

ARTICLE

CONSTITUTIONAL FORBEARANCE

A. Christopher Bryant *

INTRODUCTION

Eleven federal judges have ruled on the constitutionality of the individual mandate of the Patient Protection and Affordable Care Act (“ACA”),¹ also sometimes referred to as “Obamacare.”² Five of the six judges appointed by Republican Presidents held that the mandate violated the Constitution, while four of the five judges appointed by Democratic Presidents upheld the law. In the wake of these rulings, countless commentators quickly inferred that the judges’ political preferences and affiliations were deciding factors and forecast that the seemingly inevitable Supreme Court decision of the matter³ would split the High Court 5-4, with Justice Kennedy casting the deciding vote. The four other Justices appointed by Republicans are expected to vote to invalidate the law,

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1. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 21, 25, 26, 29, and 42 U.S.C.), *amended by* Health Care and Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified in scattered sections of 26 and 42 U.S.C.).

2. *See, e.g.*, Milton R. Wolf, *Buck Up and Stop Obamacare; GOP Should Seek Approval from Tea Party, Not Democratic Party*, WASH. TIMES, Jan. 10, 2011, at B3.

3. *See Granted & Noted List—October Term 2011*, SUPREME COURT OF THE U.S. STATES (Jan. 11, 2012), <http://www.supremecourt.gov/orders/11grantednotedlist.pdf> (noting the cases involving the ACA for which the Court will hear oral argument in March 2012).

and the four Justices appointed by Democrats are expected to vote to sustain it.⁴

How we came to this juncture, why, and who bears the blame are difficult and divisive questions. But for reasons explored below, all those concerned ought to be able to agree that the current state of affairs is regrettable, if not intolerable. In short, as the Obamacare cases starkly illustrate, our constitutional law too often looks and is too much like ordinary, partisan politics by another means. Putting aside questions about the provenance of the present dilemma, this essay ventures a claim about the way out of this situation. Ironically the same cases that so plainly exhibit the problem also provide a means to begin solving it.

At the most basic level the solution requires the recovery of a creditable distinction between constitutional law and partisan politics. This distinction depends upon, among other things, regular public displays that such a distinction can and does exist. The single, most effective way to exhibit the difference between law and politics is for judges to refrain from advancing politically desirable (to them) ends out of respect for contrary constitutional law. A judge who exercises this sort of self-restraint engages in constitutional forbearance. And the Obamacare cases present the Roberts Court with a singular opportunity for its conservative members to exercise noble, notable, and healing constitutional forbearance.

This article begins by developing the concept of constitutional forbearance and exploring the role it plays in the craft of good judging. This first Part also illustrates what is meant by constitutional forbearance by recovering a forgotten but illustrative example from a century ago. Part II then argues the need for forbearance has at present become unusually acute. Finally, in Part III this article identifies some of the qualities of the Obamacare cases that make them such singular opportunities for the exercise of this much needed judicial virtue and answers some anticipated objections to thinking about the cases in this way.

4. See *infra* notes 237–39 and accompanying text.

I. FORBEARANCE AS A CONSTITUTIONAL VIRTUE

In general, forbearance is an undervalued virtue. To some extent, this is inevitable, as forbearance tends by its very nature to be invisible. Conspicuous forbearance may be an oxymoron. Yet it is hard to resist the conclusion that prior ages valued forbearance more than our own. The ancient myth of Cincinnatus surrendering his dictatorial authority and returning to a pacific and pastoral lifestyle when the military threat to Rome had been neutralized is celebrated as singularly noble.⁵ This myth in turn is echoed in the founding era paeans to George Washington, who on multiple occasions declined opportunities to assert or seize power in deference to an emerging culture of constitutional, civilian republican government.⁶ Well into the nineteenth century, the equation of nobility with forbearance in the exercise of power exerted discernable influence on public discourse. But by the end of the twentieth century, forbearance was markedly less likely to figure prominently in narratives of noble public service. When historians were asked to rank the U.S. Presidents, the results reflected a distinct preference for men of bold, even legally dubious action, over their more restrained colleagues.⁷

A. *The Social Value of Judicial Forbearance*

One social sphere where a culture of forbearance arguably lingered well into the twentieth century was the realm of jurists. Indeed, forbearance might be the most indispensable virtue to virtuous judging. In our constitutional order, the judiciary is

5. See Jim Chen, *The American Ideology*, 48 VAND. L. REV. 809, 816 n.33 (1995).

6. See generally GARY WILLS, CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT 3 (1984) (describing Washington as “a virtuoso of resignations”); see also Gordon S. Wood, *The Greatness of George Washington*, 68 VA. Q. REV. 189, 196 (1992) (asserting that the “greatest act of his life, the one that made him famous, was his resignation as commander-in-chief” of the Continental Army after the conclusion of the Revolutionary War).

7. See, e.g., William Douglas, *Presidential Legacy; Is Truman Bounce in the Future for Bush?; Scholars Debate Whether His Status Will Increase After He Leaves Office*, THE HOUS. CHRON., Aug. 26, 2007, at A15; but see Ivan Eland, Op-Ed., *From Van Buren to Bush, a Better Way to Rank US Presidents*, CHRISTIAN SCI. MONITOR, Jan. 20, 1999, at 9 (“It’s time to rethink the way we rate presidents . . . Presidential rankings should be based on different standards: Did the president uphold the Constitution, and have an agenda that contributed to peace, prosperity, and liberty, and was he reasonably adept at getting that agenda implemented?”).

uniquely tasked to enforce fundamental policy determinations not of its own making.⁸ After all, the whole theory of judicial review is not that the courts may correct legislative missteps but rather that the judicial duty to the law includes the obligation to enforce higher law at the expense of a statute when the two are in irreconcilable conflict.⁹ That this classical explanation of judicial review is viewed with skepticism in many quarters provides all the more reason for judges to act so as to shore up the distinction between constitutional law and politics.

Constitutional forbearance is the most effective way to accomplish this goal. As a general matter, legal forbearance occurs whenever any public official exercises authority to produce a result that is, in her eyes, suboptimal but nonetheless required by law. The concept of the rule of law envisions and requires nothing less if law is to be anything more than a loose set of discretionary guidelines to persons in power. A judge or justice engages in constitutional forbearance whenever she concludes that her policy preferences conflict with what the Constitution requires, and she then rules in conformity with the latter and in disregard of the former. In so doing, she offers herself as living proof that constitutional law is not just politics by other means. It is worth noting that forbearance, so understood, does not necessarily equate to deference to the political branches of government. To the contrary, forbearance would include invalidation of a wise or even a crucially important statute (in the judge's estimation), if the Constitution (in the judge's estimation) prohibits such a law. Of course, forbearance would also include acquiescence in a constitutional statute that the judge believed to be an invitation to disaster or even a mandate of manifest injustice.

We might hope that our constitutional law would be sufficiently enlightened that it would only rarely permit (or proscribe) that which thoughtful people oppose (or support). But to the extent that any separation exists between constitutional law and judicial policy preferences (often about enormously important and complex matters over which reasonable people profoundly disagree), such cases are not only inevitable but should be common. In this

8. See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at xii (1985) (“[W]hen a judge swears to uphold the Constitution, he promises obedience to a set of rules laid down by someone else.”).

9. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–78 (1803).

sense, the measure of a good or virtuous judge would not be the frequency with which she does “the right thing” as she perceives it, but rather the frequency with which she *abstains* from doing so in the name of a contrary legal rule. To the extent that the Constitution is to be distinct from politics, this measure should be no less applicable to constitutional than to contract law. If anything, given the inherent ambiguity of a constitution with such capacious clauses as ours, and intended to endure as long as it has and (we hope) will, forbearance in the use of judicial review to accomplish what are, in a judge’s eyes, desirable ends may be even more essential to constitutional legal faith than any other subject addressed by law.¹⁰

As noted above, the traditional justification for judicial review depends upon the assumption that the Constitution supplies a rule that trumps any contrary rule supplied by a mere statute.¹¹ One need not believe the judicial process a mechanistic one to conclude that the judge should be significantly constrained in discovering the rule the Constitution provides. This understanding of judicial review in effect assigns to the judge a crucially important but sharply limited role. The judge is but one actor in a larger drama designed to achieve the public good to the extent that is humanly possible. But the authors of the play did not limit themselves to an extended judicial soliloquy. Rather, the judge is merely one agent in what is meant to be a moral system. Of course the concept of such a limited role should be familiar to any member of the legal profession serving in an adversarial system such as our own.¹² The notion provides the logically sufficient answer to that notorious question the laity use to bedevil lawyers: how can you represent people like that (i.e., people guilty of crimes, or harms to the environment, or outrageous avarice, etc.)?¹³ The lawyer has accepted a limited and, in isolation, amoral role in service of a larger scheme designed to serve moral ends.¹⁴ One need only consider that the alternative system is deemed

10. See Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J.L. & PUB. POL’Y 519, 587–88 (2008) (identifying and discussing some of the negative effects of the politicization of constitutional law).

11. See *supra* note 9 and accompanying text.

12. See generally MONROE H. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* (1975).

13. See, e.g., JAMES S. KUNEN, “HOW CAN YOU DEFEND THOSE PEOPLE?”: THE MAKING OF A CRIMINAL LAWYER (1983).

14. *Id.*

“inquisitorial” to get a fairly good sense of why the adversarial system might be thought a morally compelling one. A judge similarly accepts an indispensable, but circumscribed role in a larger system of government carefully wrought, on balance, to best advance the public good over the long term.

The logic of the matter, in the case of both the advocate and the judge, is fairly straightforward. But the actual observance of the limits on one’s role can be psychologically trying in the extreme.¹⁵ With respect to a judge, this duty requires the individual to subordinate her own view of the public good to the assessment of others and then to carry that assessment into effect in concrete circumstances, which may not have been fully envisioned when the general policy was formulated and, in any event, which the judge has come to know far more intimately than would ever be possible for a legislator acting *ex ante*. The judge confronts the particular persons to whom abstract decisions, with which the judge may or may not agree, are to be applied. When a judge is called to serve as an agent in effecting (what the judge believes to be) a misguided or even immoral result, the judge suffers a profound cognitive dissonance,¹⁶ in much the same way as an attorney charged with representing a client the attorney believed to be in the wrong.¹⁷ In both cases the human mind recoils from this uncomfortable tension and seeks to avoid it.¹⁸ Thus, a danger arises that the judge will, consciously or unconsciously, distort her perception of the facts or understanding of the law in an ef-

15. Cf. Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CAL. L. REV. 1485, 1494 (stressing that “judges are engaged in an occupation that involves ‘emotional labor’”).

16. See generally LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957). Festinger describes cognitive dissonance as the result of discord among an individual’s knowledge, opinions, and beliefs. See *id.* at 2–3, 11. He argues that the presence of dissonance motivates its subject to engage in dissonance reduction or dissonance avoidance. See *id.* at 29–31, 263–65. Numerous legal scholars have recognized the relevance of these insights for understanding and evaluating judicial behavior. See, e.g., Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash, and the ADA Amendments Act*, 55 WAYNE L. REV. 1267, 1297 (2009); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1624–25 (2006).

17. See, e.g., Gabriel Lerner, *How Teaching Political and Ethical Theory Could Help Solve Two of the Legal Profession’s Biggest Problems*, 19 GEO. J. LEGAL ETHICS 781, 783 (2006) (noting that “there is often a dissonance (or at least a perceived dissonance) between how a human being should ethically behave and how a lawyer should ethically behave” and that “[m]ost people want to be decent human beings, yet lawyers, if they make their clients’ interests the highest priority, must frequently do things, such as impugn the character of a truthful witness, that would be reprehensible if done by a non-lawyer”).

18. See *supra* note 16.

fort to escape this dilemma.¹⁹ The inevitable propensity for psychological self-defense creates a corresponding risk of cognitive biases,²⁰ even (perhaps especially) among those judges most committed to an honorable satisfaction of their official responsibilities.

This natural drift in the direction of a judge's own preferences must be countered with an equal and opposite force lest the distinction between law and politics vanish. The source of this counterbalance can either be internal or external to the judiciary.²¹ The few external constraints on a sitting federal judge's discretion are, by design, notoriously weak²² and are better adapted to remedy outrageous, self-conscious abuses of the judicial role and provide little incentive for a judge to be rigorously self-critical about her own motives and assessments.²³ The principle internal constraint grows out of the judge's desire to be perceived by her judicial colleagues, the practicing bar, and, perhaps to a lesser extent, the general public as consummate in the judicial role.²⁴ This desire in turn pushes a judge to strive to root out and resist unconscious biases and assumptions in constitutional cases only to the extent these three communities, and especially the first, be-

19. See Dan M. Kahan, "Ideology in" or "Cultural Cognition of" Judging: What Difference Does It Make?, 92 MARQ. L. REV. 413, 417 (2009) (noting that judges might "sincerely bas[e] their decisions on their views of the law [b]ut that what they understand the law to require might be shaped by their values—operating not as resources for theorizing law, but as subconscious, extralegal influences on their perception of legally consequential facts").

20. See *id.*

21. For a discussion of the distinction between internal and external constraints on judges, see Michael J. Gerhardt, *How a Judge Thinks*, 93 MINN. L. REV. 2185, 2196–97 (2009) (reviewing RICHARD A. POSNER, *HOW JUDGES THINK* (2008)).

22. See Richard Albert, *The Constitutional Imbalance*, 37 N.M. L. REV. 1, 10 (2007) ("They are sheltered from removal (except through the extraordinary act of impeachment) by the gift of life tenure, buoyed in their words and actions by an indulgent theory of judicial independence, and freed from the solemn commitment to popular accountability. When coupled with these emoluments, the mighty pen that judges wield without popular review becomes perhaps the most powerful instrument controlled by any public body in civil society.").

23. Cf. Richard A. Posner, Foreword, *A Political Court*, 119 HARV. L. REV. 31, 42 (2005) (discussing external constraints on the Court and concluding that "[t]here are political limits on what the Court can do, but they are capacious").

