

LEGAL MEMORANDUM

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Reconsidering the Constitutionality of Obamacare

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Abstract

*Obamacare became law in 2010 as a result of the Patient Protection and Affordable Care Act, and it appeared that the PPACA's constitutionality was settled by the 2012 decision of the Supreme Court of the United States in *NFIB v. Sebelius*, in which the Court held that Congress had the authority to enact a critical feature of the scheme: the "individual mandate," which required that parties must purchase health coverage with certain essential features or pay a tax under Congress's taxing power. But because Congress effectively eliminated the individual mandate tax in the Tax Cuts and Jobs Act of 2017, the PPACA can no longer be justified under Congress's power to tax, and its constitutionality is once again in doubt.*

The constitutionality of the Patient Protection and Affordable Care Act (PPACA),¹ colloquially known as "Obamacare," has "come around again."² Challenged once the act was signed into law on the ground that the statute exceeded Congress's power to regulate interstate commerce, Obamacare survived because the Supreme Court of the United States concluded in *NFIB v. Sebelius*³ that it was a lawful exercise of Congress's taxing power. The wisdom and fiscal integrity of Obamacare have remained vigorously contested topics of public discussion since the Supreme Court's 2012 decision, but the constitutionality of the PPACA appeared settled.

Yet what the Supreme Court settled in 2012 Congress unsettled in 2017 when it passed the Tax Cuts and Jobs Act.⁴ That new law eliminated the tax on which the Supreme Court had relied when it upheld Obamacare under Congress's authority to impose taxes.⁵

KEY POINTS

- The Supreme Court's 2012 decision in *NFIB v. Sebelius* upheld the constitutionality of the Patient Protection and Affordable Care Act, but the wisdom and fiscal integrity of the law continue to be vigorously contested.
- What the Supreme Court settled in 2012 Congress unsettled in 2017 when it passed the Tax Cuts and Jobs Act, which eliminated the tax on which the Supreme Court had relied when it upheld Obamacare under Congress's authority to impose taxes.
- The result was to remove the only justification that the Court found available to uphold Obamacare.
- Defenders of the PPACA can and will renew their argument that the act can be upheld by relying on Congress's authority to regulate the operation of the health insurance market.
- Whether that strategy will prevail is uncertain; what is certain is that the Supreme Court will again have to decide the constitutionality of the PPACA.

This paper, in its entirety, can be found at <http://report.heritage.org/lm230>

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The result was to remove the only justification that the Court found available to uphold President Barack Obama’s health care reform. Defenders of the PPACA can and will renew their argument that the act can be upheld by relying on Congress’s authority to regulate the operation of the health insurance market. It is uncertain—in fact, unlikely—that that strategy will prevail. What *is* certain is that the Supreme Court will again have to decide the constitutionality of the PPACA.

The Constitutionality of Obamacare: Part One

From the moment that the legislation creating Obamacare was proposed, it has been a subject of numerous—and heated—political brawls on Capitol Hill and even more numerous public policy debates in the private sector. After all, the American health insurance system is responsible for perhaps 20 percent of the gross domestic product, and the PPACA sought to make the most fundamental, systematic revision of that system that the nation had witnessed since the adoption of Medicaid and Medicare in the 1960s. Reducing the number of uninsured Americans, making health insurance “portable” so that a person could transfer his insurance plan from one job to another, and reducing the cost of coverage—those goals and others had been the dream of reformers for 50 years. Early in his presidency, Bill Clinton tried to persuade Congress to enact a comprehensive health care reform package colloquially known as “Hillarycare” because he delegated to his wife the responsibility to formulate the package and persuade Congress to enact it. Hillarycare crashed and burned, however, and Clinton did not attempt to resurrect that proposal during the remainder of his time in office.

