Book Reviews

What Really Happened in the Affordable Care Act Case

THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM. By Andrew Koppelman. New York, New York: Oxford University Press, 2013. 182 pages. $21.95.

Reviewed by Michael C. Dorf*

I. Introduction

In *National Federation of Independent Business v. Sebelius*,[1] the *Health Care Case*, a bare majority of the United States Supreme Court expressed the view that the Commerce Clause, even as supplemented by the Necessary and Proper Clause, did not provide Congress with the power to enact the so-called individual mandate of the Patient Protection and Affordable Care Act (ACA).[2] A different bare majority of the Court nonetheless upheld the mandate as a valid exercise of Congress's power to lay and collect taxes.[3] Only Chief Justice John Roberts thought that the mandate was *both* beyond the power of Congress under the Commerce Clause and within its power under the Taxing Clause.[4] Thus, by a slim margin of just his one vote did the largest domestic social welfare program since the creation of Medicare and Medicaid during the Johnson Administration survive a constitutional challenge that was initially regarded by many liberal-leaning legal experts, including me, as practically frivolous.[5] As Andrew Koppelman writes in his elegant, concise, and

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

2. *See id.* at 2591–92 (opinion of Roberts, C.J.); *id.* at 2646–47 (Scalia, J., dissenting) (opinion joined by Justices Kennedy, Thomas, and Alito).

3. *See id.* at 2600 (opinion of Roberts, C.J.) (upholding, in an opinion joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, the individual mandate as valid under the Taxing Clause).

4. *See id.* at 2591–92 (opinion of Roberts, C.J.) (concluding that Congress lacked the requisite authority under the Commerce Clause); *id.* at 2600 (opinion of Roberts, C.J.) (concluding the Taxing Clause granted Congress the requisite authority).

5. *See, e.g.*, Michael C. Dorf, *The Constitutionality of Health Insurance Reform, Part II: Congressional Power*, FINDLAW (Nov. 2, 2009), http://writ.news.findlaw.com/dorf/20091102.html (concluding that the courts would uphold the mandate if they "faithfully apply the current

punchy book, *The Tough Luck Constitution and the Assault on Health Care Reform*, "[u]nder settled law at the time that the ACA was enacted, the mandate is obviously constitutional."[6]

How then, did four Justices come to see the law as invalid? How did five Justices come to see it as beyond the reach of Congress under the Commerce Clause? Koppelman argues that, at least in this case, the Court's five Republican appointees[7] endorsed "Tough Luck Libertarianism,"[8] a view he associates, in its popular form, with Ayn Rand[9] and, in its more scholarly manifestations, with the late philosopher Robert Nozick.[10] Tough Luck Libertarianism posits that government may not legitimately pursue redistributivist aims, whether from rich to poor, from strong to weak, or from healthy to sick.[11] Koppelman contrasts Tough Luck Libertarianism with what he calls "Tragic Antistatism," a view he associates with the late Austrian economist Friedrich Hayek,[12] and which argues that while the state may legitimately pursue redistributive aims, it generally should not, because doing so will make us all worse off.[13] Although Koppelman clearly does not think very much of Tragic Antistatism, the book only targets Tough Luck Libertarianism.[14]

Koppelman's philosophical case against Tough Luck Libertarianism has two main parts. First, he argues that Tough Luck Libertarianism rests on a conceptual error. Echoing early-twentieth-century legal realism, he says that the very idea of *re*-distribution incorrectly assumes a pre-social distribution, but private property itself is a legal construct.[15] Hence, one

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Supreme Court precedents"); Laurence H. Tribe, Op-Ed., *On Health Care, Justice Will Prevail*, N.Y. TIMES, Feb. 7, 2011, http://www.nytimes.com/2011/02/08/opinion/08tribe.html (predicting that a "strong, nonpartisan majority of justices" would reject the challenge to the ACA as "a political objection in legal garb").

6. ANDREW KOPPELMAN, THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM 67 (2013).

7. For the first time in the Court's history, the five most conservative Justices—Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito—were appointed by Republican presidents, while the four most liberal Justices—Ginsburg, Breyer, Sotomayor, and Kagan—were appointed by Democratic presidents. Lawrence Baum & Neal Devins, *Split Definitive*, SLATE (Nov. 11, 2001), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/11/supreme_court_s_partisan_divide_and_obama_s_health_care_law.html.

8. *See* KOPPELMAN, *supra* note 6, at 8, 15–16, 100, 109 (suggesting the Republican Justices' opinions on the ACA were informed by Tough Luck Libertarianism).

9. *Id.* at 100–01.

10. *Id.* at 9.

11. *See id.* at 9–10 ("Under no circumstances should [government] interfere with the existing distribution of property except to rectify past violations of property rights.").

12. *See id.* at 11–12.

13. *Id.*

14. *See id.* at 12 (noting that "[t]he soundness of Tragic Antistatism is beyond the scope of this book" but nonetheless opining that Tragic Antistatism as "a tough sell").

15. *See id.* at 10. For the legal realist version of this argument, see Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 11–12 (1927). For a more recent version of the same

cannot coherently challenge laws that require some people to subsidize others—by, for example, paying taxes or by purchasing unwanted health insurance—as unfairly confiscating the property of the subsidizers, because such laws are part of the system for assigning property entitlements in the first place.[16]

Second, Koppelman thinks that Tough Luck Libertarianism's understanding of liberty fetishizes the public–private distinction. Tough Luck Libertarians worry endlessly about what the state does *to* them but not at all about what the state fails to do *for* them to protect them against external threats. As Koppelman pithily states, mandatory "vaccination is an imposition on one's liberty. Dying of smallpox is also an imposition on one's liberty."[17]

Although Koppelman peppers *The Tough Luck Constitution* with substantive criticisms of Tough Luck Libertarianism, his main goal is analytical rather than normative. He aims to identify the supposedly central role that he believes Tough Luck Libertarianism played in the legal challenge to the health care mandate.[18]

Is Koppelman right? Does Tough Luck Libertarianism explain how the conservative Justices voted in the *Health Care Case*? The evidence is mixed. On one hand, Koppelman correctly points to portions of both the oral argument and the written opinions in which particular Justices spoke or wrote in ways that reveal sympathy for Tough Luck Libertarianism.[19]

On the other hand, Koppelman himself repeatedly acknowledges that the Justices are not thoroughgoing Tough Luck Libertarians.[20] For example, there is no reason to believe that any of them would vote to invalidate either a health care mandate imposed by a state or either of the main government-provided health insurance programs, Medicare and Medicaid, even though Tough Luck Libertarianism condemns these programs no less than it condemns the ACA mandate.[21]

Hence, it appears that the conservatives used Tough Luck Libertarianism opportunistically in the *Health Care Case*. If so, then

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argument, see LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 44 (2002).

16. *See* KOPPELMAN, *supra* note 6, at 10.

17. *Id.* at 102.

18. *See id.* at 80 (positing that Randy Barnett, a well-known proponent of Tough Luck Libertarianism, was the "leading intellectual force behind the challenge" and the "leading constitutional critic of the law").

19. *See id.* at 100, 109 (noting comments by Justice Kennedy and by Chief Justice Roberts).

20. *See, e.g.*, *id.* at 1–2 ("[Scalia] suggested that under the Constitution, 'the people were left to decide whether they want to buy insurance or not.' This would mean that any federally required insurance scheme was unconstitutional. . . . Scalia clearly did not mean that.").

21. *See id.* at 8 (suggesting that Tough Luck Libertarians would find it unjust for the government to "commandeer tax payer dollars to aid" the sick, which is essentially how Medicare and Medicaid are funded).

something else must have been driving the Court's conservative Justices. But what? The balance of this Review offers two answers: federalism and "nonpartisan framing."

Part II of this Review argues that most of the solution to the mystery that *The Tough Luck Constitution* addresses is hiding in plain sight. The conservative Justices really do care about judicially enforceable federalism norms. I agree with Koppelman that, under the best reading of prior case law, the mandate ought to have been sustained as necessary and proper to the exercise of the Commerce power. Moreover, I once shared the view of Koppelman and other liberal scholars who treated the constitutional arguments against the mandate as practically frivolous.[22]

However, I have come to regard my prior view as blinkered. I no longer regard the federalism arguments against the mandate as so weak as to indicate that the Justices who endorsed them cannot *really* have believed them. Liberal scholars like Koppelman—and like me during the pendency of the *Health Care Case*—have not taken the federalism project of the Rehnquist and Roberts Courts seriously enough. Thus, I did not, and Koppelman still does not, credit the possibility that the conservative Justices could have sincerely regarded the mandate as a threat to the Constitution's state–federal balance.