24. See Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1796 (2004) ("To the extent that judges care about their prestige and power—and truly want to earn the respect of their colleagues and the legal community generally—it is crucial that they be perceived to base their decisions on the law. The prospect of public exposure, criticism, and reputational harm are among the most powerful forces that lead judges to ground their decisions in existing legal materials.").

lieve in and prize preservation of a distinction between constitutional law and politics.

Judges, no less than anyone else, exhibit their commitments through their actions. A judge's exercise of constitutional forbearance exhibits her belief in and dedication to a separation of constitutional law and her personal political predilections. As such, instances of judicial forbearance can over time reinforce forbearance as a norm governing judicial behavior.²⁵ Moreover, a commitment to forbearance depends on a faith that one's judicial colleagues both share and rigorously pursue this same virtue.²⁶ Each judicial act of forbearance is in this sense a unilateral step in a longer sequence aimed at achieving multi-lateral judicial disarmament.²⁷ In a similar fashion departures from the norm weaken it.²⁸ Law is a socially constructed reality, the meaning and significance of which is forever in the process of regeneration.²⁹ In order for there to be any law in constitutional law there must be, among other things, patterns of mutually reinforcing judicial behavior that at once make judges be and look like something other than politicians in robes.

It bears emphasis that the constitutional forbearance depends not on perceptions alone, but also on the underlying reality. As Brian Tamanaha has observed:

[I]deals have the potential to create a reality in their image only so long as they are believed in and acted pursuant to. This might sound fanciful, like suggesting that something can be conjured up by wishful thinking; or it might sound elitist, like the "noble lie," the idea that it is sometimes better for the masses to believe in myths because the truth is too much to handle. But it is neither. It is a routine application of the proposition widely accepted among social the-

25. BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 236 (2006) (noting that the "threat to the rule of law . . . is not that judges are incapable of rendering decisions in an objective fashion" but rather that they "come to *believe* that it cannot be done, or that most fellow judges are not doing it").

26. *See id.* (identifying judicial skepticism about the dedication of one's colleagues to following the law as a serious threat to the rule of law).

27. *Cf.* Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 69 S. CAL. L. REV. 431, 474-75 (1996) (illustrating through game theory and through other empirical evidence that courts, and especially the Supreme Court, employ forbearance in situations where it assists their political or ideological goals).

28. *See TAMANAHA, supra* note 25, at 236.

29. *See supra* note 25 and accompanying text.

orists and social scientists that much of social reality is the construction of our ideas and beliefs.³⁰

So constitutional forbearance not only leads to a firmer faith in a distinction between constitutional law and politics, but it also both reflects and reinforces the truth of that faith.

B. *The Analytical Contribution of Forbearance*

Even assuming these observations about the importance of constitutional forbearance are persuasive, what difference ought these considerations make in the actual practice of the judicial craft?

None in most cases; a lot in a few. Since the ultimate objective is to cabin the influence a judge's personal policy preferences have on the outcome of the cases she decides, most often the wisest course is for the judge to pretend like those preferences do not exist.³¹ Of course, this is precisely what, at least superficially, judges do all the time.³² However, judges no less than the rest of us, are irreducibly political creatures and their politics necessarily manifest themselves as subtle biases in their perception of both law and fact.³³ Ignoring these influences will not make them go away.³⁴ What we can expect judges to do, however, is be aware of their preferences and resist their gravitational pull.

It would be as inappropriate as it is unlikely were this resistance to manifest itself as hostility to one's preferred outcomes.

30. TAMANAHA, *supra* note 25, at 6.

31. Justice Frankfurter spoke of himself, albeit some have charged hypocritically, as a "political eunuch," an arresting metaphor. Cf. BRUCE ALLEN MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES* 9 (1982).

32. For example Judge Vinson began his opinion striking down the ACA by stating this case is not about whether the Act is wise or unwise legislation, or whether it will solve or exacerbate the myriad problems in our health care system. In fact, it is not really about our health care system at all. It is principally about our federalist system, and it raises very important issues regarding the Constitutional role of the federal government.

See Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1263 (N.D. Fla. 2011); see also Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 780 (E.D. Va. 2010) (calling the government's goal of expanding health care "laudable" but ultimately concluding that the scheme is unconstitutional).

33. See *supra* notes 14–20 and accompanying text.

34. Cf. Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 895–98 (2009) (urging judges to identify culturally determined heuristic biases and take steps to minimize their impact).

Applied rigorously, such an approach would produce a perverse anti-bias bias that would work a distortion in the legal process that amounts to a mirror-image of the slant it was adopted to cure. This corruption would not even provide the benefit of desirable (in the judge's eyes) outcomes in individual cases. In the vast majority of cases, a good judge, like a good umpire,³⁵ has to "call them as she sees them," without any weight accorded to either the home team or the visitors.³⁶

But awareness of the value of constitutional forbearance should pull a judge ever so slightly towards an occasion of its exercise. The force of this attraction would have to be minimal in magnitude to avoid the absurd perversity outlined above. Therefore in the vast run of cases this attraction would have no effect. In a narrow set of highly politicized and deeply indeterminate cases, however, it should be decisive.

The strength of the typically minimal attraction towards forbearance should grow as a particular case becomes more politicized.³⁷ This correlation makes sense for two reasons. First, as the politicization of a case increases, so does the temptation a judge might feel to give reign to her personal political predilections. After all, the politicization of the case reflects, among other things, the extent to which persons not party to the suit will be affected by and care about its resolution.³⁸ The more widespread the interest in the ruling, the more likely the judge will be corrupted by

35. For likely the most notorious recent use of this analogy, see the statement of Chief Justice Roberts at his Senate confirmation hearing. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.). ("Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.")

36. See *id.* at 448 (answer of John G. Roberts, Jr. to question posed by Sen. Richard Durbin ("I had someone ask me in this process . . . 'Are you going to be on the side of the little guy?' And you obviously want to give an immediate answer, but as you reflect on it, if the Constitution says that the little guy should win, the little guy is going to win in court before me. But if the Constitution says that the big guy should win, well, then, the big guy is going to win, because my obligation is to the Constitution.")).

37. There is, of course, no scientific metric by which one can measure the extent to which a case has been politicized. One can, however, point to indicia that a particular suit or issue has politicized. Those indicia and their relevance to the ACA cases is discussed at *infra* notes 188–259 and accompanying text.

38. Cf. Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 974–82 (2009) (discussing the enormous significance of some judicial opinions for persons not party to the suit).

that interest.³⁹ As the risk of cognitive bias increases, so must the force set in opposition to it, at least if it is expected to have the desired effect. Second, as a case becomes increasingly politicized, the risk that others will perceive, correctly or not, that a ruling is politically motivated likewise increases.⁴⁰ Though the point of forbearance is not solely or even primarily about professional and public perceptions, but they do matter.⁴¹

Also important is the degree to which the relevant constitutional law is settled and relatively clearly dictates a result in the case. Even at its zenith, the draw of forbearance should not be strong enough to displace a settled legal rule. The whole point of forbearance is to strengthen rule of law values, so it would make no sense to compromise them in its service. But as is developed below,⁴² modern constitutional law is hardly mathematical in its precision. Moreover, even within the realm of constitutional law, there are areas that are more or less rule-bound than others. In those cases where the traditional tools of constitutional analysis—constitutional text, history, precedent—leave the judge with little direction and much discretion, even the ordinarily negligible pull towards attraction should be enough to move the needle and resolve the controversy.

At least that is the theory of judicial virtue underlying this article. But how has this theory been reflected in actual practice? A historical example supplies concrete detail to an otherwise hopelessly abstract discussion. It might also provide some defense to the charge naïveté.

C. *The Ghost of Forbearance Past*

History has not been kind to Justice James Clark McReynolds, and for good reason.⁴³ But his unfortunate, even unforgivable, bigotry and boorish behavior ought not obscure his virtues as a

39. See Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1605–06 (2004) (“In cases of high political salience . . . judges are most in need of guidance from the Constitution because these are the cases where their raw personal preferences are most likely to distort the judicial norm of dispassionate analysis.”).

40. See *id.*

41. See *supra* note 30 and accompanying text.

42. See *infra* note 128 and accompanying text.

43. See generally JAMES E. BOND, I DISSENT: THE LEGACY OF CHIEF JUSTICE JAMES CLARK McREYNOLDS (1992).

judge, the chief of which was an unwavering dedication to constitutional duty as he perceived it. On at least two historic occasions, this dedication trumped his personal predilections to his everlasting credit.

The first was the product of his belief that the Fourteenth Amendment protected a core sphere of individual autonomy from regulatory infringement. This belief was notoriously manifest in his much-maligned adherence to economic substantive due process well past what in retrospect can clearly be seen as the doctrine's expiration date.⁴⁴ He is less well remembered for his faithful adherence to these principles in non-economic contexts on behalf of then widely vilified ethnic and religious minorities. While the following passage from the Court's opinion in *Meyer v. Nebraska* is oft-quoted, it is rarely noted that McReynolds was its author:

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁴⁵

Still, the context of the ruling is even less often recalled. At the height of the anti-German hysteria following U.S. entry into the First World War, Nebraska, like many states, enacted laws that prohibited the teaching of any modern language other than English.⁴⁶ McReynolds was far from immune from the kind of vehement passions that led to these enactments. Indeed, in a notorious dissent from the Court's reversal of two German-Americans espionage convictions, McReynolds defended anti-German prejudice as justified by common experience.⁴⁷ But he was able to bridle

44. See, e.g., *Gold Clause Cases*, 294 U.S. 240, 316, 369–70 (1935) (McReynolds, J., dissenting); *Nebbia v. New York*, 291 U.S. 502, 541–42 (1934) (McReynolds, J., dissenting).

45. 262 U.S. 390, 399 (1923).

46. William G. Ross, *A Judicial Janus: Meyer v. Nebraska in Historical Perspective*, 57 U. CIN. L. REV. 125, 125, 133 (1988).

47. See *Berger v. United States*, 255 U.S. 22, 42–43 (1921) (McReynolds, J., dissenting); see also PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 87–90 (1997) (discussing McReynolds's hostility to Germans).

these passions when confronted with the claim that the Constitution protected individuals from such prohibitions, over a dissent by Justice Holmes. In doing so, he led the Court to an exemplary and praiseworthy act of constitutional forbearance. This was not a singular episode in McReynolds's long judicial career. He exhibited impressive forbearance in service of constitutional principle when confronted with the federal government's first volley in the now century-old "war on drugs." Within ten years of the New York legislature's enactment of one of the nation's first major narcotics laws, Congress passed the revealingly labeled Harrison Anti-Narcotic Act of 1914.⁴⁸ The Court construed the Act broadly to supplant any contrary state law and impose a nationwide blanket prohibition on the sale of narcotics, to be enforced with severe criminal penalties, excepting only that distribution the Treasury Department (and the Court) deemed to be "in the regular course of the professional practice of [medicine]."⁴⁹ Then in *United States v. Doremus*, the Court rebuffed the claim that the Act, so construed, exceeded Congress's power to tax.⁵⁰ Justice Day's opinion reasoned that the Act was within the ambit of congressional authority so long as it had "some reasonable relation" to the raising of revenue, even if the law's "effect [was] to accomplish another purpose as well."⁵¹ Courts were not to inquire into congressional motives.⁵² Applying these precepts, Justice Day eagerly endorsed the fiction that the regulatory character of the Harrison Act was merely incidental to its revenue raising function manifested solely in the statute's imposition of a nominal \$1 per annum tax.⁵³ Four Justices, including McReynolds, dissented.⁵⁴

Judicial deference to claimed congressional purposes may be defensible, even laudable, in light of the relative institutional competence and legitimacy of these two branches of the national

48. See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 355 (1993). See generally Steven Wisotsky, *Exposing the War on Cocaine: The Futility and Destructiveness of Prohibition*, 1983 WIS. L. REV. 1305, 1312 (1983).

49. *United States v. Doremus*, 246 F. 958, 959 (W.D. Tex. 1918) (quoting indictment), *rev'd*, 249 U.S. 86 (1919).

50. 249 U.S. 86, 93–94 (1919).

51. *Id.* at 94.

52. *Id.* at 93 ("[F]rom an early day the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject.").

53. *Id.* at 90, 93–95.

54. *Id.* at 95.

government. But selective deference is, of course, not deference at all, but rather merely a disguise for inchoate judicial policy judgments avowedly the province of the legislature. And in *The Child Labor Tax Case*, the Court selectively abandoned the posture of deference it had assumed in *Doremus* in favor of its perceived obligation to assess independently whether the challenged law “impose[d] a tax with only that incidental restraint and regulation which a tax must inevitably involve” or whether the statute “regulate[d] by the use of the so-called tax as a penalty.”⁵⁵ Chief Justice Taft sententiously intoned that “[i]t is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress” whenever such laws dealt “with subjects not entrusted to Congress, but left or committed by the supreme law of the land to the control of the states.”⁵⁶ As to why this “high duty and function” did not require the Court to invalidate the Harrison Anti-Narcotics Act as well,⁵⁷ Taft had little to say.

Justice McReynolds was, appropriately, troubled by the Court’s inconsistency on federalism. In his opinion for a unanimous Court in *United States v. Daugherty*, he welcomed, indeed sketched, an argument that *Doremus* be overruled:

The constitutionality of the [Harrison] Anti-Narcotic Act, touching which this court so sharply divided in *United States v. Doremus*, was not raised below, and has not been again considered. The doctrine approved in *Hammer v. Dagenhart*, *The Child Labor Tax Case*, [] and *Linder v. United States*, may necessitate a review of that question if hereafter properly presented.⁵⁸

But a majority of the Justices were content to allow Congress to exercise what in effect amounted to a general police power so long as the power was discharged against conduct the Justices themselves found abhorrent. When the issue finally returned in *Nigro*

55. *Child Labor Tax Case*, 259 U.S. 20, 36 (1922).

56. *Id.* at 37.

57. His opinion identified only one difference between the two statutes. Whereas the Child Labor Tax Law was “on the face of the act . . . a penalty,” any ulterior motive that may have contributed to the passage of the narcotics law was “not shown on [its] face.” *Id.* at 39, 43. But even that alleged difference ignored the unanswered conclusion of the *Doremus* trial court and four Supreme Court dissenters that the terms of the Harrison Act standing alone revealed that the law’s actual purpose was narcotics regulation, not revenue collection. See A. Christopher Bryant, *The Third Death of Federalism*, 17 CORNELL J. L. & PUB. POL’Y 101, 109–10 (2007) (discussing the Harrison Act cases).

