NONE OF THE LAWS BUT ONE

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ABSTRACT

This Symposium contribution explores differences in how congressional Republicans responded to Medicare and how they responded to the Patient Protection and Affordable Care Act (ACA). Given the narrowness of the constitutional challenges to the ACA that congressional Republicans promoted and the many federal taxes, expenditures, and regulations that they support, this Article rejects the suggestion that today's Republicans in Congress generally possess a narrow view of the constitutional scope of federal power. The Article instead argues that congressional Republicans then and now—and the two parties in Congress today—fracture less over the constitutional expanse of congressional authority and more over the political objectives that robust federal power will be used to accomplish. Accordingly, the key question going forward is not one of perceived constitutional limits on Congress, but whether the federal government will expand or even maintain its role in combating economic vulnerability, a role that President Lyndon Johnson's Great Society performed to a significant extent by transforming America from a regulatory state to a welfare state.

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I. INTRODUCTION

Call it "Obamacare" if you feel you must, but it does not seem appropriate to call it an unprecedented assault on the federal structure of the U.S. Constitution. After all, the Congress that passed the Patient

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Protection and Affordable Care Act (ACA)[1] possessed the constitutional authority to accomplish something substantially more ambitious than the ACA. Under longstanding U.S. Supreme Court precedent that was accepted by those who declared the ACA unconstitutional,[2] Congress could have enacted a law establishing "a government-run, 'single-payer' system such as Canada's—the 'Medicare for all' approach advocated by many American liberals for years."[3] Congress did not, however, adopt as its model Medicare, one of the greatest achievements of President Lyndon Johnson's Great Society.[4] Facing fierce opposition from moderate members, insurance companies, and many medical providers, the ACA Congress declined to secure a much larger role for the federal government in healthcare and insurance markets.[5]

Instead, Congress passed the ACA, which "seeks to expand the number of people covered and begin the work of restraining costs by building on the existing structure of private insurance."[6] The ACA, in other words, is a "market-based approach" that "bears clear resemblance to the leading Republican alternative to the Clinton plan, to proposals developed by the conservative Heritage Foundation, and to the 2006 legislation signed

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1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 21, 25, 26, 29, and 42 U.S.C.).

2. *See generally* Helvering v. Davis, 301 U.S. 619 (1937) (upholding the Social Security Act's old-age pension program); *see also* Mark A. Hall, *Health Care Reform—What Went Wrong on the Way to the Courthouse*, 364 NEW ENG. J. MED. 295, 295 (2011) ("Under long-established Supreme Court precedent, Congress would have authority, if it wanted, to enact a single-payer socialized insurance system, using its powers to tax and spend 'for the general welfare.'").

3. THE STAFF OF THE WASHINGTON POST, LANDMARK: THE INSIDE STORY OF AMERICA'S NEW HEALTH-CARE LAW AND WHAT IT MEANS FOR US ALL 68 (2010) [hereinafter LANDMARK].

4. *See, e.g.*, DAVID BLUMENTHAL & JAMES A. MORONE, THE HEART OF POWER: HEALTH AND POLITICS IN THE OVAL OFFICE 163 (2009) ("Medicare and Medicaid were among Johnson's proudest legacies—two sections of the single most important piece of health care legislation in American history."). The authors retell the story of Medicare's passage based on materials that "were not available to historians who wrote the definitive histories of Medicare's passage." *Id.* at 164. Contrary to conventional wisdom, Blumenthal and Morone conclude that Johnson played a direct, pivotal role from the start. *See id.* at 163–205.

5. *See, e.g.*, Hall, *supra* note 2, ("Far short of [a single-payer socialized insurance] system, the complex blend of regulation, subsidies, and an individual mandate included in the [ACA] is vastly more protective of insurance markets and individual freedoms.").

6. LANDMARK, *supra* note 3.

by Republican [Governor] Mitt Romney that created universal coverage in Massachusetts."[7] In short, if Medicare could be characterized as top-down government regulation, the ACA could not; its market-based features were designed to be ideologically more attractive to skeptics of healthcare reform, including Republican members of Congress.

What, then, is one to make of the fact that the ACA encountered—and continues to encounter—fierce political and constitutional objections from Republicans in Congress? Among other things, one might be tempted to conclude that congressional Republicans today possess a substantially narrower view of the constitutional scope of federal power than they did during the 1960s. Then, many Republicans in Congress ultimately supported Medicare,[8] and those who opposed it did not typically condemn it as unconstitutional. The unconstitutionality of Medicare never became the official position of the Republican Party.[9] More recently, by contrast, congressional Republicans lined up in lockstep to oppose the ACA,[10] and

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7. *Id.*; *see also id.* at 6 (noting that President Nixon's healthcare reform "architecture formed the basis for what Obama would pursue three decades later"); *cf.* BLUMENTHAL & MORONE, *supra* note 4, at vii (viewing President Barack Obama's plan upon taking office as "well to the right of Nixon's 1974 proposal" and noting that "its closest predecessor was the Dole–Chafee plan constructed as a Republican alternative to Clinton in 1994").

8. *See* VOTE TALLIES FOR PASSAGE OF MEDICARE IN 1965, SOCIAL SECURITY ADMINISTRATION, http://www.ssa.gov/history/tally65.html (last visited Sept. 5, 2014) [hereinafter VOTE TALLIES FOR PASSAGE OF MEDICARE] (reporting that 13 of 32 Senate Republicans voted for Medicare, as did 70 of 140 House Republicans). Granted, the Republican Party was not as enthusiastic about Medicare as the final roll-call vote might suggest. *See* BLUMENTHAL & MORONE, *supra* note 4, at 186 ("The election [of 1964] had offered a dramatic choice. A month after being nominated, Barry Goldwater had flown to Washington and cast his very loud 'nay' on Medicare."); *id.* at 192 (noting that Medicare initially prevailed on the House floor with "[o]nly ten Republicans vot[ing] with the administration").

9. Today, by contrast, more Republican politicians are prepared to declare Medicare unconstitutional. *See* Ian Millhiser, *At Least One Third of the Federal Speakers at Virginia GOP Retreat Say Medicare is Unconstitutional*, THINKPROGRESS (Dec. 8, 2013), http://thinkprogress.org/justice/2013/12/08/3035681/featured-speakers-virginia-gop-retreat-medicare-unconstitutional (recounting remarks from Texas Governor Rick Perry and Congressman Bob Goodlatte (R-Va.) attacking Medicare, Medicaid, and Social Security as unconstitutional).

10. *See, e.g.*, LAWRENCE R. JACOBS & THEDA SKOCPOL, HEALTH CARE REFORM AND AMERICAN POLITICS: WHAT EVERYONE NEEDS TO KNOW, 63–64 (2010) ("[Senate Minority Leader Mitch] McConnell and his Republican Senate colleagues compelled [Senate Majority Leader Harry] Reid and Democrats to walk a tightrope in assembling and holding the necessary sixty votes from the ranks of Democrats and

they endorsed a litigation campaign that attacked the ACA as beyond the constitutional scope of Congress's enumerated powers.[11]

If the constitutional concern raised by the ACA's "individual mandate" and Medicaid expansion is limitless federal power—a rationale for congressional authority that "lacks logical limitation"[12]—then Medicare would seem to be more of a threat both to the American federal system and to the negative liberty championed by critics of the ACA in Congress.[13] Not only did Medicare authorize more extensive federal regulation of private conduct, but it also did not allow much opportunity for individuals to opt out.[14] If this logic is sound, then the vision of constitutional federalism animating congressional Republicans today differs substantially from the vision of constitutional federalism animating congressional Republicans who supported—or for that matter, who opposed on policy grounds—President Johnson's Great Society enactments like Medicare.