Explaining *why* conservatives on the Rehnquist and Roberts Courts value federalism is beyond the scope of this Review, but I believe that their commitment was and remains genuine. Although one might endorse federalism simply as a means of serving libertarian goals, federalism commitments need not rest on libertarian ones. Consider Chief Justice Rehnquist, who was strongly committed to federalism but, in rights cases, more of a statist than a libertarian.[23] Moreover, even a jurist who endorses federalism as an intermediate value because it ultimately serves libertarian ends will find herself treating the intermediate value as compelling in its own right, much as jurists who lean towards textualism rather than purposivism because they believe that the former enhances democratic accountability (or some other value) will lean towards textualism even when, in some particular case, doing so disserves democratic accountability (or the other ultimate value).

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22. *See* Dorf, *supra* note 5 (reviewing Supreme Court precedent and concluding that Congress is well within its constitutional power to enact an individual mandate under both the Commerce Clause and Tax Clause).

23. *See* Guido Calabresi, *The Supreme Court, 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 141–42 (1991) (contending that Rehnquist "missed no occasion to further his statist, anti-rights view of the First Amendment"); Andrew Koppelman, *How "Decentralization" Rationalizes Oligarchy: John McGinnis and the Rehnquist Court*, 20 CONST. COMMENT. 11, 18 n.24 (2003) ("[I]n its religion jurisprudence, the Rehnquist majority has been statist rather than libertarian.").

Still, federalism alone does not explain the voting pattern in the *Health Care Case*. Koppelman is probably right that Tough Luck Libertarianism arguments played some role, but something else was also at work. Part III of this Review proposes that nonpartisan framing was that something else. Borrowing a distinction elaborated at greater length by Jack Balkin and Sanford Levinson, Koppelman suggests that the conservative Justices in the *Health Care Case* engaged in "low politics" in the sense of partisanship, even as they persuaded themselves that they were engaged in only "high politics" in the sense of implementing grand, albeit controversial, constitutional principles.[24] His analysis thus raises but does not answer the question of how legal elites frame their low political claims in ways that make them look like high political claims. George W. Bush's lawyers would not have succeeded in *Bush v. Gore*[25] by expressly arguing that Bush should win simply because he was a Republican, and the plaintiffs in the *Health Care Case* would not have come nearly as close to victory as they did if they had expressly argued that the ACA should be invalidated simply because it was the product of a Democratic Congress and President. "Nonpartisan framing" is the label I attach to the 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.

Thus, in accounting for the outcome of the *Health Care Case*, I place greater emphasis on federalism and nonpartisan framing, while placing correspondingly less emphasis on Tough Luck Libertarianism, than Koppelman does. But despite devoting the greater portion of this Review to detailing my disagreements with Koppelman, I underscore here that my praise for his book is in no way perfunctory. Koppelman's trenchant descriptions and hard-hitting analysis make *The Tough Luck Constitution* the best account I have seen of the *Health Care Case* or almost any other Supreme Court litigation.

Moreover, even as I disagree with Koppelman's assessment of the role that Tough Luck Libertarianism played in the *Health Care Case*, the Conclusion to this Review urges readers to pay heed to his critique. Although no Supreme Court Justice will likely adopt Tough Luck Libertarianism as a general principle of constitutional law, as Koppelman shows throughout *The Tough Luck Constitution*, it is one of the arrows in the conservatives' quiver—and a very dangerous one when the Court lets it fly.

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24. KOPPELMAN, *supra* note 6, at 134–36 (applying the distinction between "high politics" and "low politics" articulated in Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1061–62 (2001)).

25. 531 U.S. 98 (2000).

II. How Bad Was the Federalism Argument Against the Mandate?

Koppelman is not alone in thinking that the federalism argument against the mandate was weak or in thinking that it was ultimately rooted in libertarian rather than federalism principles. For example, I was one of the signers of the law professors' amicus brief in the *Health Care Case* that argued that the challenge to the mandate was "really about individual liberty, reflecting an instinct about how far *any* government, state or federal, may go in ordering the affairs of its people."[26]

Our brief urged the Court not to construe Congress's affirmative powers as directly incorporating libertarian principles.[27] But we understood that the conservative Justices of the Rehnquist and Roberts Courts might nonetheless think otherwise. After all, it was Justice Anthony Kennedy who, concurring in *United States v. Lopez*,[28] praised judicially enforceable federalism limits on the ground that they further libertarian ends. He wrote that "it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one."[29] And prior to the oral argument in the *Health Care Case*, Justice Kennedy was widely regarded as the conservative Justice *most* likely to vote to sustain the mandate.[30]

Why, then, does Koppelman continue to view the conservative Justices' opinions regarding the Commerce Clause and the Necessary and Proper Clause as not merely unpersuasive but practically fraudulent? Because, like most liberals, myself included, Koppelman rejects the premises underlying the federalism jurisprudence of the Rehnquist and Roberts Courts.[31] Consequently, Koppelman may have difficulty imagining how the *Health Care Case* would have looked to Justices who began their analysis with a different perspective.

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26. Brief of Law Professors Barry Friedman et al., as Amici Curiae in Support of Petitioners and Reversal on the Minimum-Coverage Provision Issue at 4–5, U.S. Dep't of Health & Human Servs. v. Florida, 132 S. Ct. 2566 (2012) (No. 11-398).

27. *See id.* at 24–25 (arguing that objections to the individual mandate are actually failed substantive due process arguments and "irrelevant to the limits federalism places on Congress's commerce power").

28. 514 U.S. 549 (1995).

29. *Id.* at 576 (Kennedy, J., concurring); *see also* New York v. United States, 505 U.S. 144, 181 (1992) ("State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting))).

30. *See, e.g.*, *ObamaCare on Trial: Is the Individual Mandate Doomed?*, WEEK (Mar. 27, 2012), http://theweek.com/article/index/226096/obamacare-on-trial-is-the-individual-mandate-doomed (contending that Kennedy is the conservative most likely to uphold the mandate).

31. *See* KOPPELMAN, *supra* note 6, at 57–61, 109–13 (criticizing decisions by the Rehnquist and Roberts Courts limiting Commerce Clause power).

A. Slippery Slopes in All Directions

From the earliest days of the Republic, some of the nation's greatest statespersons have struggled with the question of how to understand the bounds of Congress's affirmative powers. President George Washington solicited and received opinions from Secretary of State Thomas Jefferson, Attorney General Edmond Randolph, and Secretary of the Treasury Alexander Hamilton on the question of whether Congress had authority to charter a bank.[32] Jefferson and Randolph said no.[33] The power to charter banks or other corporations was not expressly enumerated in Article I, and while Jefferson conceded that a national bank might be "convenient" for the execution of the enumerated powers, he denied that it was "necessary."[34] If "necessary" in the Necessary and Proper Clause means "convenient," Jefferson warned, then Congress will become omnipotent, "for there is" no implied power "which ingenuity may not torture into a *convenience, in some way or other, to some one* of so long a list of enumerated powers" as those contained in Article I.[35]

Hamilton complained that Jefferson and Randolph improperly construed "necessary" to mean "absolutely necessary."[36] But under this construction, Hamilton objected, "the exercise of a given power would be nugatory," because it is always possible to imagine alternative means by which government may achieve any particular object.[37] It should be sufficient, Hamilton concluded, that a national bank would be useful in carrying out the specifically enumerated powers.[38] Without considerable latitude with respect to implied powers, the government could not function.

Koppelman writes in *The Tough Luck Constitution* that Chief Justice John Marshall's opinion in *McCulloch v. Maryland*[39] rejected Jefferson's view,[40] and he is correct that in most respects it sides with Hamilton. But even Marshall in *McCulloch* recognized that the Court might someday have

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32. *See* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 86–112 (M. St. Clair Clarke & D.A. Hall eds., Wash., Gales & Seaton 1832) [hereinafter HIST. OF THE BANK OF THE U.S.].

33. *Id.* at 86.

34. Thomas Jefferson, Opinion of Thomas Jefferson, Secretary of State, on the Constitutionality of the Bank of the United States (Feb. 15, 1791), *in* HIST. OF THE BANK OF THE U.S., *supra* note 32, at 91, 93.