58. 269 U.S. 360, 362–63 (1926) (citations omitted).

v. United States, the Court reaffirmed the constitutionality of the Harrison Act.⁵⁹

In his opinion for the Court, Chief Justice Taft first adopted the government's broad interpretation of the Act, which in effect criminalized receipt of the covered narcotics by anyone absent a physician's lawful prescription for an approved medicinal use.⁶⁰ So interpreted, the Act fairly obviously constituted a spurious use of the taxing power to prohibit private conduct deemed dangerous and immoral, a responsibility not entrusted by the Constitution's enumerated powers to the federal government, but rather one reserved to the states. In form at least, Chief Justice Taft agreed that the federal government lacked any such power.⁶¹ Taft nevertheless upheld the Act on the transparent fiction that its strict constraints on both those who might sell *and* those who might buy narcotics were merely incidental to tax collection.⁶² Taft reasoned that the section's requirement that *purchasers* also be registered (unless they held a valid physician's prescription) relieved the revenue service of a significant enforcement burden—namely, the need of “sending to examine the list” of registered sellers to determine whether a particular seller's name appeared thereon.⁶³ But this imagined administrative convenience was eclipsed by the prohibitory effect worked by such a broad construction of the Act. Because would-be non-medicinal users were not even permitted to register, they could never obtain the forms necessary to make a purchase.⁶⁴ It was as if Congress prohibited the sale of all alcohol-

59. 276 U.S. 332, 338, 354 (1928) (addressing and resolving a series of questions that the Eighth Circuit had, in a now-extinct procedure, certified for Supreme Court consideration).

60. *Id.* at 344.

61. Early in his analysis, he rather righteously avowed that

[i]n interpreting the act, we must assume that it is a taxing measure, for otherwise it would be no law at all. If it is a mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs, it is beyond the power of Congress, and must be regarded as invalid, just as the Child Labor Act of Congress was held to be.

Id. at 341 (citing *Child Labor Tax Case*, 259 U.S. at 20).

62. *Id.* at 353–54.

63. *Id.* at 345. Chief Justice Taft also noted that, in the years intervening between the events at issue in *Doremus* and those with which the instant case was concerned, Congress had amended the Act to increase the tax and the revenue produced thereby. *Id.* at 353. For an argument that because this intervening amendment augmented the revenue raised under the Act the amendment supplied the foundation for constitutionality woefully lacking in *Doremus*, see Robert C. Brown, *When is a Tax Not a Tax?*, 11 *IND. L.J.* 399, 421–22 (1936).

64. See Harold Gill Reuschlein & Albert B. Spector, *Taxing and Spending: The Load-*

ic beverages in order to ensure that distributors paid the excise tax on alcohol sales. Taft justified congressional elimination of the non-medicinal narcotics market as a means of ensuring that the distributors in that market paid their registration fees.⁶⁵ The surgery was a success, but the patient died.

McReynolds must have been sympathetic with the policy of narcotics prohibition, likely for reasons both righteous and ignoble.⁶⁶ But he declined to join in the Court's willful blindness. In his dissent, he rejected as an artifice the claim that "Congress could have supposed that collection of the prescribed tax would be materially aided by requiring" purchasers to use an order form that they could not lawfully obtain.⁶⁷ He then acknowledged what must have been obvious to everyone, namely that Congress's "plain intent [was] to control the traffic within the States by preventing sales except to registered persons and holders of prescriptions," a bald usurpation of the police power reserved to the States.⁶⁸ Thus, unlike most of his colleagues,⁶⁹ McReynolds resisted the temptation to honor federalism in the breach in service of the apparently worthy causes of preventing addiction and preserving traditional mores,⁷⁰ causes in which he must have wholeheartedly believed. In so doing, he again demonstrated admirable fortitude, exemplified judicial forbearance, and exhibited a distinction between constitutional law and politics. As explained below, the challenge to the individual health-insurance mandate provides sitting judges with an unparalleled opportunity to follow his example.

ed Dice of a Federal Economy, 23 CORNELL L.Q. 1, 20–21 (1937) (discussing the practical effect of the Harrison Act).

65. See *Nigro*, 276 U.S. at 354.

66. McReynolds expressly acknowledged the "evils incident to the use of opium." *Id.* at 357 (McReynolds, J., dissenting). For a discussion of McReynolds's antipathy for unorthodox persons and conduct, see generally BOND, *supra* note 43, at 124–26, 136.

67. *Nigro*, 276 U.S. at 356 (McReynolds, J., dissenting).

68. *Id.*

69. *Id.* at 354. Justice Sutherland joined Justice McReynolds's dissent. *Id.* at 357. Justice Butler dissented on the ground that he would have rejected the government's broad construction of the Act, thereby, avoided the constitutional question. *Id.* at 358 (Butler, J., dissenting).

70. *Id.* at 357 (McReynolds, J., dissenting).

II. A TIME RIPE FOR FORBEARANCE

Rarely has the need for constitutional forbearance been more acute than it is today. The very possibility of a meaningful distinction between law and politics is dismissed as naive by some.⁷¹ To those truly hardened into this skepticism, this essay has little to say. Many others, however, hold out hope in the possibility of this demarcation, while at the same time their doubts grow about current federal judges' and justices' commitment to achieving it.⁷²

To be sure, this problem was long in the making. One of the central, recurring questions of twentieth-century American history was what role judicial review ought to play in the nation's political and social life. A mere five years into the century, a divided Supreme Court asserted the power and duty to scrutinize regulations governing labor contracts, then an emerging trend in the wake of industrialization, in the name of common law rights to which the Court had accorded constitutional status.⁷³ Of course, the resulting economic substantive due process jurisprudence, when joined with inconstant efforts to limit Congress to a strict reading of its enumerated powers,⁷⁴ ultimately provoked a singular constitutional crisis in which the Court first resisted and then succumbed to concentrated pressure from Congress and the President.⁷⁵ During this same period legal theory underwent momentous change, as a nineteenth-century faith in natural law and legal science was replaced with legal realism's emphasis on the inevitable choices judges made in deciding cases, even when purporting to do so according to an apparently mechanistic application of legal rules.⁷⁶ Some realists went so far as to contest the power of law to provide any constraint on raw judicial will.⁷⁷ Oth-

71. See TAMANAHA, *supra* note 25, at 239–42 (discussing and critiquing this view).

72. *Id.* at 237, 240.

73. See, e.g., *Lochner v. New York*, 198 U.S. 45, 57 (1905) (“There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.”).

74. See generally Bryant, *supra* note 57, at 102–05 (discussing the Court's efforts to limit Congress to its enumerated powers).

75. See generally THOMAS B. MCAFFEE ET AL., *POWERS RESERVED FOR THE PEOPLE AND THE STATES: A HISTORY OF THE NINTH AND TENTH AMENDMENTS* 143–61 (2006) (chronicling the Supreme Court's struggle with President Roosevelt over pieces of his New Deal legislation).

76. See TAMANAHA, *supra* note 25, at 237, 240.

77. See *id.* at 237.

er more moderate critics sustained a faith in law's capacity to constrain judicial will, while also acknowledging that judgments about matters of public policy were an unavoidable aspect of judging.⁷⁸

The Court's ill-fated New Deal Era confrontation with the political branches was soon explained as the wages of the judicial sin of hubris. The Court had conflated its legitimate role in enforcing fundamental law with an illegitimate resistance to the politically unfamiliar.⁷⁹ The lesson widely drawn from the clash and the Court's ensuing retreat was that the Court was poorly situated and ill-equipped to second guess the inevitable compromises embodied in social and economic legislation.⁸⁰ At the same time, the Court asserted the possibility of a more active role in the protection of "discrete and insular minorities," who might be unable to protect themselves in the legislative arena.⁸¹ This well-worn narrative is reiterated here, blessedly in brief, to underscore that at the heart of American jurisprudence, in the early decades of the last century, was a skepticism about a distinction between law, especially constitutional law, and politics.

The Court's reservation of a theoretical right to intervene on behalf of minorities became a reality with its 1954 invalidation of public-school segregation in *Brown v. Board of Education*,⁸² the pre-eminent legal event of the century. A former governor of California, Chief Justice Warren wrote for a unanimous Court, which dismissed the historical record of the Fourteenth Amendment as "[a]t best, . . . inconclusive,"⁸³ and proceeded with a highly contextualized and pragmatic discussion of the contemporary importance of education and the psychological harms of segregation.⁸⁴ Though Warren's opinion rested on the uniqueness of education, the Court in short order and by a series of laconic *per*

78. *See id.* at 237–38.

79. *See generally* ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* (1941) (discussing the Supreme Court's willingness to overstep its constitutional limitations to thwart innovation).

80. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 151 (1938) (affording significant deference to the legislature in making economic decisions about the safety of shipping certain types of milk across states lines).

81. *Id.* at 153 n.4.

82. 347 U.S. 483 (1954).

83. *Id.* at 489.

84. *Id.* at 493–95 & n.11 (citing psychological studies that showed segregation led to inferiority complexes among black schoolchildren).

curiam opinions extended the constitutional prohibition on segregation to buses,⁸⁵ public beaches,⁸⁶ and municipal golf courses.⁸⁷ These decisions left some legal liberals pleased with these patently noble outcomes but worried about their legality. Most famously, and to many infamously, Professor Herbert Wechsler pondered publicly whether the cases, whose results he applauded, could be squared with a commitment to any “neutral principles” of constitutional law.⁸⁸

Of course, this same skepticism has dogged the Court and its students ever since, waxing and waning according to the controversy created by the Court’s decisions. But there is reason to believe that the issue has recently grown in prominence and that another crisis in confidence may be at hand. To be sure, the twentieth century was a harrowing time for those who believe that constitutional law can and should be something more than just politics. Unfortunately, so far the twenty-first century has been even worse.

The decade got off to a terrible start when the five more conservative Justices embraced a novel equal protection argument in the service of resolving, in their favor, the deep and enduring dispute over the 2000 presidential election.⁸⁹ As bad as this was, it was further exacerbated by the remarkably partisan response of the legal academy.⁹⁰ Steven Calabresi was in splendid isolation as the sole demonstrably conservative legal scholar who challenged the validity of what the Court had done.⁹¹

But this was only the beginning. After one relatively quiet term, the Court in June 2003 splintered over two of the more di-

85. *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala.), *aff’d per curiam*, 352 U.S. 903 (1956).

86. *Dawson v. Mayor of Baltimore City*, 220 F.2d 386 (4th Cir.), *aff’d per curiam*, 350 U.S. 877 (1955).

87. *Holmes v. City of Atlanta*, 223 F.2d 93 (5th Cir.), *vacated per curiam*, 350 U.S. 879 (1955).

88. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 17 (1959).

89. *See Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

90. *See* Robert J. Pushaw, Jr., *Bush v. Gore: Looking at Baker v. Carr in a Conservative Mirror*, 18 CONST. COMMENT. 359, 386–90 (2001) (noting that “the voluminous commentary on *Bush v. Gore* has mirrored the Court’s ideological split”).

91. *See* Steven G. Calabresi, *A Political Question*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY* 129–44 (Bruce Ackerman ed., 2002).

visive political issues of the day—homosexuality⁹² and affirmative action.⁹³ In both instances, the opinions for the Court said relatively little about constitutional text, ratification-era history, or precedent, not surprisingly as these traditional tools of constitutional law either shed little light on the matter or affirmatively contradicted the majority's resolution of the issue.⁹⁴ The cases also provoked unusually lengthy and passionate dissents.⁹⁵ As with *Bush v. Gore*,⁹⁶ the academic response was similarly polarized and apparently aligned with the authorial ideology.⁹⁷

In June 2005, the Court handed down two rulings that, rather bizarrely, approved a public display of the Ten Commandments in Texas but disallowed a similar display in Kentucky.⁹⁸ Only one Justice saw any difference between the two cases, but given the contest on the Court concerning its Establishment Clause jurisprudence, that was sufficient for different results.⁹⁹ Then, without overruling its 2000 decision invalidating Nebraska's ban on so-called "partial-birth" abortions,¹⁰⁰ seven years and two new Justices later the Court sustained a remarkably similar federal law.¹⁰¹ The academic response was largely one of shock and incredulity.¹⁰²

92. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

93. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

94. Of course, *Lawrence* expressly overruled the precedent most clearly on point. See *Lawrence*, 539 U.S. at 573–78 (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)). In *Grutter*, both the majority and the dissent claimed the advantage of precedent. Compare *Grutter*, 539 U.S. at 322–23, with *id.* at 379–80 (Rehnquist, C.J., dissenting).

95. See, e.g., *Lawrence*, 539 U.S. at 586–606 (Scalia, J., dissenting); *Grutter*, 539 U.S. at 349–78 (Thomas, J., dissenting).

96. 531 U.S. 98 (2000) (per curiam).

97. Compare Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 MICH. L. REV. 1447 (2004), with Lino A. Graglia, *Lawrence v. Texas: Our Philosopher-Kings Adopt Libertarianism as Our Official National Philosophy and Reject Traditional Morality as a Basis for Law*, 65 OHIO ST. L.J. 1139 (2004).

98. Compare *Van Orden v. Perry*, 545 U.S. 677, 681 (2005), with *McCreary Cnty. v. ACLU*, 545 U.S. 844, 850, 857–58 (2005).

99. See *Van Orden*, 545 U.S. at 703–04 (Breyer, J., concurring).

100. *Stenberg v. Carhart*, 530 U.S. 914, 921–22 (2000).

101. *Gonzales v. Carhart*, 550 U.S. 124–33 (2007).

102. See Pushaw, *supra* note 10, at 567 (asserting that “[m]ost commentators agreed that *Gonzales* took a large step in the direction of eventually overruling *Roe*” and that “[p]ro-choice advocates viewed this development with trepidation, while pro-life supporters welcomed it”). The Court's claim that it had not overruled *Stenberg* was widely dismissed as disingenuous. *Id.* at 569 n.289 (“Most constitutional law scholars concluded that *Gonzales* effectively overturned *Stenberg*.”); *Id.* at 568 (“Justice Kennedy's attempts to distinguish *Stenberg* were strained and unconvincing.”).