Constitutional politics, however, is about more than logic. The foregoing "federalism explanation" of opposition by congressional Republicans to the ACA misses what may be most noteworthy about the constitutional challenges that they supported: their *narrowness*. Rather than mount a broadside constitutional attack on either the Great Society welfare state or the New Deal regulatory state, Republicans in Congress endorsed a surgical strike that was intended to destroy—with apologies to Abraham Lincoln—none of the laws but one: the ACA.[15] The narrowness of the

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Independents alone.").

11. So did the many Republican governors and state attorneys general who challenged the law in court. *See id.* at 151. The modern Republican Party, however, is a complex "they," not an "it." Instead of discussing Republicans or Republican politicians generally, this Article restricts its focus to Republicans in Congress. For further discussion of this point, see the Conclusion.

12. *See* Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 781 (E.D. Va. 2010).

13. *See* Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 LAW & CONTEMP. PROBS. 29, 74 (2012).

14. *See* Neil S. Siegel, *More Law than Politics: The Chief, the "Mandate," Legality, and Statesmanship*, *in* THE HEALTH CARE CASE: THE SUPREME COURT'S DESIGN AND ITS IMPLICATIONS 192, 206 (Nathaniel Persily, Gillian E. Metzger, & Trevor W. Morrison eds., 2013) [hereinafter THE HEALTH CARE CASE].

15. Message to Congress in Special Session (July 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler ed., 1953) ("[A]re all the laws, *but one,* to go unexecuted, and the government itself go to pieces, lest that one [concerning habeas corpus] be violated?").

constitutional challenges may be revealing. It may suggest that congressional Republicans today are not substantially less committed to robust federal power than they were during the 1960s or than congressional Democrats are now.

The two modern parties in Congress fracture less over the constitutional scope of congressional power and more over the political goals that robust federal power will be used to attain. In short, the ACA litigation may ostensibly have been conducted in the register of constitutional federalism (and more subtly, in the register of constitutional liberty), but what was most at stake—and what is most at stake going forward—is a question of political priorities, not constitutional limits. The question is whether the federal government will expand or even maintain its role in combating economic vulnerability, a role that President Johnson's Great Society performed to a significant extent by transforming America from a regulatory state to a welfare state.[16] If congressional Republicans succeed in persuading America to answer this question negatively, it will likely not be because they perceive an absence of federal constitutional warrant, but because they prefer to use federal power in other ways.

Part II of this Article illustrates the narrowness of the federalism challenges to the ACA by focusing on objections to the law's minimum coverage provision. Part III considers two potential explanations for the narrowness of the challenges: litigation strategy and substantive commitments. Part IV anticipates an objection. The Conclusion offers some qualifications.

II. NARROWNESS

The ACA contains, among many other items, a minimum coverage provision. It is commonly, if inaccurately, called the individual mandate.[17] The provision requires most Americans either to maintain a specified minimum level of health insurance coverage[18] or to make a "shared responsibility payment" to the Internal Revenue Service each year.[19] In

16. *See* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 1602–06 (5th ed. 2006) (distinguishing the post-New Deal regulatory state from the modern welfare state and cogently describing the rise of the latter).

17. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2580 (2012).

18. 26 U.S.C. § 5000A(a) (2012).

19. *Id.* § 5000A(b).

National Federation of Independent Business v. Sebelius [hereinafter *NFIB*], a majority of the Supreme Court concluded that the minimum coverage provision was beyond the scope of Congress's authority under the Commerce Clause and the Necessary and Proper Clause,[20] but the Court concluded that the provision was nevertheless constitutional because it fell within Congress's power to tax.[21]

Throughout the political and litigation campaign that ended up at the Court, Republican politicians in Congress focused on the constitutionality of the minimum coverage provision.[22] This was ironic, as Republican members of Congress and conservative think tankers at the Heritage Foundation were responsible for coming up with the idea of an individual health insurance mandate during the 1990s as a conservative alternative to the Clinton healthcare proposal.[23] But be that as it may. These congressional critics of the law asserted that the Commerce Clause disables Congress from imposing economic mandates—that is, requirements that individuals buy a product from a third party.[24] Five Justices in *NFIB* agreed. This objection to the minimum coverage provision is legally dubious,[25] but for present purposes it is irrelevant who is right.

The key point here, rather, is this: Now that the ACA has survived almost entirely intact, it does not much matter who is right. Congress never used the Commerce Clause to impose a purchase mandate before it passed the ACA.[26] As explained below, moreover, Congress actually imposed only

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20. *NFIB*, 132 S. Ct. at 2586–93; *id.* at 2644–50 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting). It is irrelevant for purposes of this Article whether the Chief Justice's Commerce Clause and Necessary and Proper analyses constitute holding or dicta. For a discussion, see generally Siegel, *supra* note 14.

21. *NFIB*, 132 S. Ct. at 2593–2600.

22. *See* Jack M. Balkin, *The Court Affirms the Social Contract*, *in* THE HEALTH CARE CASE, *supra* note 14, at 11, 13.

23. *See, e.g.*, *Hearing on the Constitutionality of the Affordable Care Act Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary), *available at* http://leahy.senate.gov/press/press_releases/release/?id=debc354f-02d2-4d2b-b564-f4e372381147 ("Ironically, the so-called individual mandate now under partisan attack in the courts has long been a Republican proposal.").

24. *See, e.g.*, JACOBS & SKOCPOL, *supra* note 10, at 91. ("Republicans in Congress . . . steadily backed away from th[e] originally conservative idea [of an individual mandate], and, by the end of 2009, were vociferously denouncing it as a Democratic plot to violate American freedoms.").

25. *See generally* Siegel, *supra* note 14.

26. *Id.* at 204.

a purchase incentive in the ACA, not a genuine mandate.[27] And Congress is unlikely to want to impose a purchase mandate in the future. They are politically unpopular, and Congress has other means available to achieve its regulatory objectives.[28] The parade of horribles imagined by critics of the minimum coverage provision, such as forcing Americans to buy broccoli and American cars, seemed to have less to do with future congressional legislation and more to do with persuading the Court to strike down the minimum coverage provision—and then, having accomplished that, the entire ACA.[29]

During the litigation, there was potential cause for concern about future implications if the Court broadly accepted the constitutional pertinence of a distinction between regulating "activity" and regulating "inactivity" under the Commerce Clause.[30] For example, Congress might then lack the power to quarantine or mandate vaccination in the face of a flu

27. Republican opponents of the ACA were so successful in framing the public debate that it has become conventional to refer to the minimum coverage provision as the individual mandate, notwithstanding the technical inaccuracy of that label—it functions not as a mandate but as an incentive implemented through an exaction on individuals who choose not to purchase health insurance. Moreover, the exaction does not apply to a wide range of individuals. *See* Siegel, *supra* note 13, at 39 (citing 42 U.S.C. § 5000(e) (2012)) ("This exaction is inapplicable to people who need not file a federal income tax return because their household incomes are too low, to people whose premium payments would be greater than 8% of their household income, to individuals who are uninsured for short periods of time, to members of Native American tribes, and to people who show that compliance with the requirement would impose a hardship.").

