

Responses

How the Obamacare Case Defined Deviancy Down

Andrew Koppelman*

Michael Dorf, in his review of my book, *The Tough Luck Constitution and the Assault on Health Care Reform*, agrees with me that what I call “Tough Luck Libertarianism”—the idea that if you get sick and can’t pay for it, the state has no right to help you—played a large role in the Court’s decision in *National Federation of Independent Business v. Sebelius*,¹ the *Health Care Case*.² Dorf, however, thinks I have not given enough weight to two other factors: federalism and “nonpartisan framing.”³ When these are taken into account, the constitutional challenge no longer seems to him as frivolous as he once thought (and I still think) it to be.

It is important to consider, as sympathetically as you can, arguments with which you do not agree. But there are dangers. Dorf’s generous spirit has led him to expand—really to explode—the bounds of the frivolous.

I. Implementing Federalism

The Tough Luck Constitution tells the story of the Supreme Court litigation over the Affordable Care Act (ACA). Chapter One examines the history of health care reform in America and shows how the logic of reform led Congress to choose the mandate over other, functionally equivalent, but politically impossible, ways of delivering near-universal health care. Chapter Two, the focus of Dorf’s critique, describes the appropriate constitutional limitations on congressional power. Chapter Three shows how the constitutional objections were invented, for the first time, as the bill neared passage. Chapter Four examines the Court’s decision. Chapter Five considers the decision’s aftermath.

Dorf thinks that I am poorly positioned to criticize the Court’s federalism reasoning:

Koppelman rejects the entire framework within which the Supreme Court’s conservative majority has implemented the Constitution’s

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1. 132 S. Ct. 2566 (2012).

2. See Michael C. Dorf, *What Really Happened in the Affordable Care Act Case*, 92 TEXAS L. REV. 133, 135 (2013) (book review).

3. See *id.* at 136.

federalism limits; thus, like other liberal constitutional scholars, he was not and is not well positioned to say what questions that majority would regard as settled and what questions it would regard as open.⁴

Actually, I share the Court's interest in limits on congressional power, though I conclude (and Dorf agrees) that the Court has made a mess of the job.

I argue in the book that the most sensible understanding of constitutional limits on congressional power is the principle of subsidiarity, which holds that central authority should perform only those tasks which cannot be performed at a more local level.⁵ At Philadelphia in 1787, the Convention resolved that Congress could “legislate in all cases . . . to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.”⁶ This was then translated by the Committee of Detail into the present enumeration of powers in Article I, Section Eight,⁷ which was accepted as a functional equivalent by the Convention without much discussion.⁸ I argue that ambiguities in the enumeration should be resolved by reference to the general purpose of the Constitution. That purpose is revealed not only by these then-secret deliberations but also by the widely shared understanding that the Articles of Confederation were defective and had to be replaced precisely because they created a state of affairs where some problems could be solved neither by the states nor by the federal government.⁹ Specifically with respect to the commerce power, I follow Robert Stern, who observed in 1934 that “no hiatus between the powers of the state and federal governments to control commerce effectively was intended to exist”¹⁰ and that the Framers did not intend that the people of the United States “be entirely unable to help themselves through any existing social or governmental agency.”¹¹

4. *Id.* at 145 (footnote omitted).

5. ANDREW KOPPELMAN, *THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM* 41–43, 58–59 (2013).

6. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 21 (Max Farrand ed., 1911); *see also* 1 *id.* at 21 (referring to Resolution VI of the Virginia Plan).

7. U.S. CONST. art. I, § 8.

8. “Though it has been argued that this action marked a crucial, even subversive shift in the deliberations, the fact that it went unchallenged suggests that the committee was only complying with the general expectations of the Convention.” JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 178 (1996) (footnote omitted); *accord* Robert L. Stern, *That Commerce Which Concerns More States than One*, 47 *HARV. L. REV.* 1335, 1340 (1934).

9. *See* MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 1–12 (1913) (detailing the inadequacies of the Articles of Confederation).

10. Stern, *supra* note 8, at 1365.

11. *See id.* at 1335.