But hope springs eternal,⁶ and President Obama made passage of comprehensive health care reform a goal of his first term. Taking advantage of the budget reconciliation process, which enables a Senate majority to avoid a filibuster and pass legislation by a simple majority, President Obama pushed through the Senate a bill intended (among other things) to increase the number of people covered by health insurance and deny insurance companies the ability to decline coverage for a preexisting illness or injury. To fund the new scheme, the legislation required parties to obtain health insurance and pay for certain conditions (such as obstetrical services) that

many parties would never need (such as men). Anyone who failed to obtain health insurance with certain minimum requirements would be subject to a penalty to be imposed by the Internal Revenue Service. The requirement that most Americans must purchase health insurance came to be known as the “individual mandate.”⁷

As soon as President Obama signed the PPACA into law in 2010, the debate shifted from the wisdom of Obamacare to its constitutionality. The gravamen of the argument that the PPACA was unconstitutional was novel but straightforward: The statute exceeded Congress’s authority under the Commerce Clause of the Constitution⁸ because the clause enables Congress to “regulate” commerce, not to “create” it. Since an individual has the freedom to decide whether or not to purchase insurance, Congress cannot order people to buy health coverage so that it can then regulate those transactions. Otherwise, there is no limit to Congress’s commercial regulatory authority.⁹

The argument in defense of Obamacare’s constitutionality was also straightforward: The health insurance market is a major sector of the national economy, and Congress can regulate how that market operates. To ensure that parties are not denied coverage due to a preexisting condition or for some other reason, Congress prohibited insurance companies from refusing coverage to someone who was already ill or injured and from charging that person more than they would charge someone who was healthy and fit. To pay for those provisions, Congress needed to require everyone to participate in the new program. By forcing people in good medical condition to buy health insurance, insurance companies could use the profit they make from those parties (since their premiums will exceed their expenses) to underwrite the cost of paying for treatment of the sick or injured.¹⁰

The Obama Administration also defended the PPACA as a lawful exercise of Congress’s authority under the Taxing and Spending Clause.¹¹ The government’s reliance on Congress’s taxing power was clearly a fallback argument: the Administration’s last battlement if the challengers overcame its Commerce Clause defense.¹² Obamacare’s challengers replied that the penalty for failing to purchase health coverage was more akin to a fine than a tax and therefore could not be defended under the Taxing and Spending Clause.

Litigation over the constitutionality of the PPACA quickly reached the Supreme Court, which resolved the matter only two years after the act became law. In *NFIB v. Sebelius*, the Court upheld the constitutionality of the PPACA by a 5–4 vote. The Court’s disposition of the case, while not unique, was certainly unusual.

To start with, there was no majority opinion. There were two separate majorities, one on the constitutionality of the PPACA under the Commerce Clause and the other resolving that issue under the Taxing and Spending Clause. Moreover, those majorities existed only by cobbling together the votes of individual justices spread across several opinions, one of which was a dissent by four members of the Court. Five justices (Chief Justice John Roberts and Associate Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito) agreed with the challengers that Congress lacked the authority under the Commerce Clause to adopt the PPACA.¹³ But a different combination of five justices (Chief Justice John Roberts and Associate Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan) concluded held that the PPACA was constitutional, albeit for different reasons.¹⁴ The four associate justices relied on the Commerce Clause, while Chief Justice Roberts, who cast the deciding vote, rested on the Taxing and Spending Clause. The Chief Justice found it irrelevant that Congress eschewed labeling or justifying the penalty for not purchasing an insurance policy as a “tax,” because it was, he said, for the Court to decide whether the penalty was a tax. The penalty for noncompliance with the individual mandate was a tax, he decided, because it raised revenue and sufficiently resembled a tax that it could properly be labeled as such.¹⁵

While there was discord in the rationales offered for sustaining the PPACA, there was no doubt that the act had been upheld over the Commerce Clause and Taxing and Spending Clause challenges that had been raised against it. The result was that the PPACA survived because there was majority of justices who voted for that result—even though a different majority rejected the basis on which Congress had relied in passing it.¹⁶ Nonetheless, the constitutionality of the PPACA had been settled.