28. For a discussion, see Neil S. Siegel, *Four Constitutional Limits that the Minimum Coverage Provision Respects*, 27 CONST. COMMENT. 591, 601–03 (2011).

29. *See, e.g.*, Florida *ex. rel.* Bondi v. U.S. Dept. of Health and Human Servs., 780 F. Supp. 2d. 1256, 1303 (N.D. Fla. 2011) (invalidating the minimum coverage provision and then declaring the entire ACA unconstitutional because "the individual mandate is indisputably necessary to the Act's insurance market reforms, which are, in turn, indisputably necessary to the purpose of the Act"), *rev'd sub nom.* Florida *ex rel.* Atty. Gen. v. U.S. Dept. of Health and Human Servs., 648 F.3d 1235 (11th Cir. 2011), *rev'd sub nom.* Nat'l Fed'n Of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012); Balkin, *supra* note 22, at 14 (noting that opponents of the ACA sought to "wipe Obamacare off the books with a single stroke" by contending that the minimum coverage provision was unconstitutional so that they could then "argue that the entire statute had to fall, because the Affordable Care Act had no severability clause").

30. *See, e.g.*, Thomas More Law Ctr. v. Obama, 651 F.3d 529, 560 (6th Cir. 2011) (Sutton, J., concurring in part), *abrogated by NFIB*, 132 S. Ct. 2566 (2012) ("Level of generality is destiny in interpretive disputes, and it remains unclear at what level [the ACA's challengers] mean to pitch their action/inaction line of constitutional authority or indeed whether a workable level exists.").

pandemic.[31] But that concern was obviated by the ultimately narrow focus of the critics and the Court on purchase mandates.[32]

One can tell a similar story about the Necessary and Proper Clause. Chief Justice John Roberts, following some of the Republican politicians who challenged the minimum coverage provision, seemed to concede that the provision was necessary—in the orthodox constitutional sense of convenient or useful[33]—to effectuate the admittedly constitutional ACA provisions that require insurers to cover people with preexisting conditions.[34] Without the minimum coverage provision, there would be a perverse incentive for uninsured, financially secure individuals to buy insurance only when they require expensive care, thereby free riding on people who pay for insurance when they are healthy. This "adverse selection" problem would substantially undermine insurance markets.[35] Roberts nonetheless concluded that the provision was improper.[36] It was improper, apparently, because it violated a new structural limit on federal power that disables Congress from compelling people to buy a product.[37] He deemed such compulsion the exercise of a "great substantive and independent power"[38] beyond those specifically enumerated, not an exercise of authority

31. *See, e.g.*, Siegel, *supra* note 13, at 52–53 (imagining a scenario in which the federal government wanted to mandate vaccination "in order to prevent the spread of a deadly disease across state lines," and opining that Congress should have the power to do so under the Commerce Clause, "[i]n light of potentially large spillover effects impinging on the general welfare").

32. *See, e.g.*, *NFIB*, 132 S. Ct. at 2590 (describing the individual mandate as constitutionally problematic because it attempts "to regulate individuals not currently engaged in commerce" as an exercise of the power to regulate commerce).

33. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 324–25 (1819).

34. *See, e.g.*, *NFIB*, 132 S. Ct. at 2592 (appearing to accept that "the individual mandate is 'necessary' to the Act's insurance reforms").

35. *See, e.g.*, Siegel, *supra* note 13, at 61–73 (explaining the adverse selection logic justifying the minimum coverage provision as necessary and proper for the execution of other ACA provisions that were widely agreed to be valid under the Commerce Clause).

36. *NFIB*, 132 S. Ct. at 2592 ("Even if the individual mandate is 'necessary' to the Act's insurance reforms, such an expansion of federal power is not a 'proper' means for making those reforms effective.").

37. *See id.* at 2618 (Ginsburg, J., concurring in part and dissenting in part) (characterizing a prohibition on purchase mandates as "newly minted constitutional doctrine" and a "novel constraint on Congress' commerce power [that] gains no force from our precedent").

38. *Id.* at 2591, 2593 (opinion of Roberts, C.J.) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411 (1819) (internal quotation marks omitted).

"derivative of, and in service to, a granted power."[39]

This conclusion, too, is legally dubious. As numerous scholars on the left and right have recognized, the minimum coverage provision is best understood as a permissible means to the end of guaranteeing people access to health insurance without unraveling insurance markets.[40] Even if Roberts is right, however, the pertinent question here is how much of a limit he imposed. How should Congress and the courts distinguish between a "great substantive and independent power"[41] beyond those enumerated in the Constitution and a power merely "derivative of, and in service to, a granted power?"[42] The answer is not clear because Roberts used broad and vague language. It seems likely, however, that he pressed such a distinction more for the purpose of deciding this case than for the future. "Having just denied Congress the power to impose purchase mandates under the Commerce Clause, he may have been determined not to allow such mandates under the Necessary and Proper Clause."[43] Language that is so broad and vague that it potentially means everything likely means little going forward—at least absent significant changes in the Court's composition. The Court has long approved much congressional action under the Necessary and Proper Clause that seems more substantive and independent than a purchase incentive. For example, Congress has created national banks, deported people, incarcerated others, and executed still others.[44] In all likelihood, neither Roberts nor Republicans in Congress meant to call any of those practices into constitutional question.[45]

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39. *Id.* at 2591–93.

40. *See, e.g.*, William Baude, *Rethinking the Eminent Domain Power*, 122 YALE L.J. 1738, 1818 (2013) ("[O]ne might even argue that the compulsory purchase of something one does not want borders on being itself a taking. But on balance, I find that analogy strained, and I find the historical case that the mandate is a great power seems too weak to justify invalidating the Act.").

41. *NFIB*, 132 S. Ct. at 2591, 2593 (quoting *McCulloch*, 17 U.S. at 411) (internal quotation marks omitted).

42. *Id.* at 2592.

43. Siegel, *supra* note 14, at 204 (arguing that this logic "den[ies] the undeniable—that the Necessary and Proper Clause is an independent source of constitutional authority").

44. *See id.* at 204–05 ("If a requirement to buy a product is always a great substantive and independent power, then perhaps Congress has long used the Necessary and Proper Clause to exercise other great substantive and independent powers, such as creating a national bank. . . . or, for that matter, criminal laws whose violation can result in long prison terms or execution.").