Dorf objects that the principle of subsidiarity is not in the Constitution as finally enacted. “Where specific language implements some general principle, the specific language controls.”¹² He is right in part: perhaps subsidiarity does not justify a federal bankruptcy law, but that is specifically authorized by the text.¹³ But he’s not right in *pertinent* part. The language of the Commerce Clause is not specific at all. It is compatible with many different interpretations. The limitations on the commerce power that the Court has devised are judge-made law, connected to the text only by the imperative to craft rules in order to implement vague constitutional provisions.¹⁴

Given that there must be judge-made law, what should the rule be? As Dorf notes, I’m torn between absolute judicial abstention and a subsidiarity rule. The problem with subsidiarity is that it is a standard that cannot be administered without a lot of discretion. There are clear violations, and perhaps the courts can remedy them without collateral mischief. The statute invalidated in *United States v. Lopez*,¹⁵ criminalizing possession of handguns near schools,¹⁶ was pure congressional grandstanding. There was no reason to think that the states could not handle the problem. As I acknowledge in the book,¹⁷ however, the *Lopez* Court did not rely on subsidiarity.¹⁸

The clearest of the limits stated in *Lopez* is the notion that Congress can regulate economic, but not noneconomic, activity.¹⁹ *Gonzales v. Raich*²⁰ clarified that even noneconomic activity could be regulated if the statute as a whole clearly did regulate interstate commerce and regulating the noneconomic activity “was an essential part of the larger regulatory scheme.”²¹

I dislike this rule because it means “Congress would be deprived of authority over such nontrivial matters as the spoliation of the environment

12. Dorf, *supra* note 2, at 143.

13. U.S. CONST. art I, § 8.

14. See RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 98–101 (2001) (describing the Court’s creation of those limitations).

15. 514 U.S. 549 (1995).

16. *Id.* at 551.

17. KOPPELMAN, *supra* note 5, at 59.

18. Dorf claims that “Koppelman writes as though the pre-*Health Care Case* doctrine *already* endorsed subsidiarity. Yet the Court has never treated subsidiarity as a directly enforceable principle of federalism.” Dorf, *supra* note 2, at 144. I never claim that subsidiarity is now the law. Readers can reasonably ask me whether I think that there should be no limits at all on congressional power. In the context of the *Health Care Case*, that question is an urgent one. Subsidiarity is my answer. The Court, as I acknowledge, has gone in another direction.

19. See *Lopez*, 514 U.S. at 561 (refusing to uphold the Act because it is not “an essential part of a larger regulation of economic activity”). On the vacuity of the other stated limits, see KOPPELMAN, *supra* note 5, at 59–60.

20. 545 U.S. 1 (2005).

21. *Id.* at 26–27.

or the spread of contagious diseases across state lines.”²² Maybe those results would have to be accepted if the Constitution’s commands were clear. But we are talking about judge-made law. Dorf writes that “these formal tests are also made up by the courts; however, if genuinely rule-like, in future cases they may be more constraining than open-ended standards.”²³ But look at the ordering of priorities: we risk epidemic diseases and the disappearance of irreplaceable species in order to get marginally greater constraint. You can believe in judicially enforced federalism without believing that.

Nonetheless, the rule, flawed as it is, is sufficient to sustain the mandate. The health care law is clearly an economic regulation.²⁴ The mandate is just as clearly useful to carrying it out and so is authorized under the Necessary and Proper Clause. Either *Lopez* as based on an economic–noneconomic distinction or *Lopez* as based on subsidiarity will sustain the mandate.

I do not devote a lot of space in *The Tough Luck Constitution* to the argument under existing law. I do not have to.

Under settled law at the time that the ACA was enacted, the mandate is obviously constitutional. That is why the Democrats paid so little attention to the constitutional objections. Here is the case for its constitutionality under existing precedent, in four sentences. *Insurance is commerce. Congress can regulate it. Therefore, Congress can ban discrimination on the basis of preexisting conditions. Under the Necessary and Proper Clause, it gets to decide what means it may employ to make that regulation effective.*²⁵

That also answers the claim that sustaining the mandate would call all limits into question. If there is any limit at all laid down in *Lopez*—whatever that may be—then it logically follows that accepting the mandate would not abandon all limits.²⁶

The ACA’s constitutionality under existing law is thus clear—unless, of course, you introduce a new, previously-unheard-of rule: the action–

22. KOPPELMAN, *supra* note 5, at 60.

23. Dorf, *supra* note 2, at 144.

24. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2609–15 (2012) (Ginsberg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (discussing the economics of health care).