Then the Tax Cuts and Jobs Act of 2017 became law. That is when, for purposes of constitutional law, the PPACA again got interesting.¹⁷

The Constitutionality of Obamacare: Part Deux¹⁸

The *NFIB* case did not end the controversy over the merits of Obamacare. The debate just shifted again, from the constitutionality of the PPACA to Obamacare’s fiscal viability. There has been considerable controversy over the issue of whether Obamacare will inevitably fail.¹⁹ A combination of three factors, some argue, appears to guarantee that outcome: Not enough individuals have purchased qualified health care insurance to pay for the cost of the health care guarantees that the act imposes on insurers; the federal government has declined to offset the inevitable losses that insurance companies have suffered due to that insufficient enrollment; and insurance companies, now hemorrhaging money, have dropped out as providers.²⁰ The issue has become, so to speak, whether to “end it or amend it”—that is, whether to repeal the PPACA and start over or revise its provisions to make it fiscally viable.²¹ The constitutionality of the PPACA has not entered into that discussion.

The Tax Cuts and Jobs Act of 2017 changed all that. The act was designed to revise the tax code so that domestic businesses could hire more Americans, increase the salaries of current employees, or both. The act sought to achieve those results by (among other things) reducing the corporate income tax and encouraging businesses to return to the United States cash that they had placed in banks overseas. An additional provision repealed the tax penalties imposed by the PPACA on individuals who failed to purchase health insurance in compliance with the act.²² That last provision had been a part of various post-2010 Republican efforts to repeal that law. It was added to the tax bill late during the debate, perhaps on the ground that it would leave additional money in the hands of taxpayers or perhaps as a sop to parties who wanted to see the PPACA repealed in its entirety but could not muster the necessary votes.

Ironically, the repeal of the individual mandate noncompliance penalty effectively took away the only basis on which the Supreme Court had upheld the constitutionality of the PPACA in *NFIB v. Sebelius*. At a minimum, there is a serious argument to that effect.²³ The result is that *The Constitutionality of Obamacare: Part Deux* is about to begin.

Where Do We Go from Here?

What, then, should be the proper response to the argument that the 2017 tax law rendered the PPACA

unconstitutional? Should Congress answer that question? If so, and if Congress agrees, should Congress act as if the PPACA no longer exists? Should the states? How about private parties? Or should one of those three parties ask the federal courts to resolve the matter? If so, which one? Should one or more parties file a lawsuit in federal district court and ask that judge to resolve the question whether the PPACA is constitutional given the effect that the Tax Cuts and Jobs Act of 2017 has on that law? Or should someone just ask the Supreme Court to answer the question under the theory that the case will get there eventually, so why not cut out the middleman?

It turns out that different states have taken different paths in this regard. One state, Idaho, made an untraditional choice. Texas (joined by other states) took the path that is ordinarily followed. This section will explain what they did and why the choice that Texas made is the wise one.

Idaho's Choice: Disregard the PPACA. The PPACA imposes various requirements on health care plans. For example, an insurance plan must force a 27-year-old single male to pay for obstetrical and maternity coverage even though he is biologically incapable of taking advantage of such treatment. The result is to force up the cost of health insurance. The federal government subsidizes the health care costs of the poor but not the middle class, which gets squeezed by spiraling premium increases. Some members of the middle class have decided to tighten their belts and pay the increases with money that they would have spent elsewhere. Others have decided to forego insurance, pay the PPACA penalty, and sign up for Obamacare if they later become sick or injured.

Recently, Idaho decided to address that problem in an unusual way. As one journal put it, "Idaho is dealing with Obamacare by just blowing it off."²⁴ On January 5, 2018, Idaho Governor Butch Otter issued an executive order authorizing the state insurance department to approve non-Obamacare-compliant health insurance for Idaho, and the state insurance department later issued a bulletin explaining what options would be available for residents.²⁵ There will still be one plan that complies with the PPACA, but the other plans can experiment with "creative options" to supply health coverage. In layman's terms, Idaho will allow health insurance companies to ignore the PPACA as long as there is a fig leaf available that allows one of the state's lawyers to argue

in court that every Idahoan can still buy an Obamacare plan.

That type of creativity, however, will not fly. The PPACA does not make compliance optional. If it did, there would have been no reason to adopt the statute in the first place. States could always authorize insurance companies to create plans that force consumers to purchase expensive coverage they do not need. The problem, of course, is that as long as consumers have any choice in the matter, they will not purchase those plans. Obamacare could not have even a remote hope of working unless its requirements were mandatory. All of which creates a problem for Idaho.