45. *See, e.g.*, United States v. Kebodeaux, 133 S. Ct. 2496, 2505–07 (2013)

Congressional critics of the minimum coverage provision also argued that it could not plausibly be understood as a tax because their Democratic colleagues had self-consciously used the language of penalties, not taxes, in order to blunt Republican criticism that the ACA would increase taxes.[46] On this view, it is constitutionally decisive that the ACA deemed the possession of insurance a requirement, used mandatory language, and even labeled the exaction for non-insurance a penalty.[47] Again, this objection is legally dubious: the provision has all of the material characteristics of a tax, not a penalty, which typically matters more for purposes of constitutionality than the expressive form of the statutory language.[48] Congress incentivized people to stop going without insurance, but it did not prevent such conduct, primarily because it made the amount of the exaction for noninsurance modest.[49] Specifically, Congress tied the amount of the exaction to individual income but capped it at an amount equivalent to the national average premium for "the lowest level of health insurance coverage identified by the ACA as sufficient to comply with the minimum coverage provision." This guaranteed that the amount of the exaction would be less than the cost of insurance for each uninsured person.[50] On this point, the Chief Justice agreed.[51]

Again, however, who is right does not matter for present purposes. What matters is how much critics conceded from the beginning. Their objection was not that Congress could not have structured the minimum coverage provision as a tax, but merely that it had failed to do so by using the wrong term in the statute.[52] In other words, if Congress had called the

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(Roberts, C.J., concurring in judgment) (agreeing "with the Court that Congress had the power, under the Military Regulation and Necessary and Proper Clauses of Article I, to require [respondent] to register as a sex offender," because "Congress could have rationally determined that 'mak[ing] the civil registration requirement at issue here a consequence of [his] offense' would give force to the Uniform Code of Military Justice adopted pursuant to Congress's power to regulate the Armed Forces" (second alteration in original) (quoting *Kebodeaux*, 133 S. Ct. at 2503 (majority opinion))).

46. *See, e.g.*, Liberty Univ. v. Geithner, 671 F.3d 391, 411 n.12 (4th Cir. 2011), *vacated* 133 S. Ct. 679 (2012) (citing Florida *ex rel.* McCollum v. U.S. Dep't of Health and Human Servs., 716 F. Supp. 2d 1120, 1142–43 (N.D. Fla. 2010)).

47. *See* 26 U.S.C. § 5000A(a)–(c) (2012).

48. *See generally* Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195, 1220–21 (2012).

49. *Id.* at 1241–42.

50. *Id.* (citing 26 U.S.C. § 5000A(c)(1)(B), (b)(1), (c)(2)(B) (Supp. 2011)).

51. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593–600 (2012).

52. *See id.* at 2651 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) ("It is

shared responsibility payment a "fee," an "exaction," or a "tax," rather than a "penalty," then there concededly would have been no constitutional case against the minimum coverage provision. That so much should turn on so little was too much for the Chief Justice, and thus the Court, to accept.[53]

By illustrating the narrowness of the enumerated powers challenges to the minimum coverage provision, this Article makes no claim to originality. On the contrary, the narrowness of the challenges was apparent at the time to advocates on both sides. Those who defended the constitutionality of the minimum coverage provision were not worried about dire future implications if Congress was barred from imposing purchase mandates. Rather, they were concerned that the Court would adopt a novel, no-economic-mandates rationale to invalidate this law in particular—the most significant expansion of the social safety net since President Johnson's Great Society[54]—especially given the political impossibility of repassage.[55]

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important to bear this in mind in evaluating the tax argument of the Government and of those who support it: The issue is not whether Congress had the *power* to frame the minimum-coverage provision as a tax, but whether it *did* so.").

53. Opponents of the ACA argued that classifying the exaction as a tax after the fact would allow Congress to avoid political accountability for tax increases. This argument was strained. For a critique, see Cooter & Siegel, *supra* note 48, at 1243–47. In short, accountability turns primarily on who pays how much, not on what Congress calls the payment. *Id.* at 1244. In any event, Congress frequently obfuscates in the Tax Code, and courts do not deem it appropriate to police such obfuscation. *Id.* at 1244–45.

54. *See, e.g.*, JACOBS & SKOCPOL, *supra* note 10, at 3 ("[I]n the assessment of many pundits, the new Affordable Care Act of 2010 instantly took its place as a landmark in U.S. social legislation, comparable to Social Security legislation enacted in 1935, Civil Rights legislation enacted in 1964, and, of course, Medicare."); LANDMARK, *supra* note 3, at 66–68 (calling the ACA "the biggest expansion of the social safety net in more than four decades, providing greater economic security to millions of poor and working-class families").

55. *Cf.* JACOBS & SKOCPOL, *supra* note 10, at 174 (predicting that, even absent invalidation of the ACA, "a Republican-controlled or influenced Congress might decide to delay or weaken subsidies to make insurance affordable or nix the taxes needed to pay for reform"). Opponents of the ACA are challenging the availability of subsidies in federally facilitated exchanges. *See generally* Halbig v. Burwell, 758 F.3d 390 (D.C. Cir.), *vacated pending reh'g en banc*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014); King v. Burwell, 759 F.3d 358 (4th Cir.), *petition for cert. filed*, 2014 WL 3811246 (U.S. July 31, 2014) (No. 14-114). All of the briefs in these cases that members of Congress have filed are politically predictable. *See, e.g.*, Brief for Senator John Cornyn et. al. as Amici Curiae in Support of Petitioners, *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014), *petition for cert. filed*, 2014 WL 3811246 (U.S. July 31, 2014) (No. 14-114), 2014 WL 4370712, http://sblog.s3.amazonaws.com/wp-content/uploads/2014/09/14-114-Amic

Likewise, critics of the minimum coverage provision like Randy Barnett—the chief intellectual architect of the constitutional challenges—repeatedly stressed their narrowness.[56] It was always primarily, if not exclusively, about the ACA.

III. SIGNIFICANCE

If the narrowness of the challenges is relatively clear, the primary explanation for their narrowness may be less so. And the explanation matters because different explanations have different legal and political implications. Specifically, has the view of congressional Republicans toward the constitutional scope of congressional power changed significantly over the past half century? Or are changes in political priorities primarily responsible for the hostility of congressional Republicans to the ACA? What is at stake, in part, is the significance of the ACA litigation for the 50th anniversary of the Great Society.

One possible explanation for the narrowness of the challenges is litigation strategy, which may cause litigants to moderate the expression of their constitutional convictions. On this view, it is difficult to persuade federal judges to invalidate major pieces of social welfare legislation;[57] judges, like other government officials, tend to take some account of the conditions of their own public legitimacy in a democratic society, and they also tend to sense that their institutional vulnerability may be at a maximum

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us-Brief-of-Senator-John-Cornyn-et-al-.pdf.

56. *See e.g.*, Randy E. Barnett, *Who Won the Obamacare Case?*, *in* THE HEALTH CARE CASE, *supra* note 14, at 17, 25.

> [A]s I insisted for two years in the face of claims that a ruling invalidating the Obamacare would undermine the entire edifice of federal programs, all such a ruling would have done was bar the Congress from using economic mandates. Here is how I usually closed my speeches on the implications of invalidating the ACA: "Should the Supreme Court decide that Congress may not commandeer the people in this way, such a doctrine would only affect one law: the ACA. Because Congress has never done anything like this before, the Supreme Court does not need to strike down any previous mandate."