25. KOPPELMAN, *supra* note 5, at 67.

26. *Id.* at 77–78. This precise argument was made in the lower courts by acting Solicitor General Neal Katyal but unfortunately was deliberately abandoned in the Supreme Court by his successor, Donald Verrilli. JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 136–37, 143–44, 151–52, 162 (2013). Dorf speculates that sustaining the mandate might have called *Lopez* into question because even the law invalidated there might have been reframed as a mandate. Dorf, *supra* note 2, at 147–48. But he immediately concedes that if the economic–noneconomic activity line is accepted, then it logically applies to such mandates so that this work-around would be defeated. *Id.* at 148.

inaction distinction. I write: “That limit has nothing to do either with the purposes for which federal power is being exercised or with the reasons for which anyone would reasonably want to constrain it. It is a limit just for the sake of having a limit.”²⁷

Dorf thinks that I do not fully appreciate “that the conservative Justices could have sincerely regarded the mandate as a threat to the Constitution’s state–federal balance.”²⁸ It is true that, if the Court wants a judicially enforceable federalism, it must devise “a test that is sufficiently capacious to satisfy the Hamiltonian concern that the government must have latitude to choose effective means to accomplish its legitimate ends, but sufficiently constraining to satisfy the Jeffersonian concern that the federal government’s affirmative powers remain limited.”²⁹ The action–inaction distinction is not that test.

The Court concededly is in love with the idea of limits on Congress. Every couple of years it has been necessary to lay some federal law onto the altar and rip its heart out. The ritual is satisfied even if, as in *Lopez*, neither Congress nor the lower courts can tell afterward what the rule is.³⁰ Judicial decision should not, however, rest on the premise, “we didn’t necessarily mean to hit you; we just needed to hit somebody.”

The other federalism doctrines the Court has invented in recent years—“an anticommandeering rule; a state sovereign immunity doctrine that goes well beyond the text of the Eleventh Amendment; [and] a distinction between economic and noneconomic activity as a predicate for the exercise of the Commerce Clause power”³¹—at least bear some relation to the underlying concern for state autonomy or the meaning of “commerce.” Dorf doubts that the action–inaction distinction “is less defensible than the other state-protective doctrinal innovations.”³² But this one is unmoored from *any* value in the constitutional text, and it does not significantly limit the commerce power.

It allows Congress to act in every case in which the citizen has voluntarily taken some action. Most of us can’t realistically avoid having jobs and buying things, and it’s not much consolation to be told that I can avoid oppression if I live in the woods and eat berries. This limitation is unlikely to have any application after the ACA litigation and is patently tailored to bring about a desired result in a single case.³³

27. KOPPELMAN, *supra* note 5, at 62.

28. Dorf, *supra* note 2, at 136.

29. *Id.* at 140.

30. See KOPPELMAN, *supra* note 5, at 59–62.

31. Dorf, *supra* note 2, at 153 (footnotes omitted).

32. *Id.*

33. KOPPELMAN, *supra* note 5, at 77.

Randy Barnett, the mastermind behind the case against the ACA,³⁴ implicitly recognizes this difficulty. He has defended the Court's holding on the commerce power, but on a different basis than he argued or than the Court relied on. He thinks that the expansion of federal power since the New Deal is too entrenched to roll back but that the approach the Court now follows "can be summarized as 'this far and no further'—provided 'no further' is not taken as an absolute, but merely as establishing a baseline beyond which serious justification is needed."³⁵

This is not doctrine at all. It is a generalized suspicion of federal power. Barnett understands that this way of drawing the lines is arbitrary but thinks that it is an appropriate response to the expansion of federal power, which "violated the original meaning of the Constitution."³⁶ Thus, the work begins of rewriting the case—a task that implicitly concedes that the Court did a poor job and needs help.³⁷ But Barnett has here relegated the action–inaction distinction to a subsidiary inquiry in which the real question is whether Congress is doing anything new. Everything will then turn on whether a new regulation is an expansion of federal power. After reviewing the argument over whether the mandate was novel, "with various analogies offered and refuted along the way," Charles Fried concludes that "the very scholasticism of this debate shows how irrelevant the sobriquet 'novel' is to the question of validity."³⁸ If this is the Court's new paradigm for constitutional law,³⁹ then judges' pretheoretical intuitions, and advocates' skills at manipulating those intuitions, will define the limits of federal power.