35. *Id.*

36. Alexander Hamilton, Opinion of Alexander Hamilton, on the Constitutionality of the Bank of the United States (Feb. 23, 1791), *in* HIST. OF THE BANK OF THE U.S., *supra* note 32, at 95, 98.

37. *Id.*

38. *See id.* at 99 ("If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, . . . it may safely be deemed to come within the compass of the national authority.").

39. 17 U.S. (4 Wheat.) 316 (1819).

40. KOPPELMAN, *supra* note 6, at 45.

to hold an act of Congress invalid as beyond the scope of the enumerated powers.[41] Ever since, the Court has struggled to avoid slippery slopes down either side of the mountain: It needs 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. And any test must also be sufficiently determinate for the courts to apply it without the need for making legislative-style policy judgments.

Three main approaches have been followed. The Court came closest to Jeffersonianism during the *Lochner* era, when it relied on formal distinctions between direct and indirect regulations of commerce and invalidated laws that targeted supposedly intrastate activities, such as manufacturing rather than transportation.[42] Koppelman rightly observes that the Court had more or less completely abandoned this approach by the late 1930s.[43]

From the late New Deal era through the early 1990s, the Court flirted with extreme Hamiltonianism. In the leading formulation, the late Herbert Wechsler argued that reliance on states in the composition of national institutions ensured that the federal government would rarely usurp power that the Constitution reserved to the states.[44] Wechsler did not quite say that the courts should never invalidate an act of Congress as beyond the scope of its enumerated powers, but he came close.[45] Other academics, most notably Jesse Choper, went further, relying on Wechsler's "political safeguards" for the conclusion that federalism-based (and other structural) constitutional challenges ought to be treated as nonjusticiable.[46] The high-water mark for this brand of Hamiltonianism was the Supreme Court's ruling in *Garcia v. San Antonio Metropolitan Transit Authority*,[47] in which

41. *See* 17 U.S. at 423 ("[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the Government; it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land.").

42. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 276–77 (1918) (invalidating the Keating-Owen Act that prohibited the interstate sale of goods produced by child labor).

43. *See* KOPPELMAN, *supra* note 6, at 54–56.

44. *See* Herbert Wechsler, *The Political Safeguards of Federalism*, 54 COLUM. L. REV. 543, 558 (1954) (arguing that the role of states in the composition and selection of the federal government ensures internal resistance to federal overreach).

45. *See id.* at 559 (conceding that the Supremacy Clause obligates the Court to invalidate laws exceeding the scope of Congress's enumerated powers but adding "that the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process").

46. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175–84 (1980).

47. 469 U.S. 528 (1985).

the Court cited Choper and Wechsler[48] in support of its conclusion that "the principal and basic limit on the federal commerce power is" the political process.[49]

Yet *Garcia* did not put an end to judicially enforced limits on the scope of Congress's affirmative powers. The case was decided by a 5–4 margin,[50] and over time, the dissenters were reinforced by new Justices appointed by Republican presidents.[51] The "federalism revolution" of the last quarter century reinvigorated federalism jurisprudence.[52] However, the Rehnquist and Roberts Courts have not rolled back the clock to the *Lochner* era. Today, only Justice Clarence Thomas espouses anything resembling the Jeffersonian view.[53]

Instead, prior to the *Health Care Case*, judicially enforced federalism under the Rehnquist and Roberts Courts took two forms. First, the Court tightened or invented restrictions on the *manner* in which Congress may legislate in areas in which it has enumerated power. The Court expanded the scope of state sovereign immunity[54] and announced a prohibition on acts of Congress that "commandeer" state legislative and executive officials.[55] Second, the Court found that a few mostly symbolic acts of

48. *See id.* at 551 n.11.

49. *Id.* at 556.

50. *Id.* at 529.

51. *See* Balkin & Levinson, *supra* note 24, at 1052–58 (discussing the ideological shift of the Supreme Court resulting from Republican appointments).

52. The scholarly literature alternately describes or deflates the federalism revolution. *See, e.g.*, Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 7 (2001) ("[W]hen constitutional historians look back at the Rehnquist Court, they will say that the greatest changes in constitutional law were with regard to federalism."); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEXAS L. REV. 1, 2 (2004) ("We have seen neither the revolution that partisans of states' rights might have wished nor the deluge that many nationalists feared.").

53. *See* United States v. Lopez, 514 U.S. 549, 585 (1995) (Thomas, J., concurring) ("My goal is simply to show how far we have departed from the original understanding . . . . I also want to point out the necessity of refashioning a coherent test that does not tend to obliterate the distinction between what is national and what is local and create a completely centralized government." (citations omitted) (internal quotation marks omitted)); *cf.* Michael C. Dorf, *The Good Society, Commerce, and the Rehnquist Court*, 69 FORDHAM L. REV. 2161, 2162 (2001) (noting that Justice Thomas espouses a highly restrictive understanding of federal power under the Commerce Clause).

54. *See, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002) (holding states immune from suits brought by private parties before federal administrative tribunals); Alden v. Maine, 527 U.S. 706, 712 (1999) ("We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."); Seminole Tribe v. Florida, 517 U.S. 44, 72 (1996) (holding Congress lacks the power to abrogate state sovereign immunity under the Indian Commerce Clause).

55. *See* Printz v. United States, 521 U.S. 898, 933 (1997) (holding the federal requirement that state executive officials make an effort to ascertain legality of firearm purchases unconstitutional); New York v. United States, 505 U.S. 144, 176 (1992) (holding the federal statute requiring states to take title to radioactive waste unconstitutional on the grounds that the

Congress went beyond the scope of any enumerated power, with formal rules focusing on the limits of the Commerce Clause[56] and the Enforcement Clause of the Fourteenth Amendment.[57]

Koppelman says that the Rehnquist and Roberts federalism "project has not gone well."[58] I agree, but it is not clear that *any* judicial approach to federalism could be expected to go well, given that it must navigate between Jefferson's Scylla and Hamilton's Charybdis. Certainly Koppelman's preferred alternative has its own share of problems.

Koppelman quotes the drafting history of the 1787 Constitutional Convention to argue that the affirmative powers of Congress implement a principle of *subsidiarity*, under which Congress may legislate when "the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."[59] Koppelman credits Jack Balkin with the idea that enumeration of particular powers by the Committee on Detail merely implemented, rather than displaced, the general principle of subsidiarity that the Convention had previously endorsed.[60] Donald Regan made the same point at the beginning of the Rehnquist Court's federalism revolution.[61] Shortly thereafter, Stephen Gardbaum proposed reading the Necessary and Proper Clause as the reservoir of subsidiarity.[62] And more recently, Robert Cooter and Neil

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statute "commandeer[ed]" state legislative processes, thereby exercising a power that "has never been understood to lie within the authority conferred upon Congress by the Constitution").

56. *See* United States v. Morrison, 529 U.S. 598, 614 (2000) (holding that the Commerce Clause did not support the creation of a private remedy for victims of gender-based violence because it was not a regulation of economic activity); *Lopez*, 514 U.S. at 561 (holding that the Gun-Free School Zones Act fell outside the Commerce Clause). *But see* United States v. Comstock, 130 S. Ct. 1949, 1954, 1956 (2010) (holding that the Necessary and Proper Clause enabled Congress to pass a federal law that allowed dangerous, mentally ill, ex-criminals to be kept in custody after their sentences ended); Gonzales v. Raich, 545 U.S. 1, 22 (2005) (holding that, under the Commerce Clause, Congress could prohibit the production and use of home-grown marijuana).

57. *See Morrison*, 529 U.S. at 627 (holding that the civil remedy provision of the Violence Against Women Act did not fall within Congress's power under the enforcement clause); City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (reaching the same conclusion with respect to the Religious Freedom Restoration Act).

58. KOPPELMAN, *supra* note 6, at 59.

59. *Id.* at 40–41 (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1911)).

60. *Id.* at 41 (quoting JACK M. BALKIN, LIVING ORIGINALISM 145 (2011)).

61. *See* Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 556 (1995) ("[T]here is no reason to think the Committee of Detail was rejecting the spirit of the Resolution when they replaced it with an enumeration.").

62. Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEXAS L. REV. 795, 835–36 (1996).