Id. (emphasis removed).

57. Adrian Vermuele, *Constitutional Conventions*, NEW REPUBLIC (Aug. 2, 2012) (reviewing MICHAEL J. GERHARDT, THE POWER OF PRECEDENT (2012)), http://www.newrepublic.com/book/review/power-precedent-michael-gerhardt (characterizing the proposition that "the Court should not invalidate major social welfare statutes enacted by the federal government" as a fundamental post-New Deal constitutional convention).

when the stakes are highest.[58] It follows from these premises that litigants seeking to persuade courts to invalidate transformative legislation are more likely to succeed if they can identify narrow means of doing so.

This may be the best explanation for the behavior of conservative libertarians like Barnett, who believe that the courts should be in the business of restricting federal power and protecting economic liberty to a substantially greater extent than they have since 1937.[59] But Barnett and principled libertarians like him are academics for the most part, not Republican members of Congress. And Republican politicians, including those in Congress, were primarily responsible for moving the constitutional objections to the minimum coverage provision from "off the wall" to "on the wall" in record time, as Jack Balkin winningly described the evolution in the way that many legal observers viewed the objections.[60] For most Republican politicians, the primary reason for the narrowness of the constitutional challenges likely lies elsewhere.

Republicans controlled the White House for 20 of the 28 years spanning 1980 to 2008. Given the phenomenon of partisan entrenchment,[61] it seems unlikely that a general, long-term disconnect would develop

58. *Cf.* Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 979–1002 (2008) (arguing that judges, like other government officials, are wise to be mindful of the conditions of their own public legitimation).

59. *See, e.g.*, Randy E. Barnett, *In What Sense is the Personal Health Mandate "Unconstitutional"?*, *in* A CONSPIRACY AGAINST OBAMACARE: THE VOLOKH CONSPIRACY AND THE HEALTH CARE CASE 38, 38 (Trevor Burrus ed., 2013) (stating his "well-known view that the text of the Constitution has a meaning that is independent of the opinions of the Supreme Court" and noting that he would personally endorse arguments that "Congress [has] no power to regulate the health insurance business since insurance contracts—like the practice of medicine—are not 'commerce,'" even though the challenge ultimately advanced made use of Supreme Court precedent and was not "an originalist objection").

60. Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012), http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/.

61. *See generally* Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 490 (2006) [hereinafter Balkin & Levinson, *Constitutional Change*] ("[C]onstitutional revolutions occur through 'partisan entrenchment,' in which Presidents appoint judges and Justices to the federal judiciary who are thought to share the broad political agenda of the political party led by the President."); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001) [hereinafter Balkin & Levinson, *Constitutional Revolution*].

between what Republican politicians wanted the federal courts to do and what those courts were prepared to do.[62] During this time period, for example, only Justice Clarence Thomas has advocated a return to the Court's pre-1937 Commerce Clause jurisprudence.[63] Perhaps there would have been two such Justices had Judge Robert Bork been confirmed. But Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, David Souter, Samuel Alito, and Chief Justice Roberts have not sought to radically restrict the constitutional scope of federal power.[64]

A better explanation for the narrowness of the constitutional challenges to the minimum coverage provision is that Republican politicians in and out of Congress wanted them to be narrow. And the most likely reason that they wanted the challenges to be narrow is that Republican politicians, too, value relatively robust federal power. Examples abound:

- As noted above, congressional Republicans advocated the idea of an individual health insurance mandate in the 1990s.[65]
- Broad federal preemption of state tort litigation is more likely to be championed by probusiness Republicans than by Democrats.[66] Broad

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62. Of course, the analysis in the text is oversimplified. Senate control matters, too, which is why Justice Anthony Kennedy has occupied the seat that would have been occupied by Judge Robert Bork. *See* Balkin & Levinson, *Constitutional Revolution*, *supra* note 61, at 1070.

63. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 599 (1995) (Thomas, J., concurring) ("If anything, the 'wrong turn' was the Court's dramatic departure in the 1930's from a century and a half of precedent."); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2677 (2012) (Thomas, J., dissenting) ("I adhere to my view that 'the very notion of a "substantial effects" test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases.'" (quoting United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring))).

64. *See, e.g.*, United States v. Kebodeaux, 133 S. Ct. 2496, 2500 (2013); United States v. Comstock, 130 S. Ct. 1949, 1965 (2010); Gonzales v. Raich, 545 U.S. 1, 9 (2005); Sabri v. United States, 541 U.S. 600, 602, 605 (2004).

65. *See supra* note 24 and accompanying text.

66. *See, e.g.*, Brief for Chamber of Commerce as Amicus Curiae Supporting Petitioner at 11, Wyeth v. Levine, 555 U.S. 555 (2009) (No. 06-1249), 2008 WL 2322235 (arguing that FDA labeling regulations preempt state tort actions for failure to warn consumers or medical professionals about improper or dangerous uses of a drug because of "the adverse and disruptive effects of certain state-law product liability lawsuits on the federal regulatory scheme"). Another amicus curiae brief was submitted on behalf of eighteen Democratic members of Congress. It argued that "federal law does not preempt state-law failure-to-warn claims with respect to drugs approved by the FDA."

federal preemption requires broad federal laws that are interpreted broadly by the courts.

- National tort reform, which is supported primarily by congressional Republicans, not Democrats, would require a significant exercise of federal power.[67]
- Republican politicians have supported a partial privatization of Social Security, which, as Jack Balkin points out, ironically would "require individuals to purchase securities and pension plans from private companies."[68] And now that the Court has taken purchase mandates off the table, Congress could accomplish a partial privatization through other means, such as tax incentives.
- Income tax cuts for corporations and individuals rest on the same constitutional authority as income tax hikes.[69]
- The massive federalization of criminal law in the United States has been accomplished with widespread Republican support.[70] (Republicans in

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See Brief for Members of Congress as Amici Curiae Supporting Respondent at 1, 3, Wyeth v. Levine, 555 U.S. 555 (2009) (No. 06-1249), 2008 WL 3851609 ("Petitioner Wyeth ascribes to Congress a considered judgment to displace state tort remedies and strip consumers of their right to receive compensation for injuries caused by inadequate warnings on the part of drug manufacturers. But Congress has made no such judgment.").

67. *See* Randy E. Barnett, *Tort Reform and the GOP's Fair-weather Federalism*, DC EXAMINER, May 23, 2011, *available at* http://www.cato.org/publications/commentary/tort-reform-gops-fairweather-federalism ("Indeed, if Congress now can regulate tort law, which has always been at the core of state powers, then Congress, and not the states, has a general police power."); *see also* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.); *The War on Tort*, THE ECONOMIST, Jan. 26, 2005, *available at* http://www.economist.com/node/3598225/ ("Republicans, who traditionally favour local or state control where possible, plan to assist businesses in reducing their exposure . . . by moving bigger class-action cases . . . from local to federal courts. Republicans hope that federal courts will be less inclined to accept less meritorious cases and will award reduced payouts.").

68. Balkin, *supra* note 22, at 13.

69. *See* U.S. CONST. art. I, § 8, cl. 1.

