

11. U.S. CONST. art I, § 8, cl. 1; see also *id.* amend. XVI (granting a power "to lay and collect taxes on incomes . . . without apportionment among the several States").

12. Chemerinsky, *supra* note 2, at 4.

13. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

14. Compare 18 U.S.C. § 794(a)–(b) (2006) (espionage), with 18 U.S.C. § 2381 (2006) (treason).

15. See U.S. CONST. art. III, § 3, cl. 1–2.

16. See *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 778 (1994).

17. But if driving constitutes an economic activity, namely the self-provision of transportation services

described civil or criminal penalties might be impermissible.¹⁸ The fact that a different law would get us to the same place doesn't make *this* law constitutional.

Nor have courts been persuaded, by and large, that we should look past *this* law's structure to reimagine it as a tax under the Taxing Clause. To be sure, Congress had political reasons for not implementing the mandate as a tax. That is, they thought voters actually cared. (The public might accept a mandate as a punishment for wrongdoing but not as a device to raise revenue.) To my knowledge, *no* court, and indeed only one concurring opinion,¹⁹ has adopted the Taxing Clause defense thus far—and a bipartisan array of judges, including some who upheld the law, have rejected it.²⁰ It's hard to call a losing argument "easy."

B. The Commerce Clause

The most popular defense of the mandate is the claim that, by forcing individuals to buy health insurance, it "regulate[s] Commerce with foreign Nations, and among the several States, and with the Indian Tribes."²¹ The mandate doesn't obviously relate to persons, things, or information moving in cross-border commerce, or to the channels or instrumentalities thereof. But under current doctrine, as expressed in *United States v. Lopez*,²² Congress can also regulate intrastate "economic activity" if that activity, "viewed in the aggregate, substantially affects" cross-border commerce.²³

The aggregate market for healthcare surely has this substantial effect. But, some ACA opponents claim, the mandate doesn't regulate economic *activity*. Instead, it regulates *inactivity*—or, more precisely, the *refusal* to engage in the kind of activity that might, in the aggregate, substantially affect cross-border

18. See, e.g., *Kurth Ranch*, 511 U.S. at 780 (noting that only "at some point" does "an exaction labeled as a tax approach[] punishment"); see also *United States v. Sanchez*, 340 U.S. 42 (1950); *Sonzinsky v. United States*, 300 U.S. 506 (1937). (I am indebted for these cases to Neil Siegel.) Chemerinsky cites *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and *Jefferson County, Ala. v. Acker*, 527 U.S. 423 (1999), for the contrary position, Chemerinsky, *supra* note 2, at 9 n.32 & n.33, but neither is apposite. *Jefferson County* looked past state labels on a question of *federal* statutory interpretation, 527 U.S. at 439, while *Quill Corp.* addressed what a tax was *on*, not whether it was a tax at all, 504 U.S. at 309–11.

19. *Liberty Univ., Inc. v. Geithner*, No. 10–2347, 2011 WL 3962915, at *16 (4th Cir. Sept. 8, 2011) (Wynn, J., concurring). The Fourth Circuit determined only that the mandate is a tax for certain statutory purposes and made no holding as to the Taxing Clause. See *id.* at *1 (majority opinion); *accord Seven-Sky v. Holder*, 661 F.3d 1, 22 (D.C. Cir. 2011) (Kavanaugh, J., dissenting as to jurisdiction) (arguing that the mandate, whether or not it is a tax, must be assessed and collected like one).

20. See *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1314 (11th Cir. 2011) (citing cases); *id.* at 1328 n.1 (Marcus, J., concurring in part and dissenting in part) (joining the majority's analysis of the taxing power); see also *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 550 (6th Cir. 2011) (Sutton, J., concurring in part and concurring in judgment).

21. U.S. CONST. art. I, § 8, cl. 3.

22. 514 U.S. 549 (1995).

23. *Id.* at 561.

commerce.²⁴ Given the relative novelty of the mandate,²⁵ and how often “economic activity” shows up in the case law,²⁶ a court might well assume that the line between activity and non-activity was supposed to mean something. The question is whether that line is worth defending.