Under the Article VI Supremacy Clause, federal law supersedes contrary state law.²⁶ The Supreme Court takes that clause quite seriously, especially when the Court itself has adopted the relevant law. A few years ago, the Court summarily reversed a decision of the supreme court of one of Idaho's neighbors when that court decided that the U.S. Supreme Court either did not mean what it said or was just wrong. In *Citizens United v. FEC*,²⁷ the U.S. Supreme Court held that the First Amendment Free Speech Clause does not allow a legislature to prevent a private party from spending its own funds to criticize a candidate in an election campaign. A year later, in *Western Tradition Partnership, Inc. v. Attorney General*,²⁸ the Montana Supreme Court upheld over a Free Speech challenge a state campaign finance law that was not materially different from the one that the U.S. Supreme Court held unconstitutional in *Citizens United*. On review of the Montana Supreme Court's decision, the U.S. Supreme Court summarily reversed the state court's judgment.

In a per curiam decision entitled *American Tradition Partnership, Inc. v. Bullock*,²⁹ the U.S. Supreme Court could barely conceal its anger at Montana's refusal to acknowledge that the *Citizens United* ruling was binding law. The Court's decision in *American Tradition Partnership*, in its entirety, reads as follows:

A Montana state law provides that a "corporation may not make...an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party." Mont. Code Ann. § 13-35-227(1) (2011). The Montana Supreme Court rejected petitioners' claim that this statute violates the First Amendment. 2011 MT 328, 363 Mont. 220, 271 P.3d 1. In *Citizens United v. Federal Election Comm'n*, 558

U.S., 310 (2010), this Court struck down a similar federal law, holding that “political speech does not lose First Amendment protection simply because its source is a corporation.” *Id.*, at 342 (internal quotation marks omitted). The question presented in this case is whether the holding of *Citizens United* applies to the Montana state law. There can be no serious doubt that it does. See U.S. Const., Art. VI, cl. 2. Montana’s arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case.

The petition for certiorari is granted. The judgment of the Supreme Court of Montana is reversed.

*It is so ordered.*³⁰

That is Supreme Court-speak. It is a nice—but unmistakably clear, firm, and resolute—way of telling a lower court that, like Horton the Elephant, the Court meant what it said and said what it meant.³¹ The Court decided the case without hearing oral argument, a practice that the Court reserves for instances in which the lower court was clearly wrong. The Court also used almost as few words as possible to tell the Montana Supreme Court that its rationale was frivolous and its action defiant. The only way that the Court could have shortened its opinion would have been simply to write “Very funny” or “Nice try.” For nonlawyers, think of what happens in the NBA when someone rejects a shot by slapping it far out into the seats or by slamming it against the backboard. The Supreme Court sent Montana the same message. Either way, the Court’s message could not have been clearer than if it had given the Montana chief justice (who wrote that court’s majority opinion) a dime and told him to tell his mother that there was serious doubt about his becoming a lawyer.³²

The result is that Idaho Governor Otter’s executive order is destined for a short half-life. His order is begging for the *American Tradition Partnership* treatment if a case could be brought in court. Showing such a lack of regard for the U.S. Supreme Court may make for great in-state politics, but in terms of accomplishing what the governor wants to do, it won’t get an elected official very far. The Supreme Court justices may not be the most important and powerful people in Washington, but they think they are. It is unwise to proceed on any other assumption.

Fortunately for Idaho, the Trump Administration intervened before the federal courts could publicly rebuke the state. On March 8, Seema Verma, Administrator of the Centers for Medicare and Medicaid Services, told Governor Otter that Idaho’s proposal violated the PPACA and urged the governor to abandon his plan.³³ That was savvy advice.

Texas’s Choice: Litigate the Constitutionality of the PPACA. Texas, by contrast, went about getting this issue resolved in the standard and proper manner. Late in February 2018, joined by other states and governors, Texas filed suit in federal district court in Fort Worth asking the court to issue a declaratory judgment that, effective January 1, 2019, the PPACA will no longer be constitutional and an injunction preventing the federal government from enforcing the act.³⁴ The complaint explains in detail why Texas believes that the individual mandate is critical to the operation of the PPACA and why, once the tax for non-compliance with the mandate goes out of effect, the act cannot be justified under the Taxing and Spending Clause because, quite simply, the penalty will no longer be a “tax.” By so doing, Texas has recognized that willfully disregarding what the U.S. Supreme Court held in *NFIB v. Sebelius* is not only unjustifiable as a matter of law, but also wacky as a prudential matter. By demonstrating their respect for the legal process, the plaintiffs enhance their prospects for being successful on the merits of their claims.