70. Consider, for example, that the Gun Free School Zones Act of 1990, which was invalidated in *United States v. Lopez*, was part of the Crime Control Act of 1990—which passed unanimously in the Senate and received 135 positive votes and one negative vote from House Republicans. *See* United States v. Lopez, 514 U.S. 549, 567–68 (1995); Crime Control Act of 1990, Pub. L. No. 101-647, sec. 1702, 104 Stat. 4789, 4844–45, (amending 18 U.S.C. §§ 921–22, 924), *invalidated* by *Lopez*, 514 U.S. at 549; *Final Vote Results for Roll Call 534*, OFF. OF THE CLERK, U.S. HOUSE OF

Congress traditionally have been more opposed than Democrats to the legalization of marijuana for medicinal or recreational use, but that appears to be changing.)[71]

- The Religious Freedom Restoration Act (RFRA),[72] which is presently being used to attack mandatory contraception coverage under the ACA,[73] was passed by large bipartisan majorities in both houses of Congress.[74] Congressional Republicans and Democrats alike believed

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REPRESENTATIVES, http://clerk.house.gov/evs/1990/roll534.xml (Oct. 27, 1990). *But see* President George [H. W.] Bush, Statement on Signing the Crime Control Act of 1990 (Nov. 29, 1990), *available at* http://www.presidency.ucsb.edu/ws/?pid=19114 ("Most egregiously, section 1702 inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed on the States by the Congress.").

71. *See, e.g.*, Rick Lyman, *Pivotal Point Is Seen as More States Consider Legalizing Marijuana*, N.Y. TIMES, Feb. 26, 2014, http://www.nytimes.com/2014/02/27/us/momentum-is-seen-as-more-states-consider-legalizing-marijuana.html ("Demonstrating how marijuana is no longer a strictly partisan issue, the two states considered likeliest this year to follow Colorado and Washington in outright legalization of the drug are Oregon, dominated by liberal Democrats, and Alaska, where libertarian Republicans hold sway."); Jordy Yager, *GOP Mum on DOJ's Decision to Stand Down on Wash., Co. Pot Laws*, THE HILL (Sept. 1, 2013), http://thehill.com/homenews/news/319737-gop-mum-on-dojs-pot-decision (noting that "[a] stark radio silence is emanating from Republicans on Capitol Hill in the wake of the Justice Department's (DOJ) decision this week not to sue Colorado and Washington state, which legalized the recreational use of marijuana, or other states that have approved its medicinal use," even though "Republicans have historically objected to the legalization and decriminalization of pot").

72. 42 U.S.C. §§ 2000bb–2000bb-4 (2012) (providing, *inter alia*, that the government "shall not substantially burden a person's exercise of religion" unless that burden "is the least restrictive means to further [a] compelling governmental interest").

73. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2755 (2014) (holding that regulations promulgated by the Department of Health and Human Services requiring employers to provide their female employees with no-cost access to contraception violate RFRA as applied to closely held for-profit corporations); Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health and Human Servs., 756 F.3d 1339, 1347 (11th Cir. 2014) (granting an injunction to a religious nonprofit corporation that brought a RFRA challenge to the certification form that the Court appeared to endorse as a less restrictive alternative in *Burwell v. Hobby Lobby Stores, Inc.*, because "[e]ven if the form alone does not 'trigger' [contraceptive] coverage—whatever that means—it is undeniable that the United States has compelled the Network to participate in the mandate scheme by requiring the Network not only to sign but also to deliver the form to its third-party administrator of its health insurance plan").

74. The vote in the House was unanimous, and the vote in the Senate was 97–

that Congress had ample authority to pass RFRA under Section Five of the Fourteenth Amendment.[75]

- The federal Partial-Birth Abortion Ban Act of 2003[76] is either Commerce Clause legislation or beyond the scope of Congress's enumerated powers, suggesting that many congressional opponents of abortion rights do not want to leave the issue of abortion entirely to the states.[77]
- Congressional Republicans approved the efforts of Attorney General John Ashcroft to prevent states from allowing physician-assisted suicide, including his threat to revoke the medical licenses of physicians who participated in the practice.[78]
- Section 3 of the federal Defense of Marriage Act (DOMA),[79] which defined the terms "marriage" and "spouse" for all purposes under federal law as "only a legal union between one man and one woman as

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3, with only two Democrats and one Republican voting against the bill. Bill Summary and Status for the Religious Freedom Restoration Act of 1993, LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d103:HR01308:@@@R (last visited Sept. 25, 2014).

75. *But see* City of Boerne v. Flores, 521 U.S. 507, 512, 536 (1997) (finding RFRA beyond the scope of Congress's power under Section Five). The Religious Land Use and Institutionalized Persons Act (RULIPA) of 2000 amended RFRA after the Court declared it unconstitutional as applied to the states. *See* Pub. L. No. 106-274, sec. 6, 114 Stat 803, 806 (amending 42 U.S.C. §§ 2000bb-2, -3(a)). RULIPA passed with unanimous bipartisan support in both houses of Congress. *See* Bill Summary and Status for the Religious Land Use and Institutionalized Persons Act of 2000, LIB. OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d106:SN02869:@@@R (last visited Sept. 25, 2014).

76. 18 U.S.C. § 1531 (2003).

77. *See generally* Gonzales v. Carhart, 550 U.S. 124 (2007) (rejecting a facial substantive due process challenge to the law).

78. *See* Brief for Senators Rick Santorum et al. as Amici Curiae Supporting Petitioners at 21, Gonzalez v. Oregon, 546 U.S. 243 (2006) (No. 04-623), 2005 WL 1126080 ("The Attorney General has the authority to determine whether physician-assisted suicide violates the CSA [Controlled Substances Act], notwithstanding the absence of specific references to the practice in the legislative history.").

79. Pub. L. No. 104-199, sec. 3, 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2012)), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013). Republicans in the House of Representatives voted in favor of DOMA by a 224–1 margin. *See Final Vote Results for Roll Call 316*, OFF. OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES (July 12, 1996), http://clerk.house.gov/evs/1996/roll316.xml. All 53 Republican Senators voted in favor of DOMA. *See Vote Summary on the Passage of the Bill (H.R. 3396)*, U.S. SENATE (Sept. 10, 1996), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=2&vote=00280.

> husband and wife,"[80] was defended as valid Necessary and Proper Clause legislation by congressional Republicans acting through the Bipartisan Legal Advisory Group of the House of Representatives, notwithstanding the traditional authority of the states to determine access to the institution of marriage.[81]

And so on.[82] The most unseemly example may be the Terri Schiavo case. In that series of unfortunate events, Republicans in the White House and Congress appeared to have little regard for Florida law or Florida courts.[83] Instead, they seemed to imagine the federal government as priest, doctor, and durable power of attorney all in one.[84]

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80. 1 U.S.C. § 7 (2012), *invalidated by Windsor*, 133 S. Ct. at 2675.