Siegel have offered a full-throated defense of subsidiarity as the best way to make sense of most of the powers allocated to Congress by Article I.[63]

Nonetheless, the case for subsidiarity as an interpretation of the existing Constitution or constitutional case law is problematic.[64] For one thing, law usually does not work in the way that Balkin's and Koppelman's historical argument in favor of subsidiarity appears to assume. Where specific language implements some general principle, the specific language controls.[65] For example, it is hardly obvious that collective action problems, races to the bottom, or any other factor make it impossible or even difficult for state law to govern the discharge of private debt; yet it hardly follows that federal bankruptcy law exceeds the powers of Congress; after all, Article I, Section Eight expressly authorizes federal bankruptcy law.[66] Under well-accepted principles, a specific provision has the full force of law, even though the provision may be broader or narrower than the background justification for it.[67] To be sure, the background justification or purpose may be useful in clarifying the scope or meaning of an unclear legal provision.[68] But Koppelman sometimes writes as though the background principle of subsidiarity is *the meaning* of the Commerce Clause[69] (and presumably of all of the enumerated powers).

Koppelman does recognize a different problem with subsidiarity: "the judiciary is ill-suited to enforce [it] in any but the weakest fashion" because "[j]udges cannot decide which topics are apt for decentralization without imposing their own political views on the rest of us."[70] Thus, judges

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63. Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 182–83 (2010). Cooter and Siegel use the term "collective action federalism" more or less synonymously with what Koppelman means by subsidiarity. *See id.* at 181 & n.238 (noting that collective action federalism is similar "in important respects" to the principle of subsidiarity).

64. *See* George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 416–23 (1994) (finding no basis for a judicially enforceable subsidiarity constraint in the U.S. Constitution).

65. *See, e.g.*, P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 501 (1988) ("[W]e have never [looked for] congressional intent in a vacuum, unrelated to the giving of meaning to an enacted statutory text. . . . [U]nenacted approvals, beliefs, and desires are not laws.").

66. U.S. CONST. art. I, § 8 ("Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.").

67. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) ("[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

68. For a controversial application of this uncontroversial principle, see *District of Columbia v. Heller*, 554 U.S. 570, 605–10 (2008).

69. For example, Koppelman criticizes the distinction between economic and noneconomic activity that was introduced in *United States v. Lopez* on the ground that "it has nothing to do with subsidiarity." KOPPELMAN, *supra* note 6, at 60.

70. *Id.* at 64.

worried about usurping policy discretion from the legislature would be more inclined to reach for formal tests implementing the relatively rule-like specifics of the enumerated powers than to refer directly to the background justification for those rules in the open-ended standard of subsidiarity. Of course, 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.

In any event, Koppelman thinks all such formal tests are unworkable, and so he expresses ambivalence between two other positions. He cannot decide whether judges should directly enforce a weak version of subsidiarity or simply treat the Constitution's federalism norms as nonjusticiable.[71] The fact that Koppelman fails to choose definitively between either of these approaches is less important for present purposes than the fact that the current Supreme Court has rejected both of the approaches between which he vacillates.

Although one might think that the Court's federalism jurisprudence would be improved if it were reconceptualized in terms of subsidiarity,[72] 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.[73] Nor does the case law support the other alternative with which Koppelman flirts—nonjusticiability. While decisions from the late 1930s through the 1980s treated federalism claims as nonjusticiable in all but name,[74] since the federalism revolution of the Rehnquist and Roberts Courts, a clear majority has rejected the nonjusticiability approach as well.[75]

Accordingly, readers of *The Tough Luck Constitution* may distrust Koppelman's assessment that the mandate was *obviously* constitutional

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71. *See* KOPPELMAN, *supra* note 6, at 58–59 ("There is a respectable case for the Court simply declining to enforce subsidiarity . . . . The key question is whether it is better for the overall constitutional scheme for this or that provision to be enforced by courts or left to the political branches. I am frankly torn.").

72. *See* Cooter & Siegel, *supra* note 63, at 159–80 (arguing that courts should use the theory of collective action federalism, which in this context is essentially parallel to subsidiarity, if engaging in judicial review of federalism questions).

73. For a review of the ambivalent role that subsidiarity has played in the case law, see Bermann, *supra* note 64.

74. *See, e.g.*, Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 305 (1981) (Powell, J., concurring) (noting that despite the "extraordinarily intrusive" nature of the legislation, "decisions of this Court over many years make clear that, under the Commerce Clause, Congress has the power to enact this legislation"); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) ("Congress cannot be denied the power to exercise [control over interstate commerce].").

75. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 551 (1995) (invalidating the Gun-Free School Zones act as beyond the scope of the Commerce Clause); New York v. United States, 505 U.S. 144, 166 (1992) (holding that the Commerce Clause does not authorize Congress "to regulate state governments' regulation of interstate commerce").

under settled law at the time that it was enacted. Koppelman rejects the entire framework within which the Supreme Court's conservative majority has implemented the Constitution's federalism limits;[76] 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.

B. Applying the Doctrine

Nonetheless, Koppelman attempts to apply the pre-*Health Care Case* federalism doctrine. His argument for the conclusion that the mandate fell within constitutional bounds under that doctrine is simple and straightforward. He writes:

> 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.[77]

Although I agree with that analysis, it no longer seems to me a slam-dunk, at least if one begins with the premises of the federalism revolution. How can Koppelman rule out a countervailing rule—analogous to the Court's sovereign immunity[78] or anticommandeering doctrine[79]—forbidding Congress from mandating activity when regulating pursuant to the Commerce Clause? Certainly no case had *approved* of mandates of that sort,[80] and thus the issue was at least technically open. To see why the Court's conservatives found the anti-mandate rule not only available but enticing requires engaging with the conservatives' own premises.

The four conservative justices who voted to invalidate the ACA *in toto* set forth their core premise very early in their separate opinion. They wrote:

> What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, is that there are

76. KOPPELMAN, *supra* note 6, at 59–64.

77. *Id.* at 67 (emphasis omitted).

78. *See supra* note 54 and accompanying text.

79. *See supra* note 55 and accompanying text.

80. Perhaps the closest the Court came to upholding Commerce Clause authority to regulate inactivity was in sustaining the application of the National Labor Relations Act to forbid secondary boycotts. *See* Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 212 (1982). Although a boycott is, by definition, a withholding of economic activity, the Court nonetheless repeatedly characterized it as "activity." *See id. passim*. However, the longshoremen petitioners in the case were undoubtedly already engaged in other commerce in a way that Americans without health insurance arguably were not, and the Court was construing the meaning of "commerce" as that term was used in a statute, not in Article I of the Constitution. *See id.* at 212.

> structural limits upon federal power—upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States. Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct . . . .[81]

Writing for himself, Chief Justice Roberts said much the same thing, namely, that the enumerated powers "must be read carefully to avoid creating a general federal authority akin to the police power" of the states.[82] Thus, the conservative majority began with the premise that any theory that justifies the mandate must draw some principled line that would deny Congress a plenary power.

For that reason, it was crucial that Solicitor General Donald Verrilli provide the Court with a persuasive limiting principle. Yet Verrilli did not provide any limiting principle, in the sense of a legal rule or standard that would clearly invalidate some mandates. Instead, he simply restated the characteristics of the health-insurance-purchase mandate that, under the government's view, brought it within Congress's power.[83]

This was not the first time that a Solicitor General representing a Democratic administration had failed to articulate any limiting principle to satisfy the Rehnquist and Roberts Courts' thirst for constraints on the Commerce power. In November 1994, Solicitor General Drew Days appeared before the Court to defend the constitutionality of the federal Gun-Free School Zones Act.[84] Nearly his entire oral argument was taken up by questions seeking a limiting principle.[85] Although Days (twice) expressly disavowed Choper's view that there are no justiciable federalism limits, he provided only one example of a law that would be invalid on federalism grounds—one which, in violation of the Court's 1992 decision in *New York v. United States*,[86] commandeered a state legislature.[87] But despite repeated questions seeking examples of real or hypothetical laws that, under his approach, would not count as regulations of interstate commerce in the first place, Days provided none.[88] He averred that the federal government could completely take over the regulation of crime, education, or domestic

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81. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2643 (2012) (Scalia, J., dissenting) (opinion joined by Justices Kennedy, Thomas, and Alito).

82. *Id.* at 2578 (opinion of Roberts, C.J.).