Chemerinsky thinks not. He argues that those who lack insurance aren’t desisting from commerce, but are making an economic decision about how to pay for future care.²⁷ They are engaging in the economic activity of *self-insuring* against future risks.²⁸ Insure or self-insure: “Either is economic activity.”²⁹

That’s a reasonable argument, but hardly a slam dunk. The problem isn’t just “activity,” but also “economic.” Nearly anything that uses resources to satisfy wants can be described as economic. The Court’s most recent definition of “economic activity”—“the production, distribution, and consumption of commodities”³⁰—hardly narrows its scope, especially once you include services as well as goods. But the “self-insurance” argument transforms the *absence* of a transaction into economic activity, simply because the regulated party chose to expend resources in one way rather than another. If that move is permitted, then the limitation to “economic” activities does virtually no work.

Think of the Court’s recent Commerce Clause cases. Under the Gun-Free School Zones Act of 1995, Alfonso Lopez could have lawfully attended school along with private bodyguards licensed to carry firearms.³¹ Instead, he carried a gun himself,³² engaging in the self-provision of protective services. That’s at least as “economic” as the activity of existing-without-health-insurance, and it undoubtedly has a substantial aggregate effect on cross-border commerce. Or, to take the facts of *United States v. Morrison*,³³ gender-motivated violence can be self-provided or it can be contracted out to hired goons. Either way, once the activity is understood as “economic,” it can be aggregated, found to have a

24. See, e.g., *Florida*, 648 F.3d at 1287 (noting the “absence” of active behavior among the uninsured “with respect to health insurance”).

25. See *Thomas More Law Ctr.*, 651 F.3d at 558–59 (Sutton, J., concurring in part and concurring in the judgment).

26. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 23–26 (2005); *United States v. Morrison*, 529 U.S. 598, 610–11, 613 (2000); *Lopez*, 514 U.S. at 559–61, 567.

27. Chemerinsky, *supra* note 2, at 6.

28. *Id.* Relying on *Raich*, Chemerinsky also suggests that Congress needs only a rational basis for treating this decision as economic activity. See *id.* at 7–8 (citing *Raich*, 545 U.S. at 22). Like the Eleventh Circuit, I read *Raich* to apply the rational-basis inquiry to the *size* of the aggregate effect, and not to the economic-ness of the subject regulated. See 545 U.S. at 22; see also *Florida*, 648 F.3d at 1300–01. The relevant passage of *Raich* itself relied on a passage of *Lopez*, which speaks only to whether the aggregate effect is “sufficient[.],” not whether the “regulated activity” is economic (or even activity). *Lopez*, 514 U.S. at 557. Nor did *Raich* invoke the rational-basis test where Chemerinsky thinks it should have: the Court said that a ban on drug possession “directly regulates economic, commercial activity,” 545 U.S. at 26, not that Congress had a rational basis for so concluding.

29. Chemerinsky, *supra* note 2, at 6.

30. *Raich*, 545 U.S. at 26.

31. See 18 U.S.C. § 922(q)(1)(B)(ii) (Supp. V 1993).

32. *Lopez*, 514 U.S. at 551.

33. 529 U.S. 598 (2000).

substantial effect,³⁴ and regulated by Congress.

The problem with the self-insurance argument is that it extends federal authority to any act or omission incorporating an economic decision—and what decision isn't? Walking around is the self-provision of transportation, which reduces demand for taxicabs. Stargazing is the self-provision of entertainment, without which more people would rent movies—and so on. The upshot is that Congress can regulate not only actual commerce that actually goes on, but also hypothetical commerce that does not. (If Congress could already restrict home-grown wheat to boost market demand,³⁵ now it can mandate backyard wheat fields to boost market supply.)

Maybe the activity–non-activity distinction is too thin to bear much weight. *But then so is the economic–non-economic distinction in Lopez.*³⁶ In fact, the two are related: Virtually any conduct involves a choice *not* to participate in some market. Erasing the distinction altogether brings under federal control plenty of individual activities (like walking around, or stargazing) that are wildly unlike cross-border commerce “with foreign Nations, and among the several States, and with the Indian Tribes.”³⁷ The case law’s emphasis on “activity” offers a narrow foothold for resisting this conclusion—on which some judges, unsurprisingly, have chosen to stand.

Chemerinsky argues that healthcare is different from all of these other markets, because it’s inevitable that people will use it.³⁸ But participation in other markets (transportation, entertainment, et cetera) is no less inevitable. And, in any case, inevitability and the self-provision concept have nothing to do with one another. One can insure against asteroids, *or self-insure* against them, without ever expecting to meet one. Either self-insurance is an economic activity or it isn’t.