II. How Nonpartisan Framing Unleashes Partisanship

Dorf's other explanation for the Court's acceptance of the action–inaction distinction is "nonpartisan framing," which he defines as "the

34. *See id.* at 80–90 (describing Barnett's role).

35. Randy E. Barnett, *No Small Feat: Who Won the Health Care Case (And Why Did So Many Law Professors Miss the Boat)?*, 65 FLA. L. REV. 1331, 1348 (2013).

36. *Id.* at 1350.

37. Sometimes that kind of work is unavoidable because the Court sometimes reaches the right result for the wrong reasons. *See, e.g.*, Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 481–83 (1990) (describing attempts to rewrite *Roe v. Wade*, 410 U.S. 113 (1973)). Barnett's approach, however, is an originalist argument with weak originalist credentials. *See* Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1082–83 (2005) (reviewing RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004)).

38. Charles Fried, *The June Surprises: Balls, Strikes, and the Fog of War, in THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* 51, 55 (Nathaniel Persily et al. eds., 2013).

39. And it very well may be. For a purely descriptive analysis upon which Barnett relies, see Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1 (2013).

process by which lawyers persuade judges—and by which judges persuade themselves—that the law requires results that the judges favor for low political reasons.”⁴⁰ This is certainly part of what drove the Court. Dorf does not claim that nonpartisan framing can make a legal argument nonfrivolous. It does not constrain legal argument at all. It is like Herbert Wechsler’s neutral principles. Wechsler made a great fuss of insisting that cases be decided by “standards that transcend the case at hand.”⁴¹ But you can always come up with a principle that satisfies this criterion and justifies what you want to do. The only limit is your own cleverness, which is why especially clever lawyers make the big bucks.⁴²

For just that reason, nonpartisan framing cannot explain any result because it will always be present. It is just a routine part of minimally competent lawyering, like remembering to show up for trial.

Dorf observes that “conservatives are especially good at framing partisan claims in nonpartisan terms because they view alternative methodologies as not merely inferior but as fundamentally illegitimate.”⁴³ But originalist methodology, which conservatives love to cite, is irrelevant here because the judges in the *Health Care Case* made no attempt to justify their position in originalist terms. The arguments that were made—for instance, the ringing claim that a regime that empowers Congress to enact the mandate is “not the country the Framers of our Constitution envisioned”⁴⁴—are specimens of what we can call Maximally Degraded Originalism: *The Framers were very wise men. Therefore it follows that they would have agreed with me.* The casual reliance on a support that is really no support at all bespeaks another pathology, which I’ll call Maximal Rationalization: *Whatever I’m doing cannot possibly be wrong, because it’s me that’s doing it.*⁴⁵

If nonpartisan framing was enough to persuade the Court that it was innocent of political motivation, that bespeaks a distinctive kind of culpable self-deception. I agree with Dorf that it is very improbable that any of the judges “would allow himself or herself to believe that he or she was voting based on partisan motives.”⁴⁶ As it happens, every single judge who joined

40. Dorf, *supra* note 2, at 137.

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

42. Wechsler was strangely unclever in justifying *Brown v. Board of Education*, 347 U.S. 483 (1954): he despaired of its justification after rejecting a couple of weak arguments. Wechsler, *supra* note 41, at 31–34.

43. Dorf, *supra* note 2, at 157.

44. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2589 (2012) (Roberts, C.J.).

45. On that pathology, see Andrew Koppelman, *Reading Lolita at Guantánamo: Or, This Page Cannot Be Displayed*, DISSENT, Spring 2006, at 64.