81. *See* Merits Brief for the Bipartisan Legal Advisory Group at 3–17, *Windsor*, 133 S. Ct. at 2675 (No. 12-307), 2013 WL 267026 (defending Section 3 of DOMA by citing federal interests in defining marriage for federal purposes, ensuring national uniformity of federal benefits, preserving past legislative judgments about marriage, protecting limited fiscal resources, proceeding slowly, supporting traditional families, and encouraging biological parents to rear their offspring).

82. *See, e.g.*, Balkin, *supra* note 22, at 13 (noting that Republicans in Congress want to use federal power to impose business-friendly environmental regulations). Likewise, one cannot implement Representative Paul Ryan's budget or Republican versions of healthcare reform without the New Deal congressional powers. *See, e.g.*, Barnett, *supra* note 67 (noting that the constitutionality of the Republican HEALTH Act of 2011 relied "entirely on post-New Deal Supreme Court cases that defer to Congress—in particular the 'Substantial Effects Doctrine'").

83. *See, e.g.*, Clyde Haberman, *From Private Ordeal to National Fight: The Case of Terri Schiavo*, N.Y. TIMES (Apr. 20, 2014), http://www.nytimes.com/2014/04/21/us/from-private-ordeal-to-national-fight-the-case-of-terri-schiavo.html?_r=0 ("As if the failed attempts at intervention by Florida politicians were not enough of a cautionary tale, Congress and President George W. Bush plunged into the fray in early 2005, enacting legislation with dazzling speed to transfer jurisdiction of the case from state courts to the federal judiciary.").

84. *See, e.g.*, *id.* ("Was anyone well served . . . when Bill Frist, the Republican Senate majority leader in 2005 and a transplant surgeon, said it was clear to him that Ms. Schiavo responded to external stimuli, a pronouncement based on his having seen a videotape of her?"); *see also* Elisabeth Bumiller, *Supporters Praise Bush's Swift Return to Washington*, N.Y. TIMES (Mar. 21, 2005), http://www.nytimes.com/2005/03/21/politics/21bush.html ("[O]n Saturday night, when Mr. Bush made the rare decision to interrupt his Texas vacation and rush back to Washington to be in place to sign a bill that could restore Ms. Schiavo's feeding tube, the White House said that the issue had become one of 'defending life,' and that time was of the essence."); Carl Hulse & David D. Kirkpatrick, *Congress Passes and Bush Signs Legislation on Schiavo Case*, N.Y. TIMES (Mar. 21, 2005), http://www.nytimes.com/2005/03/21/politics/21debate.html?_r1=&pagewanted=all&position= ("Republicans [in Congress] asserted that Ms. Schiavo's case was unique in that she was not getting any life-sustaining treatment beyond the feeding tube

Ultimately, congressional Republicans seem more likely to be political, economic, or social conservatives than federalists.[85] Moreover, most of the federalists among them are of the relatively moderate variety, including all of the conservatives on the Court except Justice Thomas—notwithstanding the fact that a majority of the Court's conservatives voted to invalidate the entire ACA.[86] Accordingly, congressional Republicans appear committed to the constitutional underpinnings of the New Deal regulatory state—to robust federal power to regulate, tax, and spend. They, too, want to deliver benefits to their favored constituents. They, too, want to use federal power to express their moral convictions and those of their constituents.

If this account is right, it follows that congressional Republicans today are not substantially less enamored of federal power than congressional Republicans of the 1960s, Great Society Democrats, or current Democrats in Congress. Accordingly, while the constitutional debate over the ACA was fought in the register of limits on federal power, the two national parties today divide less over constitutional federalism and more over the political ends that robust federal power should be used to achieve. The ACA litigation illustrates primarily how much American national politics has changed since the 1960s. In ways that were not as true in the past,[87] Republicans in Congress today oppose expansions of the welfare state that are aimed at providing greater economic security to Americans who lack it.

The ACA litigation and decision, in other words, are significant for the 50th anniversary of President Johnson's Great Society because they underscore changes in political priorities more than they illustrate changes

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and that on video they had seen she did not appear to be in the physical state normally associated with decisions to end medical assistance. 'Remember, Terri is alive, Terri is not in a coma,' Dr. [and Senate Majority Leader Bill] Frist said.").

85. For a discussion of different kinds of conservatives in modern America, see Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1181–1209 (2002).

86. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2642 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting). The fight over the constitutionality of health care reform became so partisan and polarizing—so much a part of the "culture wars"—that one should hesitate to characterize the votes of the Justices in *NFIB* as representative of their general views about constitutional federalism. For example, Justices Scalia and Kennedy were in the majority in *Gonzales v. Raich*, and no Justice in *United States v. Windsor* suggested that Section 3 of DOMA was beyond the scope of Congress's enumerated powers. *See Windsor*, 133 S. Ct. at 2675; Gonzales v. Raich, 545 U.S. 1, 1 (2005).

87. *See* VOTE TALLIES FOR PASSAGE OF MEDICARE, *supra* note 8 (noting the number of Republicans in Congress who voted for Medicare).

in perceived constitutional limits. This remarkable episode highlights how much more politically difficult it is today for the federal government to expand—indeed, to maintain—its role in combating economic vulnerability and to do so, in part, by engaging in wealth redistribution. That is, in part, what Great Society programs did,[88] and that is, in part, what the ACA does as well.[89]

In May 1964, President Johnson echoed President Franklin Delano Roosevelt when he told graduates of the University of Michigan that "we have the opportunity to move not only toward the rich society and the powerful society, but upward to the Great Society."[90] In March 2010, President Barack Obama echoed Johnson when he signed the ACA into law: "[W]e have now just enshrined . . . the core principle that everybody should have some basic security when it comes to their health care."[91] Such security does not come cheap, and it is well-known that wealthier Americans will bear primary responsibility in paying for it.[92] While congressional Democrats largely support this state of affairs, congressional Republicans largely oppose it. But judging from how they behave in other contexts, neither group regards it as violating principles of constitutional federalism.

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88. *See* Joseph A. Califano Jr., *What Was Really Great About the Great Society: The Truth Behind the Conservative Myths*, WASH. MONTHLY (Oct. 1999), http://www.washingtonmonthly.com/features/1999/9910.califano.html ("[F]rom 1963 when Lyndon Johnson took office until 1970 as the impact of his Great Society programs were felt, the portion of Americans living below the poverty line dropped from 22.2 percent to 12.6 percent, the most dramatic decline over such a brief period in this century."); *id.* ("Without such programs as Head Start, higher-education loans and scholarships, Medicare, Medicaid, clear air and water, and civil rights, life would be nastier, more brutish, and shorter for millions of Americans.").

89. *See, e.g.*, JACOBS & SKOCPOL, *supra* note 10, at 4 ("Most new benefits promised by the Affordable Care Act will go to lower and middle-income Americans—the people whose employers do not provide health insurance, yet who are not poor or old enough for existing federal programs, and these expanded benefits are slated to be paid for primarily by higher taxes on wealthier citizens and by fees assessed on parts of the health care industry."); *id.* at 133–34 (noting that affluent Americans also benefit from the ACA but pay much of the costs of its implementation).

90. Lyndon B. Johnson, Commencement Address at the University of Michigan: The Great Society (May 22, 1964), http://www.pbs.org/wgbh/americanexperience/features/primary-resources/lbj-michigan/.