The inevitability argument has some force on its own. If Congress can regulate everyone’s inevitable use of healthcare, why should it have to wait until that actual use inevitably occurs?³⁹ But current doctrine is unclear on whether Congress had to write a requirement of actual use into the statute. Alfonso Lopez’s gun had undoubtedly crossed state lines before his arrest, but that fact didn’t save the Gun-Free School Zones Act.⁴⁰

34. *See id.* at 635–36 (Souter, J., dissenting) (noting that gender-based violence has severe aggregate economic costs).

35. *See Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942).

36. *Cf. Morrison*, 529 U.S. at 656–57 (Breyer, J., dissenting) (criticizing “economic” on similar grounds).

37. U.S. CONST. art. I, § 8, cl. 3.

38. Chemerinsky, *supra* note 2, at 6.

39. *See, e.g., Seven-Sky v. Holder*, 661 F.3d 1, 18 (D.C. Cir. 2011); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 556–57 (6th Cir. 2011) (Sutton, J., concurring in part and concurring in the judgment); *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1337 (11th Cir. 2011) (Marcus, J., concurring in part and dissenting in part).

40. *See United States v. Lopez*, 514 U.S. 549, 567 (1995) (finding no statutory “requirement that [the defendant’s] possession of the firearm have any concrete tie to interstate commerce”); *cf. id.* at 602–03 (Stevens, J., dissenting) (describing gun possession as inevitably being “the consequence, either

Consider the inevitability argument as applied to the infamous broccoli mandate, under which every American has to buy a certain amount of broccoli. Some grasp the cruciferous nettle and concede that, yes, a broccoli mandate and an insurance mandate stand on the same plane.⁴¹ Not so Chemerinsky. He argues that unlike healthcare, which “literally everyone” must consume, “a person can opt . . . not to eat vegetables.”⁴² Maybe so; but no one can opt not to eat *food*. So if Congress can make us prepay for healthcare, and can decide what kind we receive, it can also enroll us all in Jenny Craig, and make us prepay for a broccoli-packed federal menu.

Chemerinsky thinks this “highly unlikely,” invoking the political safeguards of poor nutrition.⁴³ I agree,⁴⁴ but that’s beside the point. A theory that begins with a power to “regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes,”⁴⁵ and ends with deciding how much broccoli you must bring home each night, has an air of unreality about it that no political safeguards can cure.

C. The Necessary and Proper Clause

Congress has power “[t]o make all Laws which shall be necessary and proper for carrying into Execution” other federal powers.⁴⁶ This clause hasn’t received as much attention as the other defenses of the mandate—although, to my mind, it’s the strongest of the three. Nonetheless, the case isn’t one hundred percent clear.

Part of why the necessary-and-proper argument is neglected is that the commerce power has encroached on its turf. As Justice Scalia suggested in *Gonzales v. Raich*, the entire substantial-effects test could be seen as a necessary-and-proper issue, allowing Congress to regulate intrastate activities as part of a broader regulation of commerce.⁴⁷ The two doctrines aren’t identical; nothing about necessary-and-proper, for example, requires that the regulated activity be economic. But at the same time, this power doesn’t extend to *all* noneconomic activities that might have a substantial aggregate effect on

directly or indirectly, of commercial activity”). It’s not easy to fit *Lopez* into the broader jurisprudence of facial challenges. See *Sabri v. United States*, 541 U.S. 600, 610 (2004) (Kennedy, J., concurring); *Seven-Sky*, 661 F.3d at 15; cf. *supra* note 8 and accompanying text (setting this issue aside).

41. See, e.g., Einer Elhauge, *The Broccoli Test*, N.Y. TIMES, Nov. 16, 2011, at A35.

42. Chemerinsky, *supra* note 2, at 6.

43. *Id.* at 7. See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

44. But see Ilya Somin, *A Mandate for Mandates: Is the Individual Health Insurance Case a Slippery Slope?*, 75 LAW & CONTEMP. PROBS., no. 3, 2012 at 75.

45. U.S. CONST. art. I, § 8, cl. 3.

46. *Id.* § 8, cl. 18.