Remember the outcome in the *NFIB* case. Technically speaking, a majority of the Court upheld the constitutionality of the PPACA because there were five votes to support a judgment to that effect. To be sure, the five votes were spread out over two different opinions, and the five disagreed over the rationale for their votes, but there were still five votes to uphold the constitutionality of the PPACA. That is the starting point for any further litigation.

The Next Steps

The federal government has not yet answered the Texas complaint, so we do not know how that case will play out in district court. One possibility would be for the government to agree with the plaintiffs that the PPACA is unconstitutional but urge the district court to enter judgment against them. The argument would be that the plaintiffs are right on the merits of their argument, but the Supreme Court upheld the constitutionality of the PPACA, and only the Supreme Court can overrule one of its precedents.³⁵

That is the sensible approach to follow in this case. Neither district court nor circuit court judges should take it upon themselves to set aside a judgment entered by the Supreme Court on the basis of nose counting. The Supreme Court upheld the PPACA, and that should be sufficient. Besides, one of the four dissenters in the *NFIB* case, Justice Scalia, died after that decision, and his replacement, Justice Neil Gorsuch, has not yet voted on this issue. Finally, it might turn out that one or more of the other three remaining dissenters in that case (Justices Kennedy, Thomas, or Alito) could change his vote because of the reliance interests that have developed in the interim, because the individual mandate can be severed from the remainder of the PPACA,³⁶ or for some other reason. Just as it is unwise to count chickens before they are hatched, it is presumptuous for lower court judges to count Supreme Court justices before they have voted.

There is one related point that could be made. It is uncommon but not extraordinary to see the Supreme Court decide a case without a majority opinion. *NFIB v. Sebelius* is not the only example.³⁷ When that happens, the lack of a majority opinion makes it difficult for the lower courts and lawyers to identify the holding. That scenario has occurred with sufficient regularity that the Supreme Court has even adopted a rule of—for lack of a better term—“decision interpretation” to advise the lower courts and counsel how to construe such a decision. In *Marks v. United States*,³⁸ the Supreme Court explained that in cases where there is no majority opinion, the narrowest opinion by a justice in the majority should be treated as the rule of decision.³⁹

Sometimes that approach is useful, but not always. For example, in *Freeman v. United States*,⁴⁰ the Court split 4–1–4. Under *Marks*, the rationale adopted by the concurring justice, Sonia Sotomayor, would be deemed the rule of decision, but the other eight justices rejected her rationale, leaving her on the short end of an 8–1 vote. *Marks* did not say what to do in such a case; it is far from obvious, and the *Freeman* case is quite similar to *NFIB v. Sebelius*. The Court will hear argument later this term in a case dealing with the *Marks* rule. Perhaps that case will provide some clarity on what to do in cases like this one.⁴¹ If it does, the district court in Texas’s case might feel emboldened to decide the merits of Texas’s claims. Given the stakes, however, the prudent course would still be to let the Supreme Court itself decide whether *NFIB v. Sebelius* is controlling.

To be sure, there is a good reason to act expeditiously. The individual mandate penalty flies away on January 1, 2019, so the Supreme Court will want to resolve this matter before then, especially because it is the only court that can truly do so. But there are options available. There are no factual issues in dispute; the issue is a matter of law. Accordingly, no discovery or trial is necessary. The district court can decide the case based on the trial briefs filed by the parties, and the court can order the parties to file their opening and reply briefs quickly and simultaneously. Once the district court enters its judgment, the case will move to the U.S. Court of Appeals for the Fifth Circuit, which can also direct the parties to file their briefs with dispatch. Once that court issues its judgment, one or more parties can petition the Supreme Court for review.