91. LANDMARK, *supra* note 3, at 1 (second alteration in original).

92. *See* JACOBS & SKOCPOL, *supra* note 10, at 4.

IV. OBJECTION

One might object that congressional Republicans, like the Republican-appointed Justices, generally do possess a federalist constitutional vision—they just are constrained from expressing that vision in the federal legislative process by political considerations. On this view, constituent demands for federal benefits may encourage Republican politicians to vindicate their federalist vision not by acting to restrict federal power directly, but by supporting federalist judicial nominees who, if confirmed, would rein in federal power through the enforcement of constitutional limits on Congress.[93] Politicians on the left and right have long been charged with passing the buck on hard issues to the courts. For example, in the late 19th century, Harvard Law School Professor James Bradley Thayer famously worried that assertive judicial review would sap legislators of their own constitutional powers and responsibilities.[94]

This objection has the virtue of explaining how it could be that politicians who do not appear to act like federalists in the national legislative process nonetheless support federalist judges. (Another explanation, anticipated in Part II and offered in the Conclusion, is that most of those judges are not strong federalists either.) The objection, however, has at least two vulnerabilities. First, it speculates about what politicians may believe in their heart of hearts, as opposed to focusing on how they behave in the legislative process. Observing a consistent course of behavior seems more likely to yield valid inferences about the values that politicians possess. Second, the objection presupposes that the very constituents who dampen expression of a federalist constitutional vision in Congress nonetheless generally elect federalist—as opposed to nationalist—politicians. There seems no obvious reason why the electoral process would consistently

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93. I thank Jonathan Adler for raising this objection with me. *See also* Jonathan H. Adler, *The Conflict of Visions in* NFIB v. Sebelius, 62 DRAKE L. REV. 937, 942–43 (2014) (arguing that "[t]he contrasting views of the constitutionality of the individual mandate and the Medicaid expansion did not reflect different applications of settled principles so much as an allegiance to competing principles").

94. *See generally* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 129 HARV. L. REV. 3 (1893); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 22 (1962) (asking rhetorically, after quoting Thayer, "in how many hundreds of occasions does Congress enact a measure that it deems expedient, having essayed consideration of its constitutionality (that is to say, of its acceptability on principle), only to abandon the attempt in the declared confidence that the Court will correct errors of principle, if any?").

produce such a potential principal–agent problem.

V. CONCLUSION

Because this Article has taken on big questions all too briefly, the most responsible way to conclude is with some qualifications. First, the modern Republican Party is a large, complicated "they," not an "it." Certain conservatives were, and remain, interested in limiting the scope of the Necessary and Proper Clause, including in the context of the treaty power.[95] And Republican politicians in state governments surely wanted to change the constitutional law of the conditional spending power in their favor, which was at issue in a part of the ACA litigation that this Article has not discussed.[96] The difficulty of accurately capturing the multiplicity of voices in the modern Republican Party is why this Article has focused mostly on Republicans in Congress.

Even limiting one's focus to Congress, there are significant differences among establishment Republicans and tea party Republicans, including on issues relating to the constitutional scope of federal power.[97] Accordingly, this Article has painted with a broad brush, and in doing so, has oversimplified matters.

Even so, there appears to be truth to the proposition that the ideologically average or median Republican in Congress does not want to destroy his or her ability to deliver benefits to constituents. There also

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95. *See generally* Bond v. United States, 134 S. Ct. 2077 (2014) (avoiding through statutory interpretation the question whether structural constitutional limits constrain the scope of Congress's authority under the Necessary and Proper Clause to enact legislation to implement a valid treaty). For amicus briefs filed by various conservative groups that advocated restricting the scope of the Necessary and Proper Clause, see Bond v. United States, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/bond-v-united-states-2/ (last updated July 7, 2014).

96. It is noteworthy that Chief Justice Roberts defined an unconstitutionally coercive conditional subsidy narrowly. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2601–09 (2012). *See generally* Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After* NFIB, 101 GEO. L.J. 861, 864–65 (2013) (internal quotation marks omitted) (identifying an "anti-leveraging principle," which will rarely be violated, as the best interpretation of Roberts's opinion on the ACA's Medicaid expansion).

97. *See* THEDA SKOCPOL & VANESSA WILLIAMSON, THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM 168–77 (2012) (noting that, in contrast to the goals of the Republican establishment, the objective of tea party Republicans "is to dismantle much of what the federal government does").

appears to be truth to the suggestion that the average Republican member of Congress does not want to destroy his or her ability to embed the moral convictions of constituents in federal law. It follows that, in the debate over the ACA, congressional Republicans were not interested in radically undermining Congress's powers to regulate or deregulate the economy or to use the tax code to benefit supporters.

A second qualification is warranted. It would be an overstatement to suggest that Republicans and Democrats in Congress possess the same views on the constitutional scope of federal power. Judging from the judicial nominees that they support or condemn, congressional Republicans appear to approve of most of the federalism decisions of the 1990s,[98] and congressional Democrats appear to disapprove of most of them.[99] Those decisions changed the constitutional law of federalism from what it had been during the New Deal, the Great Society, and (for the most part) the 1970s and 1980s. Those changes in constitutional law, in turn, helped to render the federalism challenges to the ACA less implausible. The 1990s decisions, however, imposed relatively modest limits on the scope of federal power—which, to be clear, remains vast—and the differences between congressional Republicans and Democrats on this front likewise seem relatively modest.

Finally, although this Article has suggested that congressional Republicans were and remain more interested in invalidating the ACA than they were in substantially restricting federal power, it is too soon to know for certain whether the new limits on Congress's enumerated powers that the Court imposed in *NFIB* will prove to be modest or more significant. Future presidential and senatorial elections—and the judicial appointments that they produce—will determine the impact of those limits. Only then will it be known whether a constitutional ban on purchase mandates will be broadened into a ban on regulating "inactivity," even in an emergency; whether many other uses of the Necessary and Proper Clause will be deemed

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98. These cases include *United States v. Morrison*, 529 U.S. 598 (2000), *Printz v. United States*, 521 U.S. 898 (1997), *United States v. Lopez*, 514 U.S. 549 (1995), and *New York v. United States*, 505 U.S. 144 (1992). A more complete list would include the Court's state sovereign immunity decisions and its decisions restricting the scope of congressional power under Section Five of the Fourteenth Amendment.

99. *See* Balkin & Levinson, *Constitutional Change*, *supra* note 61, at 508 (citing Cornell W. Clayton & J. Mitchell Pickerill, *Guess What Happened on the Way to Revolution? Precursors to the Supreme Court's Federalism Revolution*, 34 PUBLIUS: J. OF FEDERALISM 85, 103, 105 (2004)) ("Republican Party platforms from the Reagan years onwards enunciated what Clayton and Pickerill call 'fixed federalism,' demanding firm judicially enforceable limits on federal power, in contrast to the Democrats' emphasis on 'flexibl[e]' federalism.").

improper; and whether all but the most modest exactions will be invalidated as unconstitutionally coercive under the tax power. This Article has explained, however, why the modern politics of federal power in Congress render it unlikely that such a constitutional law will come into being.