46. Dorf, *supra* note 2, at 155.

the Commerce Clause holding is Catholic.⁴⁷ They ought to reflect on the wisdom of the venerable moral tradition in which they participate. Aquinas observed that ignorance is not an excuse “when somebody chooses not to be informed, in order to find some excuse for sin or for not avoiding it” or “when a person does not actually attend to what he could and should consider.”⁴⁸ If the judges were unaware of the politically convenient character of their reasoning, it is likely that this unawareness was the object of the will, consented to as such.

III. Whose Tough Luck?

Dorf asks: “Does Tough Luck Libertarianism explain how the conservative Justices voted in the *Health Care Case*?”⁴⁹ But that’s not my question. Neither Tough Luck Libertarianism, federalism, nor nonpartisan framing explains why the Court did what it did. I offer some guesses, but I do not try to psychoanalyze the Justices.⁵⁰ I am not offering a “causal account” of the result in the case. My claim is that causation moves in the other direction: in order to reach the conclusions they did (and you will have to figure out for yourself why they wanted them), the judges found it necessary to introduce Tough Luck Libertarianism into constitutional law. Dorf thinks “the conservatives used Tough Luck Libertarianism opportunistically in the *Health Care Case*.”⁵¹ But the opportunism runs in both directions. This case gave Barnett, whose libertarianism approaches anarchism,⁵² the chance to shape constitutional doctrine.

The power of the challenge came from a set of rhetorical moves that depended on unstated Tough Luck Libertarian assumptions. My claim is that these assumptions were necessary for the rhetoric to work:

[P]eople . . . who were not [themselves] Tough Luck Libertarians . . . nonetheless found themselves saying Tough Luck Libertarian things and . . . making claims based on a Tough Luck *Constitution*—a constitution in which there is no realistic path to universal health care. That Constitution won’t be attractive unless Tough Luck

47. See *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2591 (Roberts, C.J.); *id.* at 2642 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting); Barbara A. Perry, *Catholics and the Supreme Court: From the “Catholic Seat” to the New Majority*, in *CATHOLICS AND POLITICS: THE DYNAMIC TENSION BETWEEN FAITH & POWER* 155, 157 tbl.9.1 (Kristin E. Heyer et al. eds., 2008) (noting that Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito are all Catholic).

48. 17 ST. THOMAS AQUINAS, *SUMMA THEOLOGICÆ* pt. I-II q. 6, art. 8, at 32 (Cambridge: Blackfriars, 1970).

49. Dorf, *supra* note 2.

50. The most impressive, informed speculations I’ve seen are by Charles Fried and Linda Greenhouse. See Fried, *supra* note 38; Linda Greenhouse, *Is It the Roberts Court?*, in *THE HEALTH CARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS*, *supra* note 38, at 186.

51. Dorf, *supra* note 2.

52. KOPPELMAN, *supra* note 5, at 81.

Libertarianism is right that it is acceptable to deny people the medical care they need. The challengers to the ACA talked a lot about slippery slopes—at the bottom of this one was a law requiring you to buy broccoli—but there’s a slope in the other direction as well. Once you decide that it’s acceptable to hold your nose and make this kind of argument, it will be easier next time.⁵³

Here I can only offer one illustration. In *United States v. Comstock*,⁵⁴ the Court upheld a law authorizing civil commitment of mentally ill sexual predators that remain dangerous after completing their federal prison sentences—an appropriate federal role, Congress found, because no state may be willing to take custody and the federal imprisonment had created that problem.⁵⁵

In his opinion in the *Health Care Case*, Roberts quoted a declaration in *McCulloch v. Maryland*⁵⁶ that the Necessary and Proper Clause did not authorize the use of any “‘great substantive and independent power’ of the sort at issue here.”⁵⁷ That raises a puzzle. How do you tell the difference between a “great substantive and independent power” and lesser powers? Roberts tries to distinguish *Comstock* because the law it upheld permitted “continued confinement of those *already in federal custody* when they could not be safely released.”⁵⁸ It thus “involved exercises of authority derivative of, and in service to, a granted power.”⁵⁹ But this is a pretty broad understanding of what constitutes a derivative power. If, in the course of exercising an enumerated power, the federal marshals ever take you into custody, they have a derivative power to keep you locked up, forever if necessary.