Alternatively, once the appeal has been lodged in the circuit court, one or both parties can file a petition for a writ of certiorari before judgment to leap frog over the circuit court and go directly to the high court. The Supreme Court does not often grant such petitions⁴²—it prefers to have at least one circuit court decide an issue before taking it up—but the Court does so every now and then, especially when the issue is as important as this one and speed is of the essence.⁴³ This might be another good occasion for the Court to do so.

Conclusion

Fans of Warner Brothers cartoons are familiar with Road Runner and his nemesis Wile E. Coyote. In his always-futile efforts to catch Road Runner, Wile E. often finds himself racing off a cliff with only thin air to support him. Unable to run without ground under his feet regardless of how fast he churns his legs, Wile E. always winds up going “Splat!” at the bottom of the canyon below.

Congress’s decision to repeal the tax that served as the ground on which the Supreme Court upheld the PPACA likely puts that statute in the same position. Without the tax revenues that the PPACA generated whenever someone did not comply with the individual mandate, the mandate is no longer a tax. Otherwise, every command could be deemed a tax, and the other, specific, limited grants of power to Congress in Article I would become superfluous. Indeed, without that penalty, the individual mandate itself is not a law; it is merely a polite request.

Whatever the merits of Chief Justice Roberts’ conclusion in 2012 that the individual mandate

penalty was a “tax,” beginning in 2019, the PPACA will no longer generate the money that is the sine qua non of a tax. Accordingly, in all likelihood, the result of the Tax Cuts and Jobs Act will be to put the PPACA in the same predicament in which Wile E. Coyote regularly finds himself: going down.

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Appendix

The Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, Tit. I, Subtit. A, Pt. VIII, § 11081 (2017), provides as follows:

PART VIII—INDIVIDUAL MANDATE

SEC. 11081. ELIMINATION OF SHARED RESPONSIBILITY PAYMENT FOR INDIVIDUALS FAILING TO MAINTAIN MINIMUM ESSENTIAL COVERAGE.

(a) IN GENERAL.—Section 5000A(c) [of Title 26] is amended—

(1) in paragraph (2)(B)(iii), by striking “2.5 percent” and inserting “Zero percent”, and

(2) in paragraph (3)—

(A) by striking “\$695” in subparagraph (A) and inserting “\$0”, and

(B) by striking subparagraph (D).

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to months beginning after December 31, 2018.