83. *See* KOPPELMAN, *supra* note 6, at 112–13 (declaring that it became "painfully clear" that Verrilli could not succinctly answer Justice Alito's question on the scope of the limiting principle).

84. Transcript of Oral Argument at 1, 3, United States v. Lopez, 514 U.S. 549 (1995) (No. 93-1260).

85. *See id.* at 5–6, 10–12, 15–20, 22–24.

86. 505 U.S. 144 (1992).

87. Transcript of Oral Argument, *supra* note 84, at 6.

88. *See id.* at 5–7, 10–13, 15–17, 22–23.

relations.[89] That was too much for the conservative majority of the Rehnquist Court. It responded with an opinion in *United States v. Lopez* that invalidated the Act on the ground that mere possession of guns near schools is not "economic activity" of any sort, and thus beyond the scope of the Commerce power.[90]

Koppelman is ambivalent about *Lopez*. He thinks the result made sense because the principle of subsidiarity condemns the Gun-Free School Zones Act.[91] Guns near schools are a local problem for which federal legislation is unnecessary. Koppelman dislikes the Court's reasoning in *Lopez*, however, because it relies on a formal distinction between economic and noneconomic activity rather than relying on subsidiarity.[92]

Koppelman is also ambivalent about the use of *Lopez* in the *Health Care Case*. The conservative Justices argued that if noneconomic activity cannot be a valid predicate for Commerce Clause regulation, then it follows *a fortiori* that complete *inactivity* cannot be a valid predicate for regulation.[93] Koppelman thinks this argument is mistaken, but he himself relies on the formal lines drawn in *Lopez* and subsequent cases in support of his own response to the conservative majority.[94] These Justices are simply wrong, he says, in claiming that acceptance of congressional power to enact the mandate would have entailed a de facto federal police power. Not true, Koppelman says, because limits on the Commerce Clause would remain: In particular, Congress would still be forbidden from enacting a law like the Gun-Free School Zones Act that was struck down in *Lopez*.[95] Why, one wonders, did the Solicitor General not offer *that* as the limiting principle?

The short answer is that the preexisting *Lopez* limit would not have satisfied the five conservative Justices who viewed the mandate as beyond the scope of the Commerce Clause. Indeed, it is not even clear that the *Lopez* limit would have survived a holding that the mandate falls within the

89. *See id.* at 11–18.

90. 514 U.S. 549, 567 (1995).

91. *See* KOPPELMAN, *supra* note 6, at 59.

92. *Id.* at 60.

93. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2587 (2012) (opinion of Roberts, C.J.) ("As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching 'activity.'"); *id.* at 2648 (Scalia, J., dissenting) (reasoning, in an opinion joined by Justices Kennedy, Thomas, and Alito, that "the decision to forgo participation in an interstate market is not itself commercial activity (or indeed any activity at all) within Congress' power to regulate").

94. *See* KOPPELMAN, *supra* note 6, at 118–19 (lamenting that "neither [Roberts nor the dissenting group] explains why the commerce power is not already sufficiently constrained by *Lopez* and *Morrison*").

95. *Id.* at 77.

scope of the Commerce Clause. To see why, we need to take note of how little was at stake doctrinally in the *Health Care Case*.[96]

As Koppelman correctly notes, the no-mandate rule that the conservatives embraced is itself quite feeble because a forewarned Congress can reword nearly any mandate as a condition on economic activity that just about everyone in a modern economy undertakes.[97] If Congress cannot compel inactive people to purchase health insurance, it can nonetheless forbid people from taking any job unless they purchase health insurance; it can forbid people from purchasing prescription or over-the-counter medicine unless they purchase health insurance; etc. The distinction that the conservative Justices drew between permissible conditioning in a case like *Wickard v. Filburn*[98] and impermissible mandating in the *Health Care Case* is easy for a savvy Congress to evade.

But the substitutability of mandates and conditions is a double-edged sword. Prohibitory laws that fall outside the outer bounds of *Lopez* and *United States v. Morrison*[99] may also be easy to reframe as constitutionally permissible if Congress may use the Commerce power to issue mandates. For example, the Gun-Free School Zones Act that was invalidated in *Lopez* might be reframed as an affirmative mandate on everyone possessing a firearm to stay outside of school zones.

Now there is a good argument against *that* mandate too: One can say that the economic–noneconomic activity line applies to mandates no less than it applies to prohibitions. In this view—which I developed at some length in a lecture published elsewhere—Congress may mandate *economic* activity, but not *noneconomic* activity.[100] If possession of a gun near a schoolyard is not economic activity—as the Court said it is not in *Lopez*[101]—then Congress may neither forbid nor mandate that activity. This argument more directly responds to the conservatives' fears in the *Health Care Case* by making clear that a mandate power under the Commerce Clause is not a plenary power. The area outside of Congress's mandate power would directly parallel the area outside of Congress's prohibitory or regulatory power.

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96. *See* Michael C. Dorf, *How Much Is Truly at Stake in the Legal Battle over Obamacare?*, VERDICT (Sept. 26, 2011), http://verdict.justia.com/2011/09/26/how-much-is-truly-at-stake-in-the-legal-battle-over-obamacare (arguing that the *Health Care Case* was important for political and policy reasons but that, whatever its outcome, it would not generate doctrine that would seriously constrain Congress in the future).

97. KOPPELMAN, *supra* note 6, at 62.

98. 317 U.S. 111 (1942).

99. 529 U.S. 598 (2000).

100. *See* Michael C. Dorf, *Commerce, Death Panels, and Broccoli: Or Why the Activity/Inactivity Distinction in the Health Care Case Was Really About the Right to Bodily Integrity*, 29 GA. ST. U. L. REV. 897, 905–09 (2013).

101. United States v. Lopez, 514 U.S. 549, 561 (1995).

I did not propose the foregoing limiting principle before the ruling in the *Health Care Case*, but Neil Siegel did.[102] Unfortunately, the Solicitor General did not include Siegel's proposal in his brief or at oral argument, and thus it is not clear whether the conservative Justices even considered it. If they did, they clearly did not find the economic-mandates-only limiting principle sufficient.

Why not? We can only speculate, but I suspect that the conservative Justices were seeking a more robust limiting principle. They believe that mandates are inherently more intrusive than prohibitions,[103] and thus call for limits beyond those that apply to prohibitions. Justice Kennedy said during the oral argument, and the Chief Justice repeated in his opinion, that mandates change the relation between the individual and the government.[104]

Koppelman and I think they are wrong about that. Mandates are hardly a recent innovation in governance. As early as the sixth century, the Emperor Justinian's digest characterized Roman law as performing four functions: to mandate, to permit, to punish, and to prohibit.[105] Bracton, writing in the thirteenth century, said the same thing about English law.[106] And as Koppelman notes, the briefs and Justice Ginsburg's dissent pointed to various prior mandates in U.S. law.[107]

Furthermore, even if one thinks that a power to mandate is subject to greater abuse than a power to forbid, the conservatives needed to explain why the insurance-purchase mandate was not necessary and proper to the regulation of the national insurance market. In a concise and elegant

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102. *See* Neil S. Siegel, *Four Constitutional Limits that the Minimum Coverage Provision Respects*, 27 CONST. COMMENT. 591, 596–99 (2011) (arguing that due to the "economic nature of the decision whether or not to purchase health insurance," upholding the health-insurance-purchase "provision would not authorize Congress to impose mandates that regulate noneconomic subject matter").

103. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2643 (Scalia, J., dissenting) (contrasting, in an opinion joined by Justices Kennedy, Thomas, and Alito, a prohibition against a citizen growing wheat for one's own consumption with a mandate to produce wheat on the ground that the latter rests on a broader power).

104. *See id.* at 2589 (opinion of Roberts, C.J.) (asserting that to give "Congress the same license to regulate what we do not do" as it enjoys with respect to what we affirmatively do, would "fundamentally chang[e] the relation between the citizen and the Federal Government"); Transcript of Oral Argument at 11–12, Dep't of Health & Human Servs. v. Florida, 132 S. Ct. 2566 (2012) (No. 11-398) (recording Justice Kennedy asking the Solicitor General whether the government ought "not have a heavy burden of justification" when a law "chang[es] the relation of the individual to the government").

105. Dig. 1.3.7 (Modestinus, Regit 1) (Alan Watson trans., 1985) ("The force of law is this: to command, to prohibit, to permit, or to punish.").