What actually determines what counts as a “great substantive and independent power,” as I argue in the book, is “the interpreter’s pretheoretical intuitions about which government powers are particularly scary.”⁶⁰ The mandate, an obligation to pay money if you impose risks on

53. *Id.* at 16. Ilya Somin similarly objects that the challengers to the ACA did not rule out all redistributionist measures and concludes that Tough Luck Libertarianism had nothing to do with the challenge. Ilya Somin, *New Books on the Obamacare Case*, VOLOKH CONSPIRACY (Aug. 12, 2013, 11:40 AM), <http://www.volokh.com/2013/08/12/new-books-on-the-obamacare-case/>. But the specific arguments they did make rested in Tough Luck Libertarian premises. (In the same post, Somin himself reads a presumption against redistribution into the Constitution, without specifying any textual basis for it. *See id.*) I do not complain that they did not follow those premises to their logical conclusions. In fact, I am relieved.

54. 560 U.S. 126 (2010).

55. *Id.* at 129, 133, 142.

56. 17 U.S. (4 Wheat.) 316 (1819).

57. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593 (2012) (Roberts, C.J.) (citation omitted) (quoting *McCulloch*, 17 U.S. at 411).

58. *Id.* at 2592.

59. *Id.*

60. KOPPELMAN, *supra* note 5, at 116–17. This argument has been challenged by David Kopel, who claims that the point is not scariness at all. Rather, he claims that compelling

other people, is an extraordinary power. Locking someone up indefinitely is a mere incident. Here we come to the dark heart of the case against the ACA: the notion that the law's trivial burden on individuals was an intolerable, outrageous invasion of liberty, even when the alternative was *really* tough luck for anyone who cannot afford medical care.⁶¹

Paul Clement, who led the litigation against the ACA, declared that he was defending a crucial element of liberty: “[F]or the most part, if you want to avoid federal regulatory power, all you can do is simply exercise your right not to engage in commerce. If the mandate is constitutional, however, then you would not have that right either.”⁶² This depends on two dubious premises: that citizens have an important interest in avoiding federal regulatory power and that it is realistically feasible to avoid engaging in commerce. The fantasy of regulation-free life is starkly presented in the description of two of the ACA's challengers in their complaint:

[Mary] Brown has not had healthcare insurance for the last four years, and devotes her resources to maintaining her business and paying her employees.

. . . [Kaj] Ahlburg has not had healthcare insurance for more than six years, does not have healthcare insurance now, and has no intention or desire to have healthcare insurance in the future. Mr. Ahlburg is and reasonably expects to remain financially able to pay for his own healthcare services if and as needed.⁶³

By the time the case was decided, Brown had gone bankrupt, and her medical bills were passed on to her creditors and so to the public at large.⁶⁴

involuntary commerce is “larger, greater, and more ‘awesome’” than the power to regulate existing commerce, and so cannot be subsidiary to it. David B. Kopel, *Postscript and Concluding Thoughts*, in *A CONSPIRACY AGAINST OBAMACARE: THE VOLOKH CONSPIRACY AND THE HEALTH CARE CASE* 261, 264–65 (Trevor Burrus ed., 2013). Look at this concretely: the power to make people buy policies, it is claimed, is larger and greater than the power (which Kopel concedes) to forbid them from receiving medical care if they are uninsured. It remains mysterious how one determines that one power is greater than another.

61. The analysis here is developed in greater detail in Andrew Koppelman, “*Necessary*,” “*Proper*,” and *Health Care Reform*, in *THE HEALTH CARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS*, *supra* note 38, at 105.

62. Paul Clement, *The Patient Protection and Affordable Care Act and the Breadth and Depth of Federal Power*, 35 HARV. J.L. & PUB. POL’Y 887, 889 (2012). He concluded his oral argument with the same claim. See BLACKMAN, *supra* note 26, at 213. If you’re so keen to avoid federal regulation, then the ACA does permit you to avoid it by declining to engage in commerce. The penalty for going without insurance is a tax on income, and “you cannot generate income without engaging in commerce.” KOPPELMAN, *supra* note 5, at 111.