Later that same term, the Justices fought fiercely over the rightful legacy of *Brown v. Board of Education*.¹⁰³ In *Parents Involved in Community Schools v. Seattle School District*, the Court, via a plurality opinion by the Chief Justice, invalidated race-based pupil assignment regimes in two public school systems.¹⁰⁴ Circling Justice Kennedy's decisive but vague concurrence in the result,¹⁰⁵ the plurality and the dissents accused one another of disrespecting the true meaning of the half-century-old canonical case.¹⁰⁶ Justice Stevens took the extraordinary step of ending his dissent with the pointed declaration that

The Court has changed significantly [in the three previous decades]. It was then more faithful to *Brown* and more respectful of our precedent than it is today. It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision.¹⁰⁷

While this claim can be read different ways, it certainly calls into question the Court's institutional dedication to the rule of law.

In June 2008, in what was perhaps its most jurisprudentially significant ruling of the decade, the Court went bitterly, if not boldly, into the final frontier of constitutional interpretation—the Second Amendment. In *District of Columbia v. Heller*, a bare five-Justice majority concluded that the Amendment protected an individual right and invalidated the District's handgun ban.¹⁰⁸ The case stimulated intense passions, both on and off the Court, even among such stalwart conservatives as Judges Wilkinson and Posner.¹⁰⁹ Critics accused the Court's conservative members of precisely the sort of judicial activism they had long reviled when in dissent.¹¹⁰ Of course, these tensions were inflamed anew when the

103. 347 U.S. 483 (1954).

104. 551 U.S. 701, 709–11 (2007).

105. See *id.* at 782 (Kennedy, J., concurring).

106. Compare *id.* at 746 (“[W]hen it comes to using race to assign children to schools, history will be heard.”), with *id.* at 868 (Breyer, J., dissenting) (“To invalidate the plans under review is to threaten the promise of *Brown*.”).

107. *Id.* at 803 (Stevens, J., dissenting).

108. 554 U.S. 570, 634–36 (2008).

109. See J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009); Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, THE NEW REPUBLIC, Aug. 27, 2008, at 32.

110. See Wilkinson, *supra* note 109, at 265, 274–75; Posner, *supra* note 109 at 35.

Court, again in a 5-4 ruling, extended the rule of *Heller* to state and local governments.¹¹¹

The Court had hardly avoided political controversy in the meantime. In February 2010, the Court decided *Citizens United v. FEC*, which expressly overruled one precedent and part of another on the way to invalidating the 2002 federal statutory restrictions on corporation and union expenditures for speech closely related to imminent federal elections.¹¹² Justice Stevens, writing one of the last dissents of his career, was nearly apoplectic.¹¹³ The case earned President Obama's rebuke in his first State of the Union address, which in turn provoked a much ballyhooed inaudible but unmistakable "not true" from the attending Justice Alito.¹¹⁴ The ruling was extraordinarily unpopular,¹¹⁵ and was perceived by many as at best naive and at worst in service of the Republican party, which likely had the most to gain from virtually unlimited corporate spending in federal elections.¹¹⁶ The timing of the ruling maximized its effect on the 2010 congressional elections,¹¹⁷ and the decision may have played a role in last fall's Republican resurgence.

One need not conclude that all, or even any, of these cases were wrongly decided to recognize that the cumulative effect of so many sharply divided rulings on some of the most politically divisive issues of our time is to further politicize the Court and constitutional law. Indeed, commentators representing a wide array of perspectives have so noted. Judge Posner devoted the unique opportunity afforded by his *Harvard Law Review* "Foreword" to the *Review's* analysis of the October 2004 term to explaining in mathematical and merciless detail why he had concluded that the Su-

111. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

112. 130 S. Ct. 876, 917 (2010).

113. *Id.* at 931 (Stevens, J., dissenting) ("The Court's ruling threatens to undermine the integrity of elected institutions across the Nation.").

114. See Shannen W. Coffin, 'Not True': With its *Citizens United* Decision, the Supreme Court Struck a Blow for Free Speech, NATIONAL REVIEW, Feb. 22, 2010, at 18.

115. See Richard L. Hasen, Op-Ed., *Is it All About Scalia?*, PITT. POST-GAZETTE, Apr. 15, 2010, at B7.

116. See Dan Eggen & Ben Pershing, *Democrats Scramble After Campaign Ruling; Corporate Purse Strings May Be Tough to Tighten as Midterms Approach*, WASH. POST, Jan. 23, 2010, at A1.

117. See *Court Ruling on Election Spending Expected*, BOSTON GLOBE, Jan. 21, 2010, at 2; Eggen & Pershing, *supra* note 116, at A1; *High Court Ruling Leaves States Scrambling to Close Gaps on Spending Limits*, BOSTON GLOBE, Mar. 21, 2010, at 12.

preme Court was “A Political Court.”¹¹⁸ Conservative scholars have long decried the Court’s politicization of constitutional law.¹¹⁹ And the experience of first the Rehnquist and now the Roberts Courts has provoked similar protests from more liberal quarters.¹²⁰

It would take far more space than the article format allows to thoroughly canvass just the relatively recent legal literature decrying the politicization of the modern Supreme Court and modern constitutional law, so the rather random sampling set forth in the notes will have to suffice. But the one principle that should emerge is that this frustration is not limited to any part of the political spectrum.¹²¹ Rather, there is a consensus emerging from all quarters that it is increasingly difficult to take modern constitutional law, at least as articulated by the Supreme Court, all that seriously.¹²² Even Brian Tamanaha—whose refreshing call upon the profession and especially the legal academy to recover a “more balanced realism” in no small part inspired the present piece—writes off constitutional law as a lost cause.¹²³

Not surprisingly the growing equation of constitutional law with raw political will has increasingly corrupted the process for nominating and confirming federal judges, most acutely at the federal courts of appeals level.¹²⁴ Of course, the Supreme Court

118. Posner, *supra* note 23, at 33–34. To be sure, Judge Posner thought this state of affairs to some extent inevitable, but he also urged a more “modest” approach than had prevailed in recent rulings. *Id.* at 54–60.

119. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (2d ed. 1997). See also Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 *YALE L.J.* 1535, 1538 n.6, 1539 & n.9 (2000) (citing articles attacking *Casey* as an unprincipled surrender to political expedience); Pushaw, *supra* note 10, at 587–88 (collecting examples).

120. See, e.g., CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *VA. L. REV.* 1045, 1049–50 (2001); William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 *U. COLO. L. REV.* 1217, 1219, 1221 (2002); see also Cass R. Sunstein, *Tilting the Scales Rightward*, *N.Y. TIMES*, Apr. 26, 2001, at A23.

121. Compare *supra* note 119, with *supra* note 120.

122. See, e.g., Pushaw, *supra* note 10, at 527 (describing a “decades-long movement that has rendered the process and substance of constitutional decision making almost indistinguishable from simple politics”).

123. See TAMANAHA, *supra* note 25, at 164.

124. See, e.g., Pushaw, *supra* note 10, at 588 (“Not surprisingly, the merger of constitutional law with raw politics has corrupted the judicial appointment process, especially at the Supreme Court level.”). To be sure, the problem is not a new one. See generally

appointment process has not been immune from this corruption.¹²⁵ Even the ACA cases themselves reflect the acuteness of the present need for constitutional forbearance. The public reaction to them has generally assumed that the division among the lower courts is explainable by the judges' various partisan sympathies and that this division will continue as the cases progress up the federal judicial ladder.¹²⁶

III. "OBAMACARE" AS CONSTITUTIONAL OPPORTUNITY

The foregoing history of constitutional forbearance and the acuteness of the present need for more of the same provide a context for fully appreciating the potentially enormous, long-term significance of judicial rulings on the constitutionality of the individual health insurance mandate. Sadly, the possibility of judicial unanimity is already behind us. But even so, an extraordinary opportunity both to conjure and illustrate a separation between our constitutional law and our politics remains. It is the opportunity for the exercise of constitutional forbearance. This part both identifies some of the reasons this is true and explores ways in which that opportunity might be fulfilled or squandered.

A. *Constitutional Indeterminacy*

The central substantive constitutional issue raised in the litigation concerning the ACA is whether the Commerce Clause, alone or as aided by the Necessary and Proper Clause, grants Congress power to enact the individual health insurance mandate.¹²⁷ One would be hard pressed to find an area of the law more notoriously indeterminate and subject to political manipulation than the Court's current Commerce Clause jurisprudence, which one leading commentator has declared "analytical chaos."¹²⁸ Ac-

STEPHEN L. CARTER, *THE CONFIRMATION MESS* (1994).

125. See TAMANAHA, *supra* note 25, at 181–84; see also *supra* note 124.

126. See *infra* note 253 and accompanying text.

127. Edward A. Zelinsky, *The Health-Related Tax Provisions of PPACA and HCERA: Contingent, Complex, Incremental, and Lacking Cost Controls*, 2010 N.Y.U. REV. EMP. BENEFITS & EXECUTIVE COMPENSATION § 7.01 (2010).

128. Pushaw, *supra* note 10, at 579 ("For instance, the Court . . . [has] declared that Congress cannot interfere with areas of 'traditional state concern,' such as crime and education, but did not explain why it had allowed Congress to pass over 3,000 criminal laws and establish a Department of Education.").

cordingly, any claim that a federal statute “clearly” exceeds Congress’s power under these clauses ought to, and ordinarily is, met with skepticism. Moreover, this claim is unusually untenable when made with respect to the ACA’s individual mandate.¹²⁹

1. The Case for Congressional Power

All agree that the federal government is one of enumerated and therefore limited powers.¹³⁰ Two clauses in Article I, Section 8 are most obviously relevant to the question of whether Congress has the power to enact the individual mandate. The first accords Congress power “to regulate commerce . . . among the several States.”¹³¹ The second, authorizes Congress to “make all laws which shall be necessary and proper for carrying into execution” its power over interstate commerce (and all other powers the Constitution vests in the federal government).¹³²

Considering first the congressional power to regulate commerce, what is “Commerce” for these purposes? Whatever may be the outer boundaries of this term, more than six decades ago the Supreme Court held that the business of insurance was “commerce” within the meaning of Article I, Section 8.¹³³ In *United States v. South-Eastern Underwriters Ass’n*, the Court observed that “[n]o commercial enterprise of any kind which conducts its activities across state lines ha[d] been held to be wholly beyond the regulatory power of Congress under the Commerce Clause” and expressly declined the invitation to “make an exception of the business of insurance.”¹³⁴ As Harvard law professor and Reagan Administration Solicitor General Charles Fried recently observed, “the law has not departed from the conclusion for a moment

129. See ACA, 42 U.S.C. § 18091 (Supp. IV 2010) (requiring non-exempted individuals to maintain minimum essential health insurance coverage beginning in 2014).

130. See, e.g., *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 891 (E.D. Mich. 2010) (“In the body of jurisprudence interpreting the Commerce Clause, the Supreme Court has set out a three-prong analysis to determine if a federal law properly falls within this enumerated grant of authority.”); *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 780 (E.D. Va. 2010) (“Despite the laudable intentions of Congress in enacting a comprehensive and transformative health care regime, the legislative process must still operate within constitutional bounds. Salutatory goals and creative drafting have never been sufficient to offset an absence of enumerated powers.”).

131. U.S. CONST. art. I, § 8, cl. 3.

132. U.S. CONST. art. I, § 8, cl. 18.

133. *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 553 (1944).

134. *Id.*

since” this 1944 ruling.¹³⁵ And although *South-Eastern Underwriters* concerned fire insurance, nowhere in all the Obamacare litigation’s voluminous filings is it contended that the holding of that case does not extend to health insurance. Similarly, all the litigants and jurists in these cases, however vigorously they dispute other questions, are nevertheless in complete agreement that the health insurance industry is one that bestrides state lines like a colossus. Once it is acknowledged that health insurance is interstate “commerce” within the meaning of the Commerce Clause, Congress then enjoys plenary power, under nearly two-century-old precedent, to “prescribe the rule” to govern the conduct of that enterprise.¹³⁶ As Chief Justice Marshall wrote nearly two centuries ago, Congress’s power under the Commerce Clause

is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce . . . among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.¹³⁷

In short, Congress has the power to make the rules as to how the health insurance business is to operate.¹³⁸ The bookend requirements that health insurers not refuse coverage to persons with pre-existing conditions¹³⁹ and that individuals not wait until

135. *The Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 4–5 (prepared statement of Professor Charles Fried, Harvard Law School).

136. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).

137. *Id.* at 196–97. For a fictional opinion purporting to reflect Chief Justice Marshall’s conclusion that Congress lacked power to enact “health laws,” and would therefore have rejected the claim that Congress had power to enact the ACA, see Robert G. Natelson & David B. Kopel, “*Health Laws of Every Description*”: *John Marshall’s Ruling on a Federal Health Care Law*, 12 *ENGAGE* 49, 52 (2011).

138. Questions may in due course arise as to the constitutionality of congressional delegation of this authority to the Secretary of Health and Human Services. See generally Sam Foster Halabi, *The Patient Protection and Affordable Care Act of 2010: Rulemaking in the Shadow of Incentive-Based Regulation*, 38 *RUTGERS L. REC.* ____ (2011) (anticipating these and other issues arising in the actual implementation of the ACA).

139. 42 U.S.C. § 18001(c)(2)(A) (Supp. IV 2010) (prohibiting health insurers from imposing “any pre-existing condition exclusion”).

they are sick to apply for health insurance¹⁴⁰ are rules governing the conduct of the health insurance business, and therefore appear plainly to be within the ambit of congressional authority. The case for congressional power to enact the mandate is strikingly plain and straightforward, far more so than the case for congressional power to enact numerous other provisions in the U.S. Code. The point is not that the individual mandate is patently constitutional and all arguments to the contrary border on frivolity, though to be sure several other distinguished commentators have so concluded.¹⁴¹ For present purposes, it suffices to show, as the foregoing presentation has, that the case for congressional power can be made under well settled Supreme Court precedents. It hardly requires heavy lifting for a federal judge to sustain the constitutionality of the individual mandate.