106. *See* HENRY DE BRACTON, 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 21 (Samuel Thorne trans., 1968) ("English laws and customs . . . sometimes command, sometimes forbid, [and] sometimes castigate and punish offenders.").

107. KOPPELMAN, *supra* note 6, at 115; *see also Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2627 n.10 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); Brief of Law Professors Barry Friedman et al., *supra* note 26, at 34–35.

chapter, Koppelman explains how health policy experts came to see the mandate as key to ensuring the economic viability of a private insurance market in which insurers are forbidden from denying or dropping coverage based on preexisting conditions.[108] Absent such a mandate, experience showed, too few healthy people would sign up for insurance (because they would understand that they could always purchase insurance should they become sick).[109] Thus, the mandate was necessary and proper—in the *McCulloch* sense of "useful"—to carrying out the regulation of the private insurance market.[110]

The four-Justice opinion really does threaten to overrule *McCulloch* on this point. The mandate is not necessary and proper, it asserts, because "there are many ways other than this unprecedented Individual Mandate by which the regulatory scheme's goals of reducing insurance premiums and ensuring the profitability of insurers could be achieved."[111] But that is problematic only if *necessary* means *indispensable*. Reading the four-Justice opinion, one has the sense that these Justices never gave the necessary-and-proper argument serious consideration because they thought that, without an adequate limiting principle, mandates could never be valid—and the government had not offered any real limiting principle.[112]

Chief Justice Roberts does somewhat better in his opinion. Quoting language that had previously been almost entirely ignored, he invokes *McCulloch* for the proposition that the Necessary and Proper Clause sweeps in incidental powers, but not those "great substantive and independent power[s]," which, if delegated to Congress, must be granted in express terms.[113] As Koppelman notes, this claim draws on an argument developed at some length by Gary Lawson and David Kopel.[114] They argue, on originalist grounds, that the Necessary and Proper Clause incorporated a

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108. *See* KOPPELMAN, *supra* note 6, at 17–27 (tracing the history of public health insurance in the United States).

109. *Id.* at 3–4; *see Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2585 (opinion of Roberts, C.J.) (acknowledging that the individual mandate addresses the incentive of healthy people "to delay purchasing health insurance until they become sick, relying on the promise of guaranteed and affordable coverage").

110. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413 (1819) (concluding that the Necessary and Proper Clause grants Congress the authority to implement its enumerated powers by any means that is "convenient, or useful, or essential").

111. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2647 (Scalia, J., dissenting) (opinion joined by Justices Kennedy, Thomas, and Alito).

112. *See id.* ("The Government was invited, at oral argument, to suggest what federal controls over private conduct . . . could *not* be justified as necessary and proper for the carrying out of a general regulatory scheme. . . . It was unable to name any." (citation omitted)).

113. *See id.* at 2591 (opinion of Roberts, C.J.) (alteration in original) (quoting *McCulloch*, 17 U.S. at 411).

114. KOPPELMAN, *supra* note 6, at 114.

variety of principles of eighteenth-century law, under which a private purchase mandate would not be considered an incidental power.[115]

Yet as Koppelman astutely observes, prior to the *Health Care Case*, no one thought that Congress's enumerated powers were tied so closely to eighteenth-century conceptions of government power; to adopt the Lawson and Kopel methodology would be to invalidate a good deal more than purchase mandates.[116]

Moreover, and as Koppelman also notes, the distinction between permissible incidental powers and impermissible inferences of great substantive and independent powers seems mysterious, even as applied narrowly.[117] The Constitution does not expressly confer on Congress a power to criminalize bad acts or to imprison criminals; yet the Court has tacitly accepted that these powers are incidental rather than "substantive and independent."[118] Indeed, just two years before deciding the *Health Care Case*, three of the five conservatives, and seven Justices overall, accepted that the power to regulate implied the power to criminalize, which implied the power to imprison, which implied the power to civilly confine a dangerous, mentally ill ex-prisoner following the completion of his sentence.[119] If there is a principle that explains why all of those powers can be implied but a power to mandate cannot be implied, it is hardly self-evident.[120]

Most confusingly, Chief Justice Roberts offers what appears to be a non sequitur in response to Justice Ginsburg's dissent, which identifies federal mandates that have previously been enacted—such as jury duty, militia service, and a mandate to exchange gold for paper money.[121] These

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115. *See* Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267, 271–72 (2011), http://yalelawjournal.org/images/pdfs/1025.pdf (arguing that the power to mandate purchasing is not incidental to the power to "regulate insurance pricing and rating practices").

116. KOPPELMAN, *supra* note 6, at 114.

117. *Id.* at 114–15.

118. Chief Justice John Marshall himself recognized the permissibility of criminal sanctions for violations of laws enacted to carry out enumerated powers. *See McCulloch*, 17 U.S. at 416 ("All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress.").

119. *See* United States v. Comstock, 130 S. Ct. 1949, 1964 (2010) (concluding, based on precedent, that implied powers can be deduced from previously implied powers to create a chain of implied powers from a single enumerated power).

120. Nevertheless, Chief Justice Roberts appears poised to expand the doctrinal category of great substantive and independent powers. *See* United States v. Kebodeaux, 133 S. Ct. 2496, 2507 (2013) (Roberts, C.J., concurring in the judgment) (suggesting the federal government's interest in promoting public safety is such a great substantive and independent power).

121. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2627 n.10 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (noting, in an opinion joined by Justices Sotomayor, Breyer, and Kagan, the prior federal mandates of selective service, jury duty, turning in gold to the Federal Reserve, and filing a tax return). Koppelman adds to this list the 1790 mandate that required merchant ship owners to

mandates, the Chief Justice wrote, "are based on constitutional provisions other than the Commerce Clause."[122] But so what? If a mandate falls outside the scope of the Necessary and Proper Clause because it is "substantive and independent," then it is independent of *all* enumerated powers.[123]

Although analytically shaky, there is nonetheless a certain sense to the Chief Justice's answer *if one keeps in mind the overriding concern of the conservative Justices*. An implied mandate power under those other enumerated powers does not threaten to become a federal police power because those other powers are not nearly so broad as the Commerce Power. Thus, for functional if not exactly historical reasons, the Chief Justice concludes that a mandate power must be deemed "independent" of the Commerce Power, even as it can be implied with respect to the Militia Clause, the Coinage Clause, and so forth.[124]

The Court has made this sort of move before. Despite substantial evidence that the Reconstruction framers and ratifiers meant to empower Congress, cases over the last couple of decades tie the scope of congressional power to enforce the Fourteenth Amendment to the Court's own cases construing the Fourteenth Amendment's substantive provisions.[125] Rather than applying the broad *McCulloch* test for validity, the Court asks whether laws that ostensibly enforce the substantive provisions of the Fourteenth Amendment have a "congruence and proportionality" between the injury sought to be remedied and the means used to achieve that end.[126] Because the Court itself defines the scope of the injury to be remedied, this test confines Congress's powers to the Court's construction of the substantive provision.

Why? The conservative Justices of the Rehnquist and Roberts Courts worry that unless the Court's substantive Fourteenth Amendment case law

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purchase the equivalent of health insurance for seamen. KOPPELMAN, *supra* note 6, at 18. However, that is arguably a condition of operating a merchant ship, not a mandate per se.

122. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2586 n.3 (opinion of Roberts, C.J.).

123. *See* KOPPELMAN, *supra* note 6, at 115. Moreover, even if one thinks that the original understanding should mark some powers as "substantive and independent," and thus outside of the Necessary and Proper Clause, mandates appear to fall on the permissible side of the line. *See* William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1818 (2013) (finding no judicial or historical practice indicating a categorical exclusion of mandates from the Necessary and Proper Clause).

124. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2593 (opinion of Roberts, C.J.).

125. *See* United States v. Morrison, 529 U.S. 598, 619–27 (2000) (restricting Congress's power under Section Five of the Fourteenth Amendment to remedying or preventing violations of Section One, in light of the Court's view of the state action requirement); City of Boerne v. Flores, 521 U.S. 507, 519 (1997) ("Congress' power under § 5, however, extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment. . . . The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States." (alteration in original)).