63. Amended Complaint at 8, *Florida v. U.S. Dep’t of Health & Human Servs.*, 716 F. Supp. 2d 1120 (N.D. Fla. May 14, 2010) (No. 3:10-cv-91-RV, EMT).

64. Jonathan Cohn, *New Twist in the Obamacare Lawsuits*, NEW REPUBLIC (Dec. 5, 2011), <http://www.newrepublic.com/blog/jonathan-cohn/98145/affordable-care-act-mandate-lawsuit-nfib-mary-brown-bankruptcy-court-standing>.

Ahlburg, a retired investment banker,⁶⁵ may be rich enough to handle his own medical bills, but it is hard to be sure. If you get really sick, you can burn through a lot of money very quickly. People who self-insure are also likely to make medical decisions in a relatively inefficient and ineffective way.⁶⁶

How can the interest in avoiding regulation be more important than the interest in avoiding illness? This premise has to be that there is something uniquely pernicious about government regulation, whatever its purpose. Regulation by government is oppression. Disaster from some source other than government is merely tough luck.

IV. Defining Deviancy Down

If a legal argument is nonfrivolous so long as it satisfies these two parameters, then no argument for invalidating a federal statute is frivolous. Any rule will satisfy the craving to invent constraints on congressional power, and it would have to be a pretty feeble lawyer who could not frame his proposed limit in nominally nonpartisan terms.

In 1993, Senator Daniel Patrick Moynihan's famous article, *Defining Deviancy Down*, argued that American society was "re-defining deviancy so as to exempt much conduct previously stigmatized, and also quietly raising the 'normal' level in categories where behavior is now abnormal by any earlier standard."⁶⁷ In 1929, the killing of seven gangsters became notorious as the "St. Valentine's Day Massacre," but in the 1990s such violence had become relatively unremarkable.⁶⁸

In constitutional law, too, the standards evidently have sunk. The opinions of Roberts and the Scalia group are a new landmark in bad judicial craftsmanship. The non sequiturs keep coming, like boulders in an avalanche.⁶⁹ Dorf writes that when we read these opinions, "we need to grade on a curve."⁷⁰ Here, though, the curve means that everyone gets a passing grade, no matter how badly they perform.

Given the Court's behavior in recent years, the impulse to adjust our expectations is probably irresistible. Moynihan, following Emile Durkheim and Kai Erikson, thought that there is a limit to the amount of behavior that

65. Paul Gottlieb, *Port Angeles Man Plaintiff in National Health Care Lawsuit That Also Includes 26 States*, PENINSULA DAILY NEWS, <http://www.peninsuladailynews.com/article/20110121/NEWS/301219981/port-angeles-man-plaintiff-in-national-health-care-lawsuit-that-also> (last updated Jan. 20, 2011, 11:37 PM).

66. Abigail R. Moncrieff, *The Individual Mandate as Healthcare Regulation: What the Obama Administration Should Have Said in NFIB v. Sebelius*, 39 AM. J.L. & MED. 539, 557 (2013).

67. Daniel Patrick Moynihan, *Defining Deviancy Down*, 62 AM. SCHOLAR 17, 19 (1993).

68. *Id.* at 26–28.

69. See KOPPELMAN, *supra* note 5, at 109–32.

70. Dorf, *supra* note 2, at 156.

any society can regard as deviant. As the level of previously deviant behavior increases, the imperative to renormalize gets stronger. In *The Tough Luck Constitution*, I criticize many of the ways the Court exercised power, but perhaps I should have said more about the way in which it has redefined the boundaries of what can count as a legal argument. American lawyers must work within those boundaries. But part of law professors' jobs is grading the work product of the judiciary. The Supreme Court is not well served by the soft bigotry of low expectations.⁷¹

71. Another even more direct path to the same result is to regard the law as whatever the Court says it is, and so implicitly to deem the Court infallible. It would follow that the only function of the professoriate is to predict what the courts will do—a job they will botch if they let their predictions get contaminated by legal principles. See Andrew Koppelman, *Did the Law Professors Blow It in the Health Care Case?*, 2014 U. ILL. L. REV. (forthcoming 2014) (on file with author) (critiquing, on this basis, David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits Against the PPACA?*, 2014 U. ILL. L. REV. (forthcoming 2014) (on file with author)).