But even if there were a weak link hidden somewhere in this chain of reasoning, an alternative argument independently supports congressional authority. Even if the individual mandate were not a regulation of commerce within the meaning of the Commerce Clause, Congress would in any event have sufficient power under the Necessary and Proper Clause to impose it.¹⁴² That clause, among other things, grants Congress the power to enact any regulation, not otherwise prohibited by the Constitution, that can be deemed “an essential part of a larger regulation of economic activity.”¹⁴³ Put differently, “where Congress has the authority to enact a regulation of interstate commerce, ‘it possesses every power needed to make that regulation effective.’”¹⁴⁴ This power extends even to intrastate, non-economic matters.¹⁴⁵ Furthermore, in considering whether a non-economic, intrastate regulation is “essential” to the success of a larger regulatory scheme, the Court does not evaluate the relationship independently.¹⁴⁶ Rather, “[t]he relevant question is simply whether

140. 42 U.S.C. § 18091(a)(2)(I) (requiring most individuals to maintain minimum levels of health insurance coverage starting in 2014).

141. See, e.g., *The Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 4–5 (2011) (prepared statement of Professor Charles Fried, Harvard Law School).

142. U.S. CONST. art. 1, § 8, cl. 18.

143. *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (Scalia, J., concurring) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

144. *Id.* (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118–19 (1942)).

145. *Id.* at 37.

146. *Id.*

the means chosen are *reasonably adapted* to the attainment of a legitimate end under the commerce power.¹⁴⁷ It is sufficient that Congress “could reasonably conclude”¹⁴⁸ that its broader regulatory scheme would be undercut absent the supplemental regulation of even a wholly intrastate and non-economic matter.

With respect to the ACA’s individual mandate, it would be difficult to conclude otherwise. The mandate was an indispensable corollary to the Act’s most fundamental industry reform.

A principal justification for the ACA was that millions of Americans lacked health insurance.¹⁴⁹ Moreover, the number of uninsured Americans was growing at an alarming rate.¹⁵⁰ Many Americans had lost their insurance after changing jobs.¹⁵¹ Because health insurance in the United States has for decades been a benefit provided to most permanent employees, a change in employers frequently also meant a change in health insurers.¹⁵² Meanwhile, health insurance companies increasingly declined to insure persons with pre-existing conditions or offered such persons coverage only at exorbitant rates.¹⁵³ The growing population of uninsured and practically uninsurable Americans presented Congress with a compelling humanitarian dilemma.¹⁵⁴ But Congress also confronted a severe threat to the long-term health of the economy.¹⁵⁵ The uninsurable were often practically unemployable and, in any event, were at grave risk of bankruptcy and poverty.¹⁵⁶ This economic dislocation, in addition to imposing an awe-

147. *Id.* (emphasis added) (internal quotation marks omitted).

148. *Id.* at 42.

149. Sheryl Gay Stolberg & Jeff Zeleny, *Obama Keeps Up Health Care Push, Citing Uninsured*, N.Y. TIMES, Sept. 11, 2009, <http://www.nytimes.com/2009/09/11/us/politics/11-obama.html?scp=1&59=Obama%20Keeps%20Up%Health%20Care%20Push,%20citing%20Uninsured&st=cse>.

150. *Id.* (citing that during the recent recession, as many as six million more Americans have lost their health insurance).

151. See Josh Gerstein, *Obama Pitches to Insured Americans*, POLITICO (July 22, 2009, 8:21 PM), <http://www.politico.com/news/stories/0709/25296.html>.

152. *Id.*

153. Jeff Mason & Matt Spetalnick, *Obama Says Insurance Companies Holding U.S. Hostage*, REUTERS (Aug. 14, 2009), <http://www.reuters.com/article/2009/08/14/us-usa-healthcare-obama-idUSTRE57D47P20090814>.

154. See Lisa Wangsness & Susan Milligan, *‘The Time for Bickering Is Over’: Obama Urges Congress to Overhaul Health Care, Spells Out Details, Denounces Misrepresentations, Evokes Kennedy’s Moral Stance*, BOSTON GLOBE, Sept. 10, 2009, at 1.

155. Michael A. Fletcher, *Obama Prods Congress to Reform Health, Saying Window Could Close*, WASH. POST, July 19, 2009, at A6.

156. James Oliphant & Kim Geiger, *The Nation: Plenty of Healthcare Aches and Pains*,

some toll of human suffering, also produced ripple effects throughout the broader economy. When joined with the specter of exponentially increasing health care costs, the purely economic consequences of the health care status quo ante required congressional action to prevent a crippling economic crisis. Or so Congress reasonably concluded.¹⁵⁷

Congress responded by, among other things, sharply circumscribing the ability of insurance companies to deny coverage or charge differential rates on the basis of applicants' pre-existing conditions.¹⁵⁸ The power of Congress to impose these restrictions on the multi-billion dollar, interstate health insurance industry is beyond reasonable debate and, in fact has not been questioned in any of the cases challenging the constitutionality of the ACA.¹⁵⁹ But once one acknowledges congressional power to enact these restrictions, the power to enact the individual mandate follows as night follows day. The prohibitions on insurer discrimination against applicants with pre-existing conditions¹⁶⁰ would, if enacted alone, create a perverse incentive to defer purchasing health insurance unless and until seriously ill.¹⁶¹ Health insurance would be only for the sick and the paranoid. Hence, the ACA requires that most Americans buy health insurance beginning in 2014.¹⁶²

L.A. TIMES, Sept. 9, 2009, at A17 (citing a Harvard University study, which found that in 2007 an American family filed for medical bankruptcy once every ninety seconds).

157. See *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 893 (E.D. Mich. 2010) (stating that Congress had a rational basis to conclude that, in the aggregate, decisions to forego insurance coverage and attempt to pay for health care out of pocket drive up the cost of insurance); cf. Mark A. Hall, *The Factual Bases for Constitutional Challenges to the Constitutionality of Federal Health Insurance Reform*, 38 N. KY. L. REV. (457, 487–88 (2011) (attempting “to collect the full range of available empirical data that sheds light on a range of legal challenges” to the ACA and concluding that those challenges have little or no factual basis supporting Congress’s decision that an individual mandate was necessary to its plan of reform).

158. As part of the ACA, Congress passed the Pre-Existing Condition Insurance Plan (PCIP) which will prohibit insurance companies from discriminating against health care consumers based on pre-existing conditions. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1201(2)(A), 124 Stat. 119, 154 (2010) (prohibiting health insurers from imposing “any pre-existing condition exclusion”).

159. See, e.g., *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1275 n.11 (N.D. Fla. 2011) (acknowledging Congress’s power to regulate the health insurance industry).

160. Patient Protection and Affordable Care Act § 1201(2)(A).

161. See *Thomas More Law Ctr.*, 720 F. Supp. 2d at 895 (“Without the minimum coverage provision, there would be an incentive for some individuals to wait to purchase health insurance until they needed care, knowing that insurance would be available at all times.”).

162. See Patient Protection and Affordable Care Act § 1501 (requiring non-exempted

Even if the mandate cannot, standing alone, be justified as a regulation of interstate commerce, and for the reasons set forth above it likely can, it nonetheless is within Congress's independent power, under the Necessary and Proper Clause, to make its other regulations of Commerce (here, the prohibitions on denying coverage because of an applicant's pre-existing conditions) effective.

These restrictions are precisely the kind of "regulatory scheme that could be undercut"¹⁶³ absent a health insurance mandate. Not only was it reasonable for Congress to conclude that an *ex ante* mandate to purchase health insurance was essential to a regulatory scheme that included *ex post* prohibitions on discrimination against applicants because of pre-existing conditions, but indeed this conclusion may have been the *only* reasonable one.¹⁶⁴ In any event, congressional concern that the prohibitions on discrimination against applicants with pre-existing conditions would endanger the private health insurance industry absent a purchase mandate cannot be dismissed as *unreasonable*.

Once again, it is not necessary to conclude that this chain of reasoning sweeps away all contrary considerations. But the analysis should make clear that existing Commerce Clause jurisprudence provides the tools to build a case for the ACA, including the individual mandate.

1. The Case Against Congressional Power

How then to explain the fact that two federal judges have held that the individual mandate exceeded congressional authority? The case against the constitutionality of the Act depends upon a distinction between activity and inactivity. The ACA's litigation

individuals to maintain minimum essential health insurance coverage in 2014).

163. See *United States v. Lopez*, 514 U.S. 549, 561 (1995) (showing that non-economic activity may be regulated provided it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.").

164. Certainly the fit between the mandate and the coverage provisions is at least as tight as the connection between non-commercial, intrastate medical marijuana possessed in accordance with state law and the federal effort to eliminate the interstate market in the drug for recreational purposes. However, the latter relationship was deemed sufficient to authorize a federal criminal prohibition on the possession of any amount of marijuana anywhere in the United States for any purpose, regardless of its source. *Gonzales v. Raichi*, 545 U.S. 1, 41–42 (2005).

opponents have argued that the individual mandate regulates inactivity because it penalizes the individual for simply doing nothing.¹⁶⁵ As the ACA's defenders have noted in response, given the undeniable frailty of this mortal coil and existing practices (including some legal requirements) that all those in our borders and in dire need of medical care receive it, it is far from clear that declining to purchase health insurance can really be characterized as doing nothing.¹⁶⁶ By failing to take the responsible step of providing a means to pay for the potentially catastrophic cost of care one may need and receive, in the future, the individual who foregoes health insurance acts in reliance on society as a form of insurance.

Regardless, as interesting as these semantic distinctions may be, it is ultimately unnecessary to resolve them to pass upon the legal challenge to health care reform. Even if the individual mandate is best understood as a regulation of inactivity, that does not automatically mean it is unconstitutional. As others have trenchantly observed, it is far from clear why even inactivity that, when considered in context, undermines a regulatory scheme crafted in response to a genuine threat to the nation's economic well-being should be immune from congressional regulation.¹⁶⁷

The two decisions striking down the requirement labeled such a regulation of inactivity as "unprecedented." To be sure, if that label is a fair one,¹⁶⁸ this means that no controlling legal authority *requires* a lower federal court to sustain the law against constitutional challenge. Of course, it likewise means that no controlling legal authority dooms the law to invalidation. No precedent re-

165. See *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 772 (E.D. Va. 2010).

166. See 42 U.S.C. § 1395dd(b)(1) (2006) (imposing duty on emergency rooms to examine and stabilize persons who present with emergency medical conditions). See generally, *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 631 (W.D. Va. 2010) (discussing the government's arguments that the decision to forgo health insurance and wait until its use is necessary is, in itself, an economic decision).

167. See *The Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 5 (Feb 2, 2011) (prepared statement of Professor Charles Fried, Harvard Law School).

168. According to the government and two of the courts that have already ruled on the ACA, it is not clear that the individual mandate is unprecedented activity. See *Mead v. Holder*, 766 F. Supp. 2d 16, 33 (D.D.C. 2011) (arguing that the Supreme Court has upheld Congress's authority to regulate the health care industry, and that it is unique from other industries); see also *id.* at 36 (holding that there is no distinction between activity and inactivity). Even if the individual mandate is accepted as unprecedented, that, by itself, does not render the legislation unconstitutional. See *United States v. Morrison*, 529 U.S. 598, 607 (2000).

quires a judge to declare the act unconstitutional.¹⁶⁹ The truly disinterested judge would, in this worst case scenario for the law, be left in equipoise, with little or no guidance as to how to resolve the controversy. As others have trenchantly observed, it is far from clear why even inactivity that, when considered in context, undermines a regulatory scheme crafted in response to a genuine threat to the nation's economic well being should be immune from congressional regulation.

At its core, the case against the ACA relies chiefly upon the claim that a decision upholding the mandate will confer on Congress virtually unlimited authority. It is argued that if Congress can compel an individual to buy health insurance, then Congress must also have to the power to compel individuals to buy and even (gasp!) eat broccoli, or other noxiously nutritious fare.¹⁷⁰ The individual mandate is characterized as a first step onto to a "slippery slope" that leads ineluctably to the demise of the Constitution's central design by which the federal government was confined to enumerated, and therefore limited, powers.¹⁷¹

These arguments have rhetorical strength, which is why they have prevailed in two of the five district courts to rule on the constitutional issue. But upon closer examination they are less than compelling. As an initial matter, contemporary claims about threats to the enumerated powers scheme urgently call for closing the barn door about seventy years after the horse escaped. In the wake of the New Deal constitutional crisis, the Supreme Court effectively abdicated any meaningful role in the enforcement of the limits imposed upon Congress by the Constitution's enumeration of its powers.¹⁷² To be sure, the Court's decisions in *United States v. Lopez*¹⁷³ and *United States v. Morrison*,¹⁷⁴ kindled hopes of a revival, albeit it a narrow one, of this judicial prerogative.

169. See Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PENN. L. REV. 1825, 1831 (2011) (concluding that "[t]here is not a breath of suggestion in [previous Supreme Court] decisions that Congress may not reach economic inactivity" and observing that the "Court has never been called upon to decide this issue").

170. See, e.g., *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1289 (N.D. Fla. 2011) (discussing and endorsing these arguments).

171. See, e.g., *id.*

172. See generally MCAFEE, *supra* note 75, at 143–62 (discussing judicial efforts to enforce the enumerated powers scheme in the 1930s).

173. 514 U.S. 549, 557 (1995).

174. 529 U.S. 598, 627 (2000).

But to whatever extent these hopes were reasonable, they were dashed by the Court's 2005 ruling in *Raich v. Gonzales*.¹⁷⁵ There, the Rehnquist Court, in one of its final constitutional decisions, recognized congressional authority to prohibit possession of any amount of marijuana, anywhere in the United States for any purpose, regardless of its source.¹⁷⁶ In dissent, Justice Thomas aptly characterized *Raich* as supplying yet another epitaph for judicial enforcement of the enumerated powers scheme:

Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.¹⁷⁷

The Court's ruling in *Raich* cannot be dismissed as an isolated misstep. Rather, *Raich* was part of a century-old pattern of conservative judges marching forward federalism principles when Congress does something they do not like, and then conveniently forgetting them when Congress does something they do like.¹⁷⁸ Of course, a selectively invoked federalism is, in fact, not federalism at all. It is instead a tool for jurists to dismantle laws they do not like for other reasons, leaving intact laws equally obnoxious to federalism principles that they happen to believe salutary, empowering them to pick and choose among federal statutes on a basis they never need to articulate, let alone defend.