47. See 545 U.S. 1, 33–35 (2005) (Scalia, J., concurring in the judgment); cf. *United States v. Lopez*, 514 U.S. 549, 561 (1995) (stating that the challenged 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”).

commerce.⁴⁸

Under the traditional test of *M’Culloch v. Maryland*, a law is within the necessary-and-proper power if it is “incidental to [the] constitutional powers,”⁴⁹ as a means “plainly adapted to” carrying a federal power into execution.⁵⁰ This language was recently inflated in *United States v. Comstock* to include any means “rationally related” to implementing a federal power.⁵¹ That’s a difficult test to fail, but I doubt the change of language will have much effect. Given the facts of *Comstock* (which concerned prisoners already in federal custody),⁵² nothing much turned on the wording, making the change look more like dicta than holding.⁵³ And if *Comstock* had really adopted rational-basis review, the opinion could have skipped over four other factors (the “long history of federal involvement in this arena,” the “custodial interest in safeguarding the public from dangers posed by those in federal custody,” the “accommodation of state interests,” and “the statute’s narrow scope”),⁵⁴ none of which offer particularly strong defenses of the mandate.

Chemerinsky would expand the test in a different direction. He notes that insuring fifty million more Americans would “have a great economic effect.”⁵⁵ This makes it “a goal that Congress can pursue” (in light of the Commerce Clause, perhaps), and thus one that Congress may “choose any reasonable means to effectuate.”⁵⁶ That proves too much. Fighting crime also has a great economic effect, but letting Congress choose its means to achieve this end overrules *Lopez* and *Morrison*.

Other defenses of the mandate focus instead on its role in the ACA. The Act imposes various price controls and regulations on insurers (like a ban on considering pre-existing conditions) that, absent a mandate, “will inexorably drive that market into extinction.”⁵⁷ Thus, the mandate is necessary to save the rest of the Act from disaster.⁵⁸

That makes plenty of sense—so what follows is a tentative ground for hesitation. As some judges have noted, unlike many traditional “means” of implementing a law, the mandate isn’t designed to ensure compliance with the

48. See *Raich*, 545 U.S. at 34–35, 38 (Scalia, J., concurring in the judgment).

49. 17 U.S. (4 Wheat.) 316, 418 (1819).

50. *Id.* at 421.

51. 130 S. Ct. 1949, 1956 (2010).

52. *Id.* at 1955.

53. See also *id.* at 1966–67 (Kennedy, J., concurring in the judgment) (criticizing the change in language); *id.* at 1968 (Alito, J., concurring in the judgment) (same).

54. *Id.* at 1965 (majority opinion).

55. Chemerinsky, *supra* note 2, at 11.

56. *Id.*

57. *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1350 n.12 (11th Cir. 2011) (Marcus, J., concurring in part and dissenting in part) (quoting *Health Reform in the 21st Century: Insurance Market Reforms: Hearing Before the H. Comm. on Ways & Means*, 111th Cong. 13 (2009) (statement of Dr. Uwe Reinhardt)).

58. See *id.*

Act.⁵⁹ It's designed to keep the Act from destroying insurance companies, which could religiously observe the pre-existing-conditions rule until the day they file for bankruptcy. In that sense, the mandate doesn't help carry the ban on pre-existing-condition discrimination *into effect*, in the way that a ban on robbing the mail helps execute the power to move letters from Point *A* to Point *B*.⁶⁰ What the mandate does is prevent entirely collateral consequences of the ACA's other provisions, which otherwise might make the ACA a really lousy idea.

But Congress has no general power to control the consequences of its own legislation. Suppose it lets everyone send mail to family members for free. That costs too much money, so Congress then makes all Americans live within ten miles of their grandparents. Or suppose that, having stifled innovation with bad patent laws, Congress fixes the problem by forcing every American to submit three patentable ideas a week. Both of these measures pass rational-basis review, but they hardly seem "incidental" or "plainly adapted" to the enumerated powers to establish post offices or secure patent rights.⁶¹

Of course, Congress can accompany a valid law with other measures "conducive to its beneficial exercise"—but only when those measures are in fact "incidental to the power" actually granted.⁶² In the case of ordinary "means," this is obvious: The "plainly adapted" requirement prevents the tail from wagging the dog. But when it comes to consequences, there's a temptation to claim extraordinary powers to fix the problems created by ordinary ones. To the extent that current doctrine still requires implicit powers to be "plainly adapted" or "incidental" to those granted in the Constitution, Congress can't do *everything* necessary to keep its choices from proving unwise.⁶³

59. See, e.g., *id* at 1310 (majority opinion) ("An individual's uninsured status in no way interferes with Congress's ability to regulate insurance companies."); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 570 n.2 (6th Cir. 2011) (Graham, J., concurring in part and dissenting in part) (describing the claim that the mandate "is 'necessary' to cure the economic disruption caused [by] . . . the 'guaranteed issue' provision").