Endnotes

1. Pub. L. No. 111-148, 124 Stat. 119, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).
2. “But here’s some advice, boy. Don’t put your trust in revolutions. They always come around again. That’s why they’re called revolutions.” TERRY PRATCHETT, *NIGHT WATCH* 234 (2002).
3. 567 U.S. 519 (2012).
4. Pub. L. No. 115-97 (2017).
5. See § 11081, reprinted in the Appendix.
6. See Alexander Pope, *An Essay on Man*, Epistle I (1733–34).
7. *NFIB v. Sebelius*, 567 U.S. 519, 538–40 (2012).
8. The Commerce Clause states that Congress has the authority “[t]o regulate Commerce with foreign Nations, and among the States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.
9. See, e.g., 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 (2012) (“The argument for its unconstitutionality is relatively simple. The place to start, as with any constitutional argument, is with the text of the Constitution. The Commerce Clause refers to the power to regulate commerce. The fundamental problem with this Act is that forcing somebody to engage in commerce, so that the government can better regulate commerce, is not itself the regulation of commerce. When you force somebody to engage in commerce, you create commerce, and that is not what the Commerce Clause authorizes.”) (footnotes omitted).
10. See, e.g., Laurence H. Tribe, *The Constitutionality of the Patient Protection and Affordable Care Act: Swimming in the Stream of Commerce*, 35 HARV. J. L. & PUB. POL’Y 873, 878–79 (2012) (“Arranging how to finance one’s eventual medical care and arranging to have other people bear the risk of financing it is an economic activity on its face.... The contrary view depends on depicting a taxpayer’s choice to remain without health insurance as noneconomic and describing a tax penalty for making that choice as a way to conscript the taxpayer into commerce rather than a way to regulate that taxpayer’s economic behavior. Even if that were so, it would be constitutionally irrelevant. But it is not so. Increasing income tax liability for making choices that directly and immediately increase other people’s premiums in the interstate health insurance market and raise other people’s health-related taxes across the country does not involve conscripting people into a stream of commerce to which they would otherwise be strangers. The conscription view is an optical illusion caused by focusing too narrowly on moments at which a healthy individual does not happen to be using healthcare services.”).
11. The Taxing and Spending Clause grants Congress the power to “lay and collect Taxes...to pay the Debts and provide for the common Defense and general Welfare of the United States.” U.S. CONST. art. I, § 8, cl. 1.
12. For example, consider the order of arguments and the number of pages that the government used to defend the PPACA in its Supreme Court briefs. The principal and lion’s share of the defense rested on the Commerce Clause. The Taxing and Spending Clause was almost an afterthought. See, e.g., Brief for Petitioners (Minimum Coverage Provision), No. 11-398, at 21–52 (Commerce Clause defense); *id.* at 52–62 (Taxing and Spending Clause defense); Reply Brief for Petitioners (Minimum Coverage Provision), *HHS v. Florida*, No. 11-398, at 2–21 (Commerce Clause defense); *id.* at 21–25 (Taxing and Spending Clause defense).
13. *NFIB*, 567 U.S. at 546–61 (opinion of Roberts, C.J.); *id.* at 646–60 (dissenting opinion of Scalia, Kennedy, Thomas & Alito, JJ).
14. *Id.* at 561–74 (opinion of Roberts, C.J.); *id.* at 589 (opinion of Ginsburg, J., joined by Breyer, Sotomayor & Kagan, JJ., concurring in the judgment in part and dissenting in part).
15. *Id.* at 561–74 (opinion of Roberts, C.J.).
16. In Chief Justice Roberts’s words, “The individual mandate cannot be upheld as an exercise of Congress’s power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it. In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress’s power to tax.” *Id.* at 588.
17. In the meantime, some parties brought a challenge to Obamacare on the ground that it violated the Origination Clause of Article I, the clause requiring that all taxes originate in the House of Representatives. See U.S. CONST. art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”). The U.S. Court of Appeals for the D.C. Circuit rejected that claim. See *Sissel v. HHS*, 760 F.3d 1 (D.C. 2014). The Supreme Court has not considered it.
18. With apologies to Lieutenant Sean “Topper” Harley. See *Hot Shots! Part Deux* (20th Century Fox 1993).
19. See, e.g., Cong. Budget Off., *Repealing the Individual Health Insurance Mandate: An Updated Estimate* (Nov. 8, 2017), <https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53300-individualmandate.pdf>; Cong. Budget Off., *Repeal the Individual Health Insurance Mandate* (Dec. 8, 2016), <https://www.cbo.gov/budget-options/2016/52232>.
20. As Heritage scholars Edmund Haislmaier and Doug Badger have recently explained, “Obamacare’s seismic effects on insurance markets continue to be felt nearly eight years after its enactment. Enrollment in individual-market coverage is now declining, despite tens of billions of dollars in federal subsidies. The number of small firms offering health benefits to their workers dropped by 24 percent between 2012 and 2016. Premiums for individual coverage more than doubled between 2013 and 2017, and rates rose again in 2018.” Edmund F. Haislmaier &