Even if that context were ignored, the claim that a decision upholding the individual mandate would in turn become a precedent for unlimited congressional authority fails on its own terms. The

175. 545 U.S. 1, 23–25 (2005).

176. See *id.* at 32–33.

177. *Id.* at 57–58 (Thomas, J., dissenting). Justice Thomas added that according to the majority's opinion,

the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States. This makes a mockery of Madison's assurance to the people of New York that the "powers delegated" to the Federal Government are "few and defined," while those of the States are "numerous and indefinite."

Id. at 69 (quoting THE FEDERALIST No. 45, at 313 (James Madison)) (J. Cooke ed. 1961).

Justice Thomas also noted that "[o]ne searches the Court's opinion in vain for any hint of what aspect of American life is reserved to the States." *Id.* at 70.

178. See generally Bryant, *supra* note 57, at 102–06 (providing an overview of Justices who adhered to federalist principles in the context of narcotics regulation when adherence was consistent with policy preferences).

argument ignores the possibility of a ruling narrowly confined to the peculiar circumstances giving rise to the ACA. A recognition of congressional power to mandate that citizens enter into qualifying private health insurance transactions would not, as the ACA's constitutional opponents have maintained, necessitate the conclusion that Congress could likewise mandate innumerable other private transactions, such as the purchase of gym memberships, automobiles, or even the dreaded broccoli.¹⁷⁹ Health care is an unusual if not unique good, in that the need for it is often sudden, unexpected, and life-threatening.¹⁸⁰ Moreover, in many such cases the needed care is catastrophically expensive.¹⁸¹ Finally, no mortal individual can ever be certain that she will not in the future develop such a need for overwhelmingly expensive care.¹⁸²

None of this can be said about gym memberships, automobiles, or leafy green vegetables.¹⁸³ The distinctive nature of the health care and health insurance markets matters because it affords a basis for limiting the reach of any judicial ruling sustaining the ACA's constitutionality. Whether Congress could mandate the purchase of automobiles¹⁸⁴ to stimulate a recovery in the auto industry could remain undecided until the unlikely day Congress attempts to do so. Were that case ever to arise, it would present a genuinely open question, as the fit between that purchase mandate and whatever perceived problem prompted the law simply would not be the same as that relied upon to sustain the ACA.

Upholding the ACA would, to be sure, require the Court to abandon the mythical absolute bar on congressional regulation of

179. See *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1289 (N.D. Fla. 2011) (asserting that the logical extreme of the government's broad reading of the commerce power could lead to Congress requiring people to eat broccoli because it is part of commerce and may lead to healthier people).

180. See *Mead v. Holder*, 766 F. Supp. 2d 16, 37 (D.D.C. 2011) (holding that the health care market is unique because of two factors: "the inevitability of individuals' entrance into that market and the obligation of providers to serve those who do enter" into it).

181. See *id.* at 38 (noting that approximately 62% of personal bankruptcies in part result from a lack of coverage).

182. See *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 894 (E.D. Mich. 2010) (calling health care a "fundamental need" for all people).

183. See *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 633-64 (W.D. Va. 2010) (exploring the uniqueness of health care from other services).

184. When asked about Congress's power under the Commerce Clause, Professor Erwin Chemerinsky, a constitutional scholar, replied that "Congress could use its commerce power to require people to buy cars." See *Wheat, Weed, and Obamacare: How the Commerce Clause Made Congress All-Powerful*, REASONTV (Aug. 25, 2010), <http://reason.tv/video/show/wheat-weed-and-obamacare-how-t>.

inactivity under the Commerce Clause and Necessary and Proper Clause. But it would not of its own force bestow upon Congress a wide-ranging authority to mandate private purchases. Were the ACA found to be a constitutional statute, notwithstanding its regulation of inactivity, this conclusion would not make the fact that future laws also regulated inactivity irrelevant to the constitutional inquiry. The ACA is premised on an extraordinarily strong case that a purchase mandate is indispensable to a regulatory regime Congress otherwise indisputably has the power to enact.¹⁸⁵ A court could be confident that future assertions of the authority to mandate purchases, should they ever present themselves, would not be insulated from meaningful constitutional scrutiny by the precedent of the ACA.

Close examination reveals that the consequences of upholding the ACA have been greatly exaggerated.¹⁸⁶ Moreover, as noted above, the worst that can be said about the law is that it is without precedent, which ultimately means only that no existing legal precedent dictates an answer to the constitutional question. In this light, the arguments against the validity of the Act are neither implausible nor compelling. At best, the ACA's opponents can argue the matter to a stalemate. The truly disinterested judge would, in this worst case scenario for the law, be left in equipoise, with little or no guidance from the traditional sources of legal authority as to how to resolve the controversy.¹⁸⁷

Of course, it is in precisely such circumstances that the typically negligible pull of constitutional forbearance becomes significant. The strength of that attraction should turn in part on the extent to which the cases have been politicized.

185. See generally Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform* (Northwestern Public Law Research Paper No. 11-25, 2011), available at <http://ssrn.com/abstract=1758986> (developing this argument).

186. See *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1289 (N.D. Fla. 2011) (expressing concerns that under the government's position, Congress would have the power to compel the purchase and consumption of broccoli or the purchase of a General Motors automobile).

187. Cf. *Virginia ex rel. Cuccinelli v. Sebelius*, 768 F. Supp. 2d 7678, 775 (E.D. Va. 2010) (acknowledging that existing Commerce Clause precedents supplied only a "finite well of jurisprudential guidance in surveying the boundaries of [this] power").

B. *The Politics of “Obamacare”*

Numerous characteristics of the Obamacare cases coalesce to present an almost “perfect storm” of forbearance opportunity. The most important is the political salience of the debate over legislation. The extraordinary partisanship that has infected the ensuing litigation has only exacerbated the political sensitivity of the constitutional issue. In light of this context, the lawsuits challenging the constitutionality of the individual mandate present the courts with the most glaring opportunity for meaningful constitutional forbearance since the missed opportunity provided by the 2000 presidential election.¹⁸⁸

1. The Bill

As the moniker “Obamacare” suggests, the ACA has become a singularly signal achievement of the first two years of Obama’s presidency.¹⁸⁹ It was enacted after more than a year of vigorous congressional and public debate that stirred passions like little else in the preceding two decades.¹⁹⁰ That debate was rancorous and, at times, unseemly.¹⁹¹ More to the point, it was frequently conducted in apocalyptic terminology.¹⁹² It resulted in a compromise that fully satisfied few, but that nevertheless was promptly hailed as the culmination of three-quarters of a century of Democratic efforts.¹⁹³

Health care reform was one of the foremost domestic policy issues addressed in the 2008 presidential election.¹⁹⁴ As a candidate, Obama adopted a more moderate position than Hillary Clinton, eschewing her proposal that Congress enact a federal

188. See *Bush v. Gore*, 531 U.S. 98, 111 (2000); see also Pushaw, *supra* note 10, at 585–87 (asserting that with *Bush v. Gore* and the subsequent scholarly reaction “[t]he politicization of constitutional law had reached its apex”).

189. See James Oliphant, *A Year Later, Healthcare Law Is Still in Contention: Public Attitudes Toward It Have Not Shifted Much Despite the Best Efforts of Both Political Parties to Praise It or Bury It*, L.A. TIMES, Mar. 24, 2011, at 17.

190. See *infra* notes 199–228 and accompanying text.

191. See *infra* notes 202–06 and accompanying text.

192. See Mark Z. Barabak, *Anger in the Streets of Washington: Protestors Decry Obama’s Agenda—Especially Healthcare*, L.A. TIMES, Sept. 13, 2009, at 1.

193. See *infra* notes 217–19 and accompanying text.

194. See Editorial, *The Battle Over Health Care*, N.Y. TIMES, Sept. 23, 2007, at WK11.

mandate to purchase health insurance.¹⁹⁵ His first few weeks as President were consumed by the threat that the worst recession in decades would deepen into a depression,¹⁹⁶ but the Democratic party still chose to make health care a paramount priority of Obama's first term.¹⁹⁷ By the end March 2009, the chairs of the relevant congressional committees—all Democrats—had largely settled on the broad contours of legislative reform.¹⁹⁸ Few, if any, anticipated that the final vote on the legislation was still a year away.¹⁹⁹

In June and July, committees in both the House and the Senate approved different bills, albeit along strict party-line votes.²⁰⁰ During the August recess, congressional town-hall meetings became venues for contentious clashes over the proposed legislation, at which members of Congress were “shouted down, hanged in effigy and taunted” by the bills’ opponents, including many affiliated with the emerging “Tea Party.”²⁰¹ In some instances, the rudeness ripened into violence, with noisy demonstrations leading to “to fistfights, arrests and hospitalizations.”²⁰² What initially appeared to be an organic, grassroots movement was in fact the product of exhortations by prominent conservative commentators such as Sean Hannity, Glenn Beck, and Rush Limbaugh.²⁰³ Limbaugh went so far as to suggest a likeness between the Obama Administration’s health care logo and a symbol used by the Nazis.²⁰⁴ Several town-hall meetings ended in chaos when crowds opposed to the proposed legislation succeeded in drowning

195. See Paul Krugman, Op-Ed., *Clinton, Obama, Insurance*, N.Y. TIMES, Feb. 4, 2008, at A23 (comparing and contrasting the two candidates’ health care plans and concluding that Clinton’s plan would cover more Americans and reach closer to universal coverage than Obama’s).

196. See Edmund L. Andrews & David M. Herszenhorn, *Plan to Jump-Start Economy With No Instruction Manual*, N.Y. TIMES, Jan. 10, 2009, at A1.

197. See Robert Pear, *Senator Takes Initiative on Health Care*, N.Y. TIMES, Nov. 12, 2008, at A18.

198. See Robert Pear, *Democrats Agree on a Health Plan; Now Comes the Hard Part*, N.Y. TIMES, Apr. 1, 2009, at A19.

199. See *id.*

200. See Thomas Maier, *The Best Rx For What Ails Us?: Two Plans in Congress Stir Supporters, Opponents; Costs and Depth of Coverage Part of Thorny Issues*, NEWSDAY, July 19, 2009, at A18.

201. See, e.g., Ian Urbina, *Beyond Beltway, Health Debate Turns Hostile*, N.Y. TIMES, Aug. 8, 2009, at A1.

202. *Id.*

203. *Id.*

204. *Id.*

out the remarks of the sponsoring member of Congress.²⁰⁵ Even more concerning a congressional Democrat even received a death threat.²⁰⁶

When members of Congress returned from the recess, they brought the rancor with them. Speaking to a joint session of Congress, President Obama disclaimed any intent to extend health insurance coverage to illegal immigrants.²⁰⁷ In response, South Carolina Republican Joe Wilson shouted, “you lie!”²⁰⁸ This extraordinary breach of decorum earned Wilson a formal rebuke by the House of Representatives and prompted an extended public discussion about the need for civility in political discourse.²⁰⁹ The possibility of a bipartisan effort grew increasingly remote.

That fall Democrats finally overrode steadfast Republican opposition to pass separate bills in both chambers of Congress. Speaker Pelosi cobbled together a fragile coalition of liberals and more conservative “Blue Dog” Democrats sufficient to approve the House bill by a narrow 220-215 vote on November 7.²¹⁰ Then, in a dramatic Christmas Eve session, the Senate passed its version of the bill, defeating a threatened filibuster without the aid of a single Republican vote.²¹¹ But each bill had yet to pass in the non-sponsoring chamber. Then the August 2009 death of Senator Edward Kennedy threatened to tip the balance against reform in the Senate.²¹²

In a stunning upset, Scott Brown won the special election to fill Kennedy’s Senate seat after a hard-fought campaign in which his most salient message was his pledge to vote against health care reform.²¹³ It appeared that the extended, rancorous, and seemingly unprincipled log-rolling in Congress soured support for the

205. *Id.*

206. *Id.*

207. See Carl Hulse, *In Lawmaker’s Outburst, a Rare Breach of Protocol*, N.Y. TIMES, Sept. 10, 2009, at A26.

208. *Id.*

209. See Carl Hulse, *House Formally Rebukes Wilson for Shouting ‘You Lie,’* N.Y. TIMES, Sept. 16, 2009, at A14.

210. See Noam N. Levey & Janet Hook, *House Passes Healthcare Plan: The 220-215 Vote Marks the First Such Victory in Decades of Efforts*, L.A. TIMES, Nov. 8, 2009, at A4.

211. Robert Pear, *Senate Approves Health Care Bill in Overhaul on Party-Line Vote*, N.Y. TIMES, Dec. 25, 2009, at A1.

212. John Ibbitson, *The End of Consensus*, GLOBE & MAIL, Aug. 27, 2009, at A1.

213. See, e.g., Joan Vennoch, Op-Ed., *Brown and the Kennedys*, BOSTON GLOBE, Jan. 31, 2010, at 9.

proposed legislation.²¹⁴ Brown not only captured what had for decades been a solidly Democratic seat,²¹⁵ but also occupied the place of a liberal icon who made the achievement of universal health care his life-long objective.²¹⁶ Conservative pundits read in Brown's election a message from the electorate to President Obama that, in pressing for a health care overhaul, he had misjudged the political tenor of the nation and exceeded his mandate.²¹⁷ Brown even garnered (and embraced) the nickname "41," a reference to the fact that his election provided the Republicans just enough votes to maintain filibuster in the Senate.²¹⁸ Contemporaneous national polls indicated that less than 40% of Americans approved the Administration's proposal.²¹⁹ In the wake of Brown's victory, health care reform was widely deemed dead.²²⁰

Rumors of its demise, however, proved to be greatly exaggerated. Faced with the prospect of a filibuster in the Senate, Democrats shifted their efforts towards getting the House to approve the bill the Senate had already passed.²²¹ Speaker Pelosi initially reported that she lacked the votes.²²² But after the promise of changes to accommodate the concerns of the most liberal and the most conservative Democrats, and a bipartisan, day-long, televised health care summit at the White House, majority support in the House at last appeared to be within reach.²²³ Still, Pelosi and the President had to lobby and cajole conservative House Democrats for their support—which ultimately proved fatal to some po-

214. See generally Janet Hook, *Obama Also Has Himself to Blame*, L.A. TIMES, Feb. 22, 2010, at 6 (noting that "[t]he spectacle of Congress' horse-trading, secrecy and gridlock has fueled today's virulent anti-Washington mood" and that "[t]he way voters saw it, the smoke-filled room was back—and they did not like it").