60. See Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1 (2011) (presenting the mail-robber hypothetical); see also Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267 (2011) (disputing Koppelman's reading of the Necessary and Proper Clause).

61. See U.S. CONST. art. I, § 8, cl. 7–8. The problem isn't pretext; Congress might have been honestly surprised at the bad outcomes. Nor is it that one measure would be impossible without the other—something true of all necessary-and-proper legislation. See generally Stuart M. Benjamin, *Bootstrapping*, 75 LAW & CONTEMP. PROBS., no. 3, 2012 at 115.

62. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 418 (1819); see also Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in GARY LAWSON ET AL., THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 52, 60–68 (2010) (discussing the doctrine of incidental powers); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1639–43 (2002) (contrasting such powers with "[g]reat [s]ubstantive and [i]ndependent [p]owers").

63. In *Jinks v. Richland County*, 538 U.S. 456, 462 (2003), the Court referenced its holding in *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 507 (1870), that Congress could "remed[y] the evils" of the Civil War by tolling state statutes of limitations. But *Jinks* upheld the challenged statute because it improved the actual operation of the federal courts, and declined to apply *Stewart's* remedy-the-evil

This was an explicit theme at the Founding. In *The Federalist*, Hamilton recognized that the existence of a state tax “might render it *inexpedient*” for Congress to tax the same thing.⁶⁴ Maybe the combination of the taxes would be worse than no tax at all. But that doesn’t make the federal taxing power exclusive: Though there would be “mutual[] questions of prudence,” Hamilton saw “no direct contradiction of power,” and he thought “reciprocal forbearances” might be necessary on *each* side.⁶⁵ Chief Justice Marshall expressed a similar view: Responding to critics of *M’Culloch*, he denied that a federal law restricting a state tax “would be an ‘appropriate’ means, or any means whatever, to be employed in collecting the tax of the United States. It is not an instrument to be so employed.”⁶⁶ Not every law dealing with collateral consequences is incident to, or a means of implementing, the original grant. Because some areas have been left to state control, this means that not all federal policies can be made into good ideas. But that’s a feature of the federal system, not a bug.

I don’t know if these considerations ultimately carry the day. But they do explain some of the judicial hesitation surrounding the mandate—and why the necessary-and-proper defense presents a hard question rather than an easy one.

III

THE IMPLICATIONS

A. Policy

What would happen if the mandate were struck down? Chemerinsky sees disaster: If the Court separates activity from non-activity, hoteliers could refuse to serve minority customers, and factories could refuse to install pollution controls.⁶⁷

This seems overblown. It’s hard to claim that the activity–non-activity distinction has devastating effects, and at the same time that it’s too thin to carry any weight. Remember, if the mandate were simply limited to Americans who buy healthcare (that is, *everyone*), the commerce challenge goes away. Running a hotel or factory is obvious “economic activity,” even without the fancy footwork of “self-insurance”—which gives a nervous Justice plenty of room to distinguish the cases. And if political ideology were the main motivator, as Chemerinsky suggests, would a majority really strike down programs with broad bipartisan support?

A decision striking down the mandate, then, could be easily cabined for the

test outside the context of the war power. *See Jinks*, 538 U.S. at 462 (noting that the challenged statute “has nothing to do with the war power”).

64. THE FEDERALIST NO. 32, at 200 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

65. *Id.*

66. *A Friend to the Union*, PHILA. UNION, Apr. 28, 1819, reprinted in JOHN MARSHALL’S DEFENSE OF *MCCULLOCH V. MARYLAND* 91, 100 (Gerald Gunther ed., 1969).

67. Chemerinsky, *supra* note 2, at 13–14.

future. By contrast, a decision *upholding* the mandate would pose very difficult questions about the limits on Congress's enumerated powers.

B. Theory

In this context, Chemerinsky's description of the mandate question as "easy" isn't just a legal conclusion. It's also a rhetorical strategy designed to make an implicit argument about the proper sources of constitutional law. However "easy" the mandate question might be, a bunch of federal judges (and *most* of the fifty States) have lined up against it.⁶⁸

Now, something can be "easy" even if smart lawyers think it isn't. You just need an external theory of how law is supposed to work, distinct from the current degree of consensus on any particular issue. Chemerinsky, for example, relies on precedents and "existing constitutional doctrines" to tell us what to do.⁶⁹ But it's no accident that many people who oppose the mandate *don't buy into* a theory of law based exclusively on precedents and doctrines—in which whatever the Supreme Court says, goes.