126. *Morrison*, 529 U.S. at 625–26.

tethers the scope of congressional enforcement authority, Congress will have a police power.[127] After all, virtually any law can be justified as furthering *some vision* of life, liberty, property, or equality—each of which receives textual protection from Section One of the Fourteenth Amendment.[128] By tying Congress's enforcement power to the Court's own Section One jurisprudence, the Court ensures that there is an outer limit on Congress's Section Five power. In both the Commerce Clause and the Fourteenth Amendment contexts, the resulting doctrine limiting congressional power is messy and arguably incoherent, but for these Justices the alternative is worse: a slide down the slippery slope to *Garcia*'s world of no justiciable federalism limits.[129]

Even one who thinks that there ought to be some justiciable federalism limits might also think that the Court has gone too far in essentially making them up. Just since the 1990s, the Rehnquist and Roberts Courts have given us the following, largely invented, federalism doctrines: an anticommandeering rule;[130] a state sovereign immunity doctrine that goes well beyond the text of the Eleventh Amendment;[131] a distinction between economic and noneconomic activity as a predicate for the exercise of the Commerce Clause power;[132] and now a prohibition on mandates under the Commerce Clause.[133]

Yet looking over that list, it is hard to say that the last item is less defensible than the other state-protective doctrinal innovations. Now that Congress knows that it cannot enact mandates under the Commerce Clause, it will probably find that it can evade this limit at least as readily as it can evade the others.

The fundamental problem with the no-mandate theory was not that the Supreme Court made up this new, highly contestable principle of constitutional law, for the Court routinely does just that[134]—sometimes for conservative ends and sometimes for liberal ends. The real problem in the *Health Care Case* was the willingness of four Republican-appointed Justices to spring their new no-mandate rule on an unsuspecting Congress in a case in which that was the difference between upholding and invalidating the signature domestic policy achievement of a Democratic

127. *See id.* at 619 (noting that there are limits to the scope of Congress's power under Section Five of the Fourteenth Amendment).

128. *See* U.S. CONST. amend. XIV, § 1.

129. *See supra* notes 47–53 and accompanying text.

130. *See supra* note 55 and accompanying text.

131. *See supra* note 54 and accompanying text.

132. *See supra* notes 92–94 and accompanying text.

133. *See supra* note 128 and accompanying text.

134. *See* Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 61 (1997) (explaining that the Court frequently formulates and applies doctrinal tests that are not found within the plain text of the Constitution).

president running for reelection with the wisdom of the ACA as a central campaign issue.

III. Nonpartisan Framing

Given the very high partisan stakes, why did four conservative Justices vote to invalidate not only the mandate but, pursuant to their aggressive approach to severability,[135] the entire ACA? Koppelman is undoubtedly right that the Tough Luck Libertarian argument against the mandate held some appeal for the conservatives,[136] but I believe that he overemphasizes its role. As discussed in Part II, the federalism arguments against the mandate genuinely appealed to the Court's conservative wing. Moreover, with the possible exception of the Chief Justice, the conservatives did not think that the partisan stakes justified departing from views that they persuaded themselves were required by the Constitution.[137] On the contrary, the partisan nature of the debate about "Obamacare" may well have convinced them of the importance of sticking to their guns.

In doing so, the conservative Justices were responding to nonpartisan framing. The term may be new, but the concept should be familiar. It is on vivid display whenever the Senate holds confirmation hearings. Clarence Thomas told the Senators that a judge must be "stripped down like a runner."[138] John Roberts averred that judges act like umpires, merely calling balls and strikes.[139] Sonia Sotomayor, who had been criticized for having given a speech in which she admitted that courts of appeals make policy judgments, claimed that as a Justice she would do her very best to make decisions based solely on the law, rather than her "personal" views.[140]

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135. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2668–71 (2012) (Scalia, J., dissenting) (arguing, in an opinion joined by Justices Kennedy, Thomas, and Alito, that the valid portions of the ACA cannot be severed from the portions the dissenters would invalidate).

136. KOPPELMAN, *supra* note 6, at 131–32.

137. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2643 (Scalia, J., dissenting) (declaring, in an opinion joined by Justices Kennedy, Thomas, and Alito, that there are "absolutely clear" limits on federal power as outlined by the Constitution and the ACA would invalidly extend that power beyond such limits).

138. *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 203 (1991) (statement of then-Judge Clarence Thomas).

139. *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. 56 (2005) (statement of then-Judge John G. Roberts, Jr., J.).

140. *See Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 432 (2009) (statement of then-Judge Sonia Sotomayor) ("I do not permit personal views, sympathies or prejudices to influence the outcome of cases, rejecting the challenges of numerous plaintiffs with undisputably sympathetic claims, but ruling the way I have on the basis of law . . . .").

Judges and Justices do not merely say such things. At least at a conscious level, they appear to believe them. Judges and Justices who, in their candid moments, acknowledge that values and life experience affect how they understand the law, still disavow any "low political" motivation. Such disavowals form part of our basic conception of the rule of law. Even Judge Richard Posner—the most prominent, openly policy-oriented judge ever to sit on the federal bench—who stated that it was legitimate for the *Bush v. Gore* Court to resolve the case as it did to avoid a constitutional crisis,[141] would surely say it would have been illegitimate for the Court to resolve the case on the ground that a majority of Justices thought that Bush would be a better president than Gore (or vice-versa). The former was at least arguably a high political consideration; the latter would clearly have been a low one.

Nonetheless, the voting patterns in *Bush v. Gore*, the *Health Care Case*, and a handful of other cases at least suggest low political motives.[142] How is that possible?

Perhaps one or more of the Justices self-consciously sought to advance low political aims. However, having spent a fair bit of time in the company of judges and Justices (including most of the members of the Rehnquist and Roberts Courts), I strongly doubt that any of them would allow himself or herself to believe that he or she was voting based on partisan motives. Accordingly, if one finds the political correlations too strong for coincidence, one needs to posit mechanisms by which Justices who are unconsciously driven at least partly by low political aims come to see the results that serve those aims as required by law. Nonpartisan framing is simply the name I give to those mechanisms.

Koppelman rightly praises the lawyering skills of the conservative and libertarian critics of the ACA for transforming the political case against the Act in general and the mandate in particular into a constitutional case.[143] That was a tall order because the debate over the mandate was, at least at first, so nakedly partisan. As Koppelman recounts in an especially elegant chapter on the history of federal health care reform, the insurance mandate originated as a conservative alternative to more far-reaching reforms.[144] Conservative politicians eventually came to oppose the mandate mostly because President Obama supported it.[145] In order for the Justices to come

141. *See* RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 4 (2001) ("The decision averted what might well have been . . . a political and constitutional crisis . . . .").

142. For a critical examination of the Supreme Court's vote in the former, see generally ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001).

143. *See* KOPPELMAN, *supra* note 6, at 76–79.

144. *See id.* at 17–37.

145. *See id.* at 74–75 (noting the link between anti-Obama sentiment and growing opposition to the mandate in the summer of 2010).

to see the mandate as unconstitutional, they needed a nonpartisan framework within which to reach that result.

Although I cannot prove the point definitively in this Review, I would posit that nonpartisan framing worked in the *Health Care Case*—and it works more generally—for three main reasons. First, at least within the Supreme Court itself, constitutional law is sufficiently indeterminate to permit room for effective advocates to argue for nearly any position that falls within the broad mainstream of public opinion. Koppelman thinks that the constitutional argument against the mandate was laughably bad, but as discussed in Part II, we need to grade on a curve. Hamilton's broad reading of the enumerated powers risks sliding down the slippery slope to a federal police power; Jefferson's strict reading of "necessary" risks hamstringing the federal government; and any compromise test risks reliance on formal lines that sometimes lead to perverse results or on functional tests that arrogate complex policy judgments to unelected judges.[146] There was enough room in the doctrine to *permit* the fashioning of a no-mandate rule as a means of advancing an end that all of the conservative Justices already sincerely desired: ensuring that there were limits on the enumerated powers.

Second, nonpartisan framing works because the distinction between high and low politics is often unclear. Do conservatives read the Second Amendment as protecting an individual right to possess firearms for high political reasons or low ones? Do liberals think the Constitution protects abortion rights on high or low political grounds? On these and many other issues, the political categories of liberal and conservative track judicial cleavages relatively cleanly.[147] To paint with a broad brush, conservatives favor (and liberals oppose) judicial overriding of the judgments of political actors on questions of affirmative action,[148] campaign finance,[149] federalism,[150] and gun rights,[151] while liberals favor (and conservatives oppose) judicial overriding of the judgments of political actors on questions of abortion,[152] capital punishment,[153] church–state separation,[154] and gay

146. *See supra* subpart I(A).