215. See Beverly Ford et al., *Massachusetts Miracle For the GOP—Bay Staters Tap Republican to Fill Kennedy Senate Seat*, N.Y. DAILY NEWS, Jan. 20, 2010, at 7.

216. See Vennoch, *supra* note 213.

217. See Ford, *supra* note 215.

218. See David M. Herszenhorn, *The Loneliest Number: 41*, N.Y. TIMES, Jan. 21, 2010, at A24.

219. See Noam N. Levey, *Reviving Healthcare*, L.A. TIMES, Mar. 31, 2010, at 13.

220. See Vennoch, *supra* note 213.

221. See Levey, *supra* note 219; Harold Meyerson, Op-Ed., *It's Her House; Pelosi's Role in Passing Healthcare Reform Puts Her in the Top Rank of Speakers*, L.A. TIMES, Mar. 26, 2010, at A27.

222. See Susan Milligan, *Mass. in Mind for State of the Union; President Will Address Voter Unrest Tonight*, BOSTON GLOBE, Jan. 27, 2010, at 1.

223. See Christi Parsons, *Obama Wants to Curb Insurers; His Healthcare Plan Would Give the Federal Government the Power to Stop Rate Hikes*, L.A. TIMES, Feb. 22, 2010, at A1.

litical careers—until the eve of the scheduled floor vote.²²⁴ Particularly difficult to resolve were controversies concerning the legislation's treatment of the ever volatile issue of abortion.²²⁵ Just hours before the vote, the last holdout, Bart Stupak of Michigan, pledged his support in exchange for the President's promise to promulgate a clarifying executive order prohibiting federal payment for abortions.²²⁶ The final vote in the House was 219 in favor and 212 opposed.²²⁷ On Tuesday, March 23, 2010, President Obama signed into law the ACA—the first major legislation in generations to be enacted without a single Republican vote.²²⁸

In short, the ACA reflected the settlement of a year-long, deeply divisive, and profoundly partisan legislative ground war over the structure of a multi-billion-dollar industry. Not since the Civil and Voting Rights Acts of the 1960s had federal legislation emerged from a similar crucible.²²⁹ The unparalleled acrimony and duration of the health care debate make it unusually difficult for judges, no less than any other citizens, to avoid feeling a vested allegiance either for or against the law, depending upon the individuals ideological or economic sympathies. This legislative history alone should give prudent pause to judges called upon now to undo that pact. As it turned out, however, the ACA's political problems were just beginning.

224. See Doyle McManus, *Will the 'Blue Dogs' Hunt for Obama?*, L.A. TIMES, Mar. 14, 2010, at A30.

225. See David M. Herszenhorn & Jackie Calmes, *Abortion Was at Heart of Wrangling*, N.Y. TIMES, Nov. 8, 2009, at A24.

226. *Id.*

227. Noam N. Levey & Janet Hook, *Healthcare Overhaul; House Passes Historic Healthcare Overhaul*, L.A. TIMES, Mar. 22, 2010, at A1.

228. See Peter Nicholas & Christi Parsons, *Healthcare Overhaul: Democrats Celebrate Their Victory*, Mar. 24, 2010, L.A. TIMES, at A1; see also Robert S. McElvaine, *Before Health Care Reform, Republicans Weren't Always the Party of 'No!'*, CHRISTIAN SCI. MONITOR (Apr. 7, 2010), <http://www.csmonitor.com/commentary/opinion/2010/0407/Before-health-care-reform-Republications-weren't-always-the-party-of-No!> (noting that even the then-highly controversial 1965 statute creating Medicare had the support of nearly half the House Republicans).

229. See Gail Russell Chaddock, *Was Rep. Tom Perriello Targeted for His Vote on Healthcare Bill?*, CHRISTIAN SCI. MONITOR (Mar. 24, 2010), <http://www.csmonitor.com/layout/set/print/content/view/print/290189>; Editorial, *Rhetoric of Violence Must be Reined In*, N.Z. HERALD (Jan. 11, 2011), http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10698945 (asserting that “[n]ot since the 1960s, when civil rights and the Vietnam War aroused heated debate, has the United States been so divided”).

2. The Statute

From the moment of enactment, repeal became a lodestar for the Republican party.²³⁰ Support for the legislation became a defining issue of the 2010 congressional elections, with Republicans targeting vulnerable Democrats in swing districts.²³¹ The strategy proved successful.²³² President Obama famously dubbed the 2010 congressional elections “a shellacking.”²³³ Republicans took control of the House and reduced the Democratic margin of majority in the Senate.²³⁴ The new Speaker of the House, John Boehner of Ohio, announced his intention to seek repeal of the law, which he labeled “a monstrosity.”²³⁵ Good to his word, the first action taken by the new House, after a public reading of the Constitution, was a vote to repeal the ACA.²³⁶

Of course the vote was largely symbolic, as the matter was sure to die via filibuster in the Senate, which it did.²³⁷ Boehner has also threatened to block all funding to carry the law into effect, though that remains to be seen.²³⁸ Thus, notwithstanding the March 2010 legislative victory, health care reform remains a leading and active issue. Only a few weeks into the 112th Congress it became clear that the Democrats could not reenact the ACA if they had to but neither could the Republicans effect a repeal. This legislative stalemate is certain to become one of a very few defining issues in the 2012 presidential election.

230. See David M. Herszenhorn & Robert Pear, *Health Vote is Done, but Partisan Debate Rages On*, N.Y. TIMES, Mar. 23, 2010, at A19.

231. See James O'Toole, *A New Political Landscape Emerges: Winning GOP, Losing Democrats Seek a New Path*, PITT. POST-GAZETTE, Nov. 4, 2010, at A1.

232. See Oliphant, *supra* note 189 (“The battle over President Obama’s signal domestic policy goal played a major role in transforming the political landscape.”).

233. See Carol E. Lee & Glenn Thrush, *Barack Obama Vows to Work with GOP After ‘Shellacking’*, POLITICO (Nov. 3, 2010) <http://www.politico.com/news/stories/1110/44657.html>.

234. See, e.g., Jeff Zeleny, *G.O.P. Takes House; Reid is Re-Elected and Keeps Leader’s Job*, N.Y. TIMES, Nov. 3, 2010, at A1.

235. David M. Herszenhorn, *Road Ahead Turns Right*, N.Y. TIMES, Nov. 4, 2010, at B1.

236. See, e.g., David M. Herszenhorn & Robert Pear, *As Vowed, House Votes to Repeal Health Care Law*, N.Y. TIMES, Jan. 19, 2011, at A1; Jennifer Steinhauer, *Constitution Has Its Day (More or Less) in House*, N.Y. TIMES, Jan. 7, 2011, at A15.

237. See, e.g., Herszenhorn & Pear, *supra* note 236, at A1 (describing also the Senate plan to block the repeal).

238. See, e.g., David M. Herszenhorn & Robert Pear, *Republicans Are Given a Price Tag for Health Law Repeal, but Reject It*, N.Y. TIMES, Jan. 7, 2011, at A15 (discussing Speaker Boehner’s plans to refuse implementation of the health care law).

3. The Litigation

Within minutes of the President's signing of the ACA, a coalition of partisan, elected state attorneys general and private parties—led by Bill McCollum, the Republican Attorney General Florida, who was then a candidate for governor—challenged the constitutionality of the law in federal court.²³⁹ The case was brought in the Northern District of Florida, which was thought likely, with good reason it turns out, to assign a judge inclined to offer a sympathetic hearing.²⁴⁰ This filing was accompanied by press releases and conferences obviously aimed at deflecting at least some of the Democrats glory and clouding the media message for the day.²⁴¹ Over the next few months, numerous additional suits were brought challenging the constitutionality of the ACA.²⁴² Seven states have taken the extraordinary step of enacting state statutes or adopting state constitutional amendments purporting to preclude enforcement of the ACA.²⁴³ Both the litigation and the state statutes were then widely seen as largely symbolic. The statutes were patently invalid under the Supremacy Clause, and most commentators thought little more of the lawsuits, which were decried as hallow publicity stunts.²⁴⁴

239. See *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1250, 1263 (N.D. Fla. 2011).

240. See Marianne Goodland, *Colorado Republicans Praise Latest Florida Court Ruling on Health Care Reform*, COLO. STATESMAN (Feb. 4, 2011), <http://www.coloradostatesman.com/content/992560-colorado-republicans-praise-latest-florida-court-ruling-health-care-reform> (noting that “[l]iberal groups and bloggers have accused the plaintiffs of ‘forum-shopping,’ or looking for the most conservative court in which to file the case”).

241. See Warren Richey, *Attorneys General in 14 States Sue to Block Healthcare Reform Law*, CHRISTIAN SCI. MONITOR (Mar. 23, 2010), <http://www.csmonitor.com/Attorneys-General-in-14-states-sue-to-block-healthcare-reform>.

242. See Rosalind S. Helderman, *‘Straight Arrow’ Considers Health-Care Suit*, WASH. POST, Dec. 8, 2010, at B1 (noting that more than fifteen lawsuits challenging the ACA had been filed around the country).

243. See, e.g., Virginia Health Care Freedom Act, VA. CODE ANN. § 38.2-3430.1:1 (Cum. Supp. 2011); see also *supra* O’Toole, note 231 (stating that the November 2010 election “results included the passage of ballot questions designed to block the health care bill’s implementation in Arizona and Oklahoma, while a similar measure was defeated in Colorado”). See generally Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111, 113–14 (2010) (reviewing and evaluating the on-going “health reform nullification trend” and noting that “[s]even states . . . enacted resolutions establishing that citizens of their respective states would not be required to comply with the new federal mandate that all individuals obtain health insurance”); Katharine Q. Seelye, *States Look to Forestall Hypothetical Mandate*, N.Y. TIMES, Feb. 7, 2010, at A21.

244. See, e.g., David A. Fahrenthold & N.C. Aizenman, *Health Law Fight Shifting to*

In these suits, the plaintiffs raised a broad array of arguments. The courts uniformly rejected nearly all these claims as legally groundless. To the surprise of many, however, two judges ultimately held determined that Congress lacked the power to impose the individual mandate. One, Judge Hudson of the eastern district of Virginia, severed the mandate from the rest of the massive law.²⁴⁵ The other, Judge Vinson, who sits in the northern district of Florida where the first suit was filed, invalidated the law in its entirety,²⁴⁶ though he later stayed his ruling and allowed implementation efforts to go forward pending appeal of his decision.²⁴⁷ These and other district court rulings now await review in the federal appeals courts.

The opinions of Judges Hudson and Vinson, and indeed of all the judges to reach the merits, acknowledged the extraordinarily divisive and partisan nature of the process leading to the law's enactment.²⁴⁸ They also expressly disclaimed that their decisions in any way reflected their views about the wisdom of the law.²⁴⁹ That all the judges reaching the merits found it necessary to state this proposition, which in most cases is taken for granted, unconsciously echoed Justice Owen Roberts's notorious characterization of judicial review as mechanical in his discredited opinion for the Court in *United States v. Butler*.²⁵⁰ Then, as now, it might be thought that the judges "doth protest too much."²⁵¹

The inclusion of disclaimers such as these also reflected the judges' expectations that their opinions would soon be made fod-

Courts, WASH. POST, Feb. 3, 2011, at A1 (noting that initially legal scholars widely viewed the litigation "as a quixotic political tactic").

245. *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 790 (E.D. Va. 2010).

246. *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1306 (N.D. Fla. 2011).

247. *Id.* at 1319.

248. *See, e.g., Florida ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, F. Supp. 2d 1120, 1127–28 (N.D. Fla. 2010).

249. *See, e.g., id.* at 1128.

250. *See* 297 U.S. 1, 62–63 (1936) ("When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question."). *See generally* Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49, 51 & n.13 (2010) (citing this passage as "[p]erhaps the most prominent example" of "mechanical jurisprudence").

251. WILLIAM SHAKESPEARE, *HAMLET*, act 3, sc. 2, c.240 (E.K. Chambers ed., D.C. Health & Co. 1917).

der for mass media. In this expectation they could not have been disappointed. Few district court rulings merit discussion by the President during his pre-Super-Bowl television interview.²⁵² But of course, the district court decisions were only initial steps along the federal judicial path, and all such roads lead to the Supreme Court. Talking heads, pundits of all stripes, and even a few legal scholars were not in the least shy about predicting the likely division of the Justices on the issue.²⁵³

The extent to which Justice Kagan should recuse herself from cases due to her involvement with them while Solicitor General has proven unusually contentious and garnered disproportionate attention; much of it focused on the prospect of the High Court's ruling on the constitutionality of the ACA—which some have attributed to the possibility that her presence or absence might be decisive in a High Court test of the law.²⁵⁴

The timing of the litigation continues to exacerbate its political impact.²⁵⁵ If, as is expected, the various appeals are given priority

252. See Darlene Superville, *Obama, Fox Host O'Reilly Talk Politics, Football: President Says People Who Say They Hate Him Don't Know Him*, HOUS. CHRON., Feb. 7, 2011, at A8.