For instance, many mandate opponents base arguments on their views of the Constitution's original meaning,⁷⁰ from which modern jurisprudence may have departed. Marshall's opinion in *Gibbons v. Ogden*,⁷¹ often cited for its stirring description of "commerce" as "the commercial intercourse between nations, and parts of nations, in all its branches,"⁷² was equally solicitous of "that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government"—such as "[i]nspection laws, quarantine laws, health laws of every description, as well as laws . . . which respect turnpike roads, ferries, &c."⁷³ Today, few would agree with Marshall that these areas fall outside the commerce power.

The lawyers challenging the mandate aren't asking the Court to overrule *Wickard v. Filburn*, or to get rid of the substantial-effects test. That's no surprise. Lawyers don't go into court advancing the most extreme, philosophically pure version of their theories. They make arguments they think will win, by persuading those currently in power. Courts often amend past doctrines by distinguishing prior cases on narrow, sometimes formal, grounds.⁷⁴ That's how doctrine usually changes over time; not by wholesale overruling, but

68. *E.g.*, *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 266 (4th Cir. 2011); *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1240 (11th Cir. 2011).

69. Chemerinsky, *supra* note 2, at 15.

70. *See, e.g.*, Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 583–87 (2010); Lawson & Kopel, *supra* note 60.

71. 22 U.S. (9 Wheat.) 1 (1824).

72. *Id.* at 189–90.

73. *Id.* at 203.

74. *See, e.g.*, *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 608 (2007) (distinguishing discretionary executive spending from congressional appropriations with respect to Establishment Clause taxpayer standing); *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362–63 (2006) (distinguishing the Bankruptcy Clause from the rest of Article I with respect to state sovereign immunity).

by slow evolution and reassessment of the law.

That's also why the lawyers challenging the mandate have spent so much time talking about silly things like broccoli. Functionally, even a broccoli mandate could survive under today's doctrine. Any method of getting food is "economic activity."⁷⁵ And in the aggregate, those activities have an enormous effect on interstate commerce. A broccoli mandate expressly limited to people who obtain food (that is, *everyone*) would stand on stronger doctrinal ground than the ACA.

This is part of Chemerinsky's point: The doctrinal gap between the ACA's mandate, and a different mandate limited to those who actually obtain healthcare, is functionally nonexistent. For that, we should blame the substantial-effects test, not President Obama.⁷⁶ But that's part of the mandate opponents' point as well. To them, the mandate—as the apotheosis of the substantial-effects test—is a signal that Something Has Gone Wrong in our reading of the Constitution.⁷⁷ If we can't invalidate *this*, they argue, we'll have given up hope of any coherent account of Congress's enumerated powers.

People who oppose a given policy tend to use any arguments available. Sometimes those arguments are constitutional ones, and often those constitutional arguments are bad. That's a traditional feature of American politics, not unique to healthcare or to one political party. And while different legal theories are correlated with politics (as they have been for a long time), they also have many intellectual adherents who adopt them for intellectual reasons.

What bothers many opponents of the mandate is not that it might overstep the Holy Writ of *Raich* or *Comstock*. Rather, they think the theories on which our existing doctrine is based are deeply unpersuasive and deserve reexamination. This kind of disagreement—at the level of legal theory, not just political ideology—does a great deal to explain the different ways in which lawyers and judges have approached the mandate. To describe these divisions merely as partisan politics in disguise runs the risk of appearing to delegitimize, rather than engage with, the theoretical concerns on the other side. And the claim that the mandate presents an "easy question," and that the only dissenters are blinded by partisanship, could itself be criticized as raising, rather than lowering, the ideological temperature of an honest constitutional debate.

75. Growing it, receiving it as a gift, or buying it in the market all qualify as either "production, distribution, [or] consumption" of a "commodit[y]." *Gonzales v. Raich*, 545 U.S. 1, 26 (2005).

76. *Cf. Chemerinsky*, *supra* note 2, at 7 (citing *Morrison*, 529 U.S. at 627 (Thomas, J., concurring)).

77. *Cf. Kelo v. City of New London*, 545 U.S. 469, 518 (2005) (Thomas, J., dissenting) ("Something has gone seriously awry with this Court's interpretation of the Constitution.").