147. *See* Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 352 (2004) ("No reasonable person seriously doubts that ideology . . . helps to explain judicial votes."); *cf.* Nancy Staudt et al., *The Ideological Component of Judging in the Taxation Context*, 84 WASH. U. L. REV. 1797, 1805–06 (2006) (reviewing several studies that found the political party of the appointing president to be a strong indicator of the voting record of judges on a variety of issues).

148. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003).

149. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 316 (2010).

150. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995).

151. *See, e.g.*, McDonald v. City of Chi., 130 S. Ct. 3020 (2010); District of Columbia v. Heller, 554 U.S. 570 (2008).

152. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 130, 168 (2007).

153. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 411 (2008).

154. *See, e.g.*, Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011).

rights.[155] On each of these issues, of course, judges invoke ostensibly legal grounds for why their views of the Constitution happen to correspond with the views of most of the members of the party of the president who appointed them, but only a naïf would deny that judicial ideology substantially overlaps political ideology.

Still, we usually count judicial ideology as a form of high politics. That is why the voting pattern in *Bush v. Gore* was so much harder to swallow than the pattern in the *Health Care Case*. In the *Health Care Case*, the Justices voted according to prior type—with liberals supporting broad federal power and conservatives opposing it. True, the result largely aligned the liberal Justices with Democratic policy druthers and conservative Justices with Republican policy druthers, but that fact could be chalked up to the overlap between high and low politics. By contrast, in *Bush v. Gore*, the conservatives and liberals flipped their usual ideological druthers: Conservatives embraced a broad construction of voting rights and a correspondingly narrow domain for state sovereignty; liberals took the opposite positions. The opinions were written in nonpartisan terms, of course, but the dissonance with prior views was too jarring to ignore.

Nonetheless, I would not accuse any of the Justices in *Bush v. Gore* of *consciously* acting on low political motives. Focusing on the conservatives against whom most of the criticism in *Bush v. Gore* was directed, consider a third mechanism of nonpartisan framing: conservatives are especially good at framing partisan claims in nonpartisan terms because they view alternative methodologies as not merely inferior but as fundamentally illegitimate.

Although not all of the conservative Justices on the Rehnquist and Roberts Courts consider themselves thoroughgoing originalists, originalism can serve as emblematic of the broader jurisprudential attitude of conservatives because originalism operates as a kind of rallying cry for conservatives, both among the public and on the Court.[156] And the case for originalism is frequently put as an argument about what judges simply must do if they are to engage in legitimate interpretation.[157] In this view, liberals who find a right to abortion or same-sex intimacy in the Constitution are not merely disagreeing about how to read the Due Process Clause of the Fourteenth Amendment but are engaged in a kind of fraud because *the Constitution has nothing to say about such matters*.[158]

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155. *See* United States v. Windsor, 133 S. Ct. 2675, 2681, 2689 (2013).

156. *See* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 688–96 (2009) (discussing the connections between the conservative movement and originalism).

157. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 143 (1990) ("[O]nly the approach of original understanding meets the criteria that any theory of constitutional interpretation must meet in order to possess democratic legitimacy.").

158. *See, e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 293 (1990) (Scalia, J., concurring) ("I assert only that the Constitution has nothing to say about [the right to die].");

To be sure, in neither *Bush v. Gore* nor the *Health Care Case* did the conservative Justices make much of an attempt to tie their positions to the original understanding and, in both cases, it was the liberals rather than the conservatives who argued that the Constitution permitted the political system to run its course.[159] Nonetheless, the belief that liberals make stuff up but conservatives merely enforce the Constitution is deeply ingrained in modern conservative jurisprudential thought.[160] It explains how Justice Scalia could begin his dissent in *United States v. Windsor*[161] by castigating the majority for invalidating a federal law[162]—Section Three of the Defense of Marriage Act—just one day after he joined an opinion doing the very same thing in *Shelby County v. Holder*,[163] which invalidated the coverage formula of the Voting Rights Act.[164]

Ironically, the tendency of conservative Justices to regard liberals as engaged in a kind of constitutional fraud may make nonpartisan framing especially effective in just those cases in which the partisan stakes are highest. High political stakes lead the conservatives to see *the other side* as playing fast and loose with the law. Thus, the conservative Justices imagined that Democrats in 2000 were trying to rob President-elect Bush of his victory[165] and that Democrats in 2010 had betrayed the Constitution by

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Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in part and dissenting in part) (asserting, in an opinion joined by Chief Justice Rehnquist and Justices White and Thomas, that the right to an abortion, like "bigamy[,] is not constitutionally protected because . . . the Constitution says absolutely nothing about it"); *60 Minutes: Justice Scalia on the Record* (CBS Television Broadcast Sept. 14, 2008), *available at* http://www.cbsnews.com/8301-18560_162-4040290.html ("You think there ought to be a right to abortion? No problem. The Constitution says nothing about it.").

159. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2615 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (stating, in an opinion joined by Justices Breyer, Sotomayor, and Kagan, "Whatever one thinks of the policy decision Congress made, it was Congress' prerogative to make it").

160. *See* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 550–54 (2006) (discussing the centrality of originalism, conceptualized as an apolitical, text-based judicial philosophy in supposed contrast to the judicial activism of the liberal Warren Court, in modern conservative jurisprudential thought).

161. 133 S. Ct. 2675 (2013).

162. *Id.* at 2697–98 (Scalia, J., dissenting).

163. 133 S. Ct. 2612 (2013).

164. *Id.* at 2631.

165. *See* Bush v. Gore, 531 U.S. 1046, 1116–20 (2000) (Scalia, J., concurring in the grant of certiorari) ("The counting of votes that are of questionable legality does in my view threaten irreparable harm to Petitioner Bush, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election."); *see also* Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1434 (2001) ("The best prudential defense of the Court's intervention is that the Court saw the election as a serious political crisis. It believed—or rather five Justices believed—that the Florida Supreme Court was an out-of-control activist court that was trying to steal the election for Al Gore.").

enacting the supposedly unprecedented health-insurance mandate.[166] In each instance, the highly partisan nature of the fight over the underlying issue only strengthened the resolve of the conservative Justices to stand firm on what they regarded as nonpartisan ground.

In light of the power of nonpartisan framing, the main mystery in the *Health Care Case* was not why most of the Justices voted in line with their (presumed) political druthers. The mystery is that Chief Justice Roberts—in voting to sustain the mandate under the Taxing Power[167]—and Justices Breyer and Kagan—in voting to invalidate the conditions attached to the Medicaid expansion as beyond the scope of the Spending Power[168]—voted contrary to their (presumed) political druthers. Perhaps all three of them really were persuaded by the respective arguments. Or perhaps one or more of them thought it more important for the Court's long-term institutional legitimacy to appear to transcend partisan disagreement in a case with such high partisan stakes. Whatever the explanation, it has little to do with their views about Tough Luck Libertarianism.

IV. Conclusion

Whatever the failings of *The Tough Luck Constitution* as a causal account of Supreme Court decision making in the *Health Care Case*, the book succeeds magnificently as a concise, highly readable explanation of the broader political and legal battle over the Affordable Care Act. With much of the Act only now first coming into force, and a great many Republicans still opposed to the law, that battle will undoubtedly continue for years.

Moreover, Koppelman is right to focus considerable attention on Tough Luck Libertarianism, which, as he shows, is an unattractive and unrealistic philosophy. If, as some nineteenth-century German social democrats said, anti-Semitism is "the socialism of fools,"[169] then Tough Luck Libertarianism is the conservatism of fourteen-year-old boys. Unfortunately, much of our polity appears to consist of such boys. Although Koppelman ably shows that no Supreme Court Justice is really a Tough Luck Libertarian, a great many citizens and politicians are—or at least believe that they are. Given the inevitable connections between politics and law, a triumph of Tough Luck Libertarianism in the public square would eventually lead to its triumph in the courts.

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166. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2643 (2012) (Scalia, J., dissenting) (asserting, in an opinion joined by Justices Kennedy, Thomas, and Alito, that the mandate clearly goes far beyond all federal powers).

167. *Id.* at 2600 (majority opinion).

168. *Id.* at 2607 (opinion of Roberts, C.J.) (opinion joined by Justices Breyer and Kagan).

169. RICHARD J. EVANS, THE COMING OF THE THIRD REICH 173 (2003).