253. See David A. Fahrenthold & N.C. Aizenman, *supra* note 244 (observing that “[t]he high court’s decision, assuming it does get the final word, may turn on its ‘swing justice,’ who frequently breaks ties between the four liberals and four conservatives on the bench” and quoting Harvard law professor Richard Fallon as saying that the litigation in the lower courts is “essentially a rehearsal for Anthony Kennedy”); see also *A Brisk Constitutional*, ST. PETERSBURG TIMES, Feb. 6, 2011, at 5P (“Many pundits expect it to be a 5–4 decision, with Justice Anthony Kennedy the swing vote whichever way the high court rules.”); Joe Carlson, *Moving Forward; Law’s Future Uncertain; Hospitals Implementing Plans*, MODERN HEALTH CARE, Dec. 20, 2010, at 8 (“With the case now heading to the Supreme Court by all signs, a central question has become whether the court’s Libertarian-minded swing vote, Justice Anthony Kennedy, would vote with liberals or conservatives.”); Editorial, *When the Supreme Court Takes up the Obama Health-Care Law ‘Mandate’*, CHRISTIAN SCI. MONITOR (Dec. 14, 2010), <http://www.csmonitor.com/Commentary/the-monitors-view/2010/1214/When-the-Supreme-Court-takes-up-the-Obama-health-care-law-mandate> (“Justice Anthony Kennedy, as often happens, could be the swing vote.”); Ezra Klein, *The Justice Will See You Now; The Fate of Obama’s Health-Care Law May Rest with One Man*, NEWSWEEK, Feb. 14, 2011, at 16 (“And once it gets those, odds are the bill’s fate will come down to one person: Justice Kennedy.”); Warren Richey, *Health Care Reform: Battleground Shifts to Florida Courtroom*, CHRISTIAN SCI. MONITOR (Dec. 15, 2010), <http://www.csmonitor.com/USA/Justice/2010/1215/Health-care-reform-Battleground-shifts-to-Florida-courtroom> (“Some analysts predict it could be a close case, with Justice Anthony Kennedy potentially casting the deciding vote.”).

254. See Warren Richey, *Would Elena Kagan Bow Out of a Health-Care Reform Case?*, CHRISTIAN SCI. MONITOR (July 15, 2010), <http://www.csmonitor.com/layout/set/print/content/view/print/314283>; see also Adam Liptak, *To Recuse or Not*, N.Y. TIMES, July 25, 2010, at WK5.

255. See Noam N. Levey & David G. Savage, *Key Healthcare Provision Voided; Requir-*

in the courts of appeals, the matter is on course for a Supreme Court ruling in June of 2012.²⁵⁶ A decision at that date, and especially one invalidating the law, would undoubtedly figure prominently in the nationwide discussion leading up to the fall presidential election.²⁵⁷ Worse, the Justices' opinions could be crafted with that end in mind. It might even be unrealistic to think that the Justices would not take into account their potential value as partisan soundbites.²⁵⁸ Indeed, within hours of its publication, Judge Hudson's ruling invalidating the ACA's individual mandate was featured in a Republican solicitation for campaign contributions.²⁵⁹

Hence, nearly everything about the manner in which these cases have been litigated, decided, and reported on by the press, suggests that they threaten to turn the federal judiciary into a political football. To do so would, of course, further politicize this nominally non-partisan branch of government and further erode whatever difference remains between constitutional law and partisan politics. Yet while these cases present the risk of exacerbating these trends, they also present opportunity for the judiciary to do much to reverse them by exercising judicial forbearance. How they might do so is discussed below.

ing People to Buy Insurance is Unconstitutional, a Judge Rules, L.A. TIMES, Dec. 14, 2010, at A1.

256. *See id.* ("Declaring a core part of the new health care law unconstitutional, a federal judge in Virginia has launched President Obama's signature domestic achievement into a gantlet of conservative-leaning courts that will almost certainly conclude at the Supreme Court just as the 2012 election is cresting.")

257. *Id.*

258. Senior D.C. Circuit Judge Laurence Silberman even coined a term for the Justices' awareness of how their opinions might be received by the mass media; he labeled this awareness, and by implication the impact it would in turn have on the Justices' opinions, the other Greenhouse effect—alluding to Pulitzer-prize-winning journalist Linda Greenhouse, who long covered the Supreme Court for the *New York Times*. *See* Amnon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar*, 95 CAL. L. REV. 1619, 1638 n.85 (2007); *see also* Miguel Schor, *Judicial Review and American Constitutional Exceptionalism*, 46 OSGOODE HALL L.J. 535, 542 (2008) ("Conservatives complain that justices 'drift' left because they 'listen' to the opinions of cultural and media elites such as Linda Greenhouse, a reporter who writes extensively on the Supreme Court for the *New York Times*, in what some have called the 'Greenhouse effect.'") (footnotes and citations omitted).

259. *See, e.g.,* Levey & Savage, *supra* note 255.

C. *What Forbearance Would Look Like*

Each additional judicial opinion by a Republican-appointed judge against the constitutionality of the individual mandate bolsters the claim that the results in important constitutional cases turn more on political preferences than on law. So the best thing the federal judiciary can do is to stop issuing such opinions. Harm has already been done by the two district court decisions invalidating the law. But if they are reversed on appeal, and the appellate courts are unanimous in upholding the law, that harm will be contained. In such circumstances, the Supreme Court could simultaneously avoid committing itself on the issue and stay out of the fray by simply declining to exercise jurisdiction,²⁶⁰ an act requiring no explanation and of no precedential significance.²⁶¹

But if the past is prologue, at least one circuit court will eventually rule against the constitutionality of the law, which will in effect force the Supreme Court to decide the matter.²⁶² Once there, unanimity would again be ideal. It is also extremely unlikely. Justice Thomas has since *Lopez* consistently called for the abandonment of modern precedents and a return to an understanding more in keeping with that of the 1780s.²⁶³ For present purposes, the key word is “consistently.” This means that his vote will do little or no harm to the notion that constitutional law or interpretation is more than just politics. By repeatedly adhering to his narrow understanding of federal legislative power in the face of what must have mighty temptations to yield to his contrary policy preferences,²⁶⁴ Justice Thomas has earned the right to vote to strike down “Obamacare.” No fair assessment of his record on congressional power would dismiss such a vote as mere politics. The same cannot be said for any of his conservative brethren. All

260. See generally SUP. CT. R. 10 (declaring that “[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion” and identifying considerations weighed in ruling on a petition for the writ).

261. See Jonathan L. Entin, *Insubstantial Questions and Federal Jurisdiction: A Footnote to the Term-Limits Debate*, 2 NEV. L.J. 608, 612 (2002) (“A denial of certiorari, the Court has often explained, has no precedential weight.”).

262. See, e.g., *United States v. Morrison*, 529 U.S. 598, 605 (2000) (“Because the Court of Appeals invalidated a federal statute on constitutional grounds, we granted certiorari.”).

263. See, e.g., *United States v. Lopez*, 514 U.S. at 549, 589 (1995) (Thomas J., concurring).

264. See, e.g., *Raich v. Gonzales*, 545 U.S. 1, 57 (2005) (Thomas, J., dissenting); *United States v. Comstock*, 130 S. Ct. 1949, 1970 (2010) (Thomas, J., dissenting).

four of them have in recent years strayed from their federalism vows,²⁶⁵ and their purported discovery of an inflexible commitment to them when ruling on “Obamacare” would fool none but the foolhardy. Accordingly, to be truly efficacious as an act of constitutional forbearance, the Roberts Court would not only have to uphold the ACA but do so by an 8-1 margin. The significance of the Court’s forbearance would be dissipated to the extent that less steadfast friends of strict limits on federal power chose this case to join Justice Thomas. And, while marginally better than a ruling invalidating the law, a 5-4 decision upholding the law would merely confirm the many predictions that the Justices would divide along partisan lines with the most moderate conservative, Justice Kennedy, casting the deciding vote.²⁶⁶

D. *Forbearance is not Abdication*

One person’s constitutional forbearance might be another’s political cowardice. In this light, it is worth asking whether there exists a category of cases in which the kinds of societal and institutional considerations that forbearance serves should play no role whatsoever in a judge’s thinking?

The most compelling candidate would be the category of cases in which the judiciary alone could realistically be expected to act impartially. One of the most significant theories of modern constitutional law articulated in the last half of the twentieth century was set forth in John Hart Ely’s seminal *Democracy and Distrust*.²⁶⁷ In that book he argued, among other things, that much of modern constitutional law could best be understood as reflecting the Court’s intuitions about when ordinary political processes were trustworthy and when systemic problems suggested that they were not.²⁶⁸ In the latter cases, Ely argued that the Court intervened either to clear away a barrier to the healthy functioning of the political process,²⁶⁹ or to correct errors the political process

265. See, e.g., *Raich*, 545 U.S. at 33 (Scalia, J., concurring in the judgment); *Comstock*, 130 S. Ct. at 1953 (majority opinion joined by the Chief Justice and Justices Kennedy and Alito).

266. See *supra* note 253 and accompanying text.

267. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

268. *Id.* at 73–179.

269. The archetypical example is legislative redistricting, where absent judicial intervention legislators would have been only too happy to perpetuate the representational dis-

itself could never adequately address.²⁷⁰ This is no place to take up a general evaluation of Ely's theory. In any event, it suffices for present purposes to observe that it remains a dominant trope in the legal literature.²⁷¹ One does not have to be a partisan or devotee of the theory to acknowledge that it reflects some degree of both descriptive and normative truth.

In any event, whatever weight ought to be accorded considerations of process failure, there are no reasons to think that they afford a basis to invalidate the ACA. As recounted above, the law is the product of one of the most salient, extended, and passionate political debates in modern memory.²⁷² And while this conversation was at times uncivil,²⁷³ no one can credibly claim that the March 23, 2010 enactment caught him unawares. And the political conversation continues and will undoubtedly be a major issue in the 2012 election, as it was last fall.

Far more importantly, however, is the fact that the individual mandate, the only provision in the law found by any judge to be of doubtful constitutional validity, is exactly the kind of legal imposition which the political process is most likely to impose justly. As Justice Jackson observed more than sixty years ago,

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.²⁷⁴

parities that put them in office in the first place. *See generally* STEPHEN ANSOLABEHRE & JAMES M. SNYDER, JR., *THE END OF INEQUALITY: ONE PERSON, ONE VOTE, AND THE TRANSFORMATION OF AMERICAN POLITICS* (2008).

270. The archetypical example is racial segregation, which was entrenched by a history of one-party rule in the South that in turn secured it controlling seniority in the Senate. *See* Kathleen A. Bergin, *Authenticating American Democracy*, 26 *PACE L. REV.* 397, 437 n.212 (2006) (explaining that Southern segregationists held crucial Senate committee chairs and used these positions to block civil rights legislation for decades).

271. *See, e.g.*, Symposium, *On Democratic Ground: New Perspectives on John Hart Ely*, 114 *YALE L.J.* 1193 (2005).

272. *See supra* notes 194–228 and accompanying text.

273. *See supra* notes 201–08 and accompanying text.

274. *Ry. Express Agency v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., con-

The constitutional challenges to the individual mandate have emphasized the unprecedented breadth of this requirement.²⁷⁵ To be sure, aside from a few narrow exceptions,²⁷⁶ the mandate does indeed apply to virtually every American.²⁷⁷ And it is precisely the mandate's all-encompassing nature that makes the case for judicial intervention so weak. The universality of the requirement is itself the most "effective practical guaranty against arbitrary and unreasonable government."²⁷⁸ If the mandate, which has of course not yet gone into effect, proves in practice to be an intolerable yoke upon the citizenry, Congress and the President will be unable "to escape the [resulting] political retribution,"²⁷⁹ and their successors will repeal the law. Far from necessitating judicial intervention,²⁸⁰ the circumstances of the ACA's individual mandate provision bolster the case for leaving the issue to the ordinary political process.

CONCLUSION

For better or worse, the federal judiciary has already been drawn deeply and irreversibly into the health care-reform-debate maelstrom. Additional federal judicial rulings on the merits of the constitutional arguments arrayed against the statute are inevitable, and a decision by the U.S. Supreme Court finally resolving the matter seems likely as well.

The ACA cases give those conservative federal judges and Justices who will decide them an almost perfect opportunity to do something that is sorely needed and long overdue, and that is to begin restoration of a distinction between constitutional law and partisan politics. Few would doubt that these judges must be sorely tempted to seize the tools afforded by the notoriously inde-

curing).

275. *See, e.g., Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1284 (N.D. Fla. 2011). ("Never before has Congress required that everyone buy a product from a private company (essentially for life) just for being alive and residing in the United States.")

276. *See Patient Protection and Affordable Care Act*, § 1501, 124 Stat. at 246–48 (exempting categories of persons from mandatory coverage requirement).

277. *Id.* at 246.

278. *Railway Express*, 336 U.S. at 112 (Jackson, J., concurring).

279. *Id.*

280. *See supra* notes 268–70 and accompanying text (discussing cases where the call for judicial intervention was far more compelling).

terminate law of the post-*Lopez* Commerce Clause jurisprudence and employ them to dismantle a federal program detested by the American right like little else. What is more, the cases are on a timeline such that they also offer the chance to rob the incumbent Democratic President of the signal achievement of his first term in the midst of his reelection campaign. Millions already believe that these kinds of considerations will prove decisive in the minds of judges, whether or not they operate consciously. Further judicial rulings along partisan lines of division will deepen such suspicions in countless future cases.

For the same reasons, were these judges to decline this opportunity, to refrain from exploiting it and forego the partisan bounty it promises, they would demonstrate by their actions what a less partisan constitutional law would look like. To be sure, were this to occur it would be but small step toward a transformation of our legal and political culture. But it may be a generation before another opportunity as significant as this one presents itself. Moreover, the cases are well timed in another way, and that is that the Roberts Court has yet to address the precedential significance of *Lopez* and *Morrison*. There will never be a better time for the Court to signal that it will not countenance gamesmanship with constitutional principle. There may never be a better opportunity for the Roberts Court, should it reach the matter, to exercise constitutional forbearance.

To be clear, only the naive can at this point in our history expect that it will do so. The Court has recently had countless opportunities to exercise forbearance and it has repeatedly declined. There is little reason to believe that the Justices will suddenly and dramatically reorient their values in this instance. But assuming this essay has convinced you that there is at present an acute need for constitutional forbearance and that the ACA cases provide an outstanding opportunity for the same, the question becomes, why not? Now might be a good time to start thinking about whom to blame.