- Doug Badger, *How Obamacare Raised Premiums*, HERITAGE FOUND. BACKGROUNDER No. 3291, at 1 (Mar. 5, 2018), <https://www.heritage.org/sites/default/files/2018-03/BG3291.pdf>; see also, e.g., Doug Badger, *How Lawmakers Should Deal With Obamacare Cost-Sharing Reduction Payments*, HERITAGE FOUND. ISSUE BRIEF No. 4797 (Dec. 18, 2017), <https://www.heritage.org/sites/default/files/2017-12/IB4797.pdf>; Edmund F. Haislmaier, *2018 Obamacare Health Insurance Exchanges: Competition and Choice Continue to Shrink*, HERITAGE FOUND. ISSUE BRIEF No. 4813 (Jan. 25, 2018), https://www.heritage.org/sites/default/files/2018-01/IB4813_1.pdf; Edmund F. Haislmaier & Drew Gonshorowski, *2016 Health Insurance Enrollment: Private Coverage Declined, Medicaid Growth Slowed*, HERITAGE FOUND. ISSUE BRIEF No. 4743 (July 26, 2017), https://www.heritage.org/sites/default/files/2017-07/IB4743_0.pdf; Whitney Jones, *Obamacare Continues to Crush Small Business Owners in 2018*, HERITAGE FOUND. COMMENTARY (Jan. 29, 2018), <https://www.heritage.org/health-care-reform/commentary/obamacare-continues-crush-small-business-owners-2018>; Robert E. Moffit, *We Don't Need Zombie Obamacare*, HERITAGE FOUND. COMMENTARY (July 27, 2017), <https://www.heritage.org/health-care-reform/commentary/we-dont-need-zombie-obamacare>.
21. See, e.g., Edmund F. Haislmaier et al., *A Fresh Start for Health Care Reform*, HERITAGE FOUND. BACKGROUNDER No. 2970 (Oct. 30, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/BG2970.pdf; Robert E. Moffit, *How State Leaders Can Begin Undoing Obamacare's Damage*, HERITAGE FOUND. COMMENTARY (Jan. 25, 2018), <https://www.heritage.org/health-care-reform/commentary/how-state-leaders-can-begin-undoing-obamacares-damage>.
 22. Technically, the 2017 law did not repeal the penalty provision; it just reduced the penalty to \$0. The difference between a repeal and a zero penalty might be a good subject for a dissertation in philosophy, but it is immaterial for constitutional purposes.
 23. As some observers have noted. See Randy Barnett, *The New Challenge to Obamacare*, REASON/THE VOLOKH CONSPIRACY, Mar. 7, 2018, <https://reason.com/volokh/2018/03/07/the-new-challenge-to-obamacare>; Josh Blackman, *Understanding Texas's New Challenge to the ACA's Individual Mandate: Part I*, JOSH BLACKMAN'S BLOG, Mar. 7, 2018, <http://joshblackman.com/blog/2018/03/07/understanding-texas-new-challenge-to-the-acas-individual-mandate-part-i/>; Ilya Somin, *Thoughts on the New Constitutional Case Against Obamacare*, REASON/THE VOLOKH CONSPIRACY, Feb. 28, 2018, <https://reason.com/volokh/2018/02/28/thoughts-on-the-new-constitutional-case>. All three commentators agree with the position taken in this Legal Memorandum: The elimination of the individual mandate noncompliance penalty renders the PPACA unconstitutional. They disagree over the extent to which that provision is severable from the remainder of the PPACA. The severability issue is beyond the scope of this paper.
 24. Opinion, *Blowing Off Obamacare—Idaho Shows How*, WASH. EXAMINER, Feb. 17, 2018, <http://www.washingtonexaminer.com/blowing-off-obamacare-idaho-shows-how/article/2649294>; see also, e.g., Stephanie Armour, *Federal Agency Sidesteps Idaho Dispute on Health Insurance*, WALL ST. J., Feb. 15, 2018.
 25. See Idaho Dep't of Insurance, Bulletin No. 18-01, Provisions for Health Carriers Submitting State-Based Health Benefit Plans (Jan. 24, 2018); Idaho Exec. Order No. 2018-02 (Jan. 5, 2018); News Release, *Governor Directs Development of Guidelines for More Affordable Health Care Coverage* (Jan. 5, 2018), https://gov.idaho.gov/mediacenter/press/pr2018/1_Jan/pr_01.html; Anna Wilde Matthews, *Idaho to Allow New Insurance Plans Outside of Federal Health Law*, WALL ST. J., Jan. 25, 2018.
 26. U.S. CONST. art. VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).
 27. 558 U.S. 310 (2010).
 28. 271 P.3d 1 (Mont. 2011).
 29. 567 U.S. 516 (2012).
 30. *Id.* at 516-17.
 31. DR. SEUSS, HORTON HATCHES THE EGG (1940) (“I meant what I said, and I said what I meant. An elephant’s faithful one hundred percent.”).
 32. *The Paper Chase* (20th Century Fox 1973), https://www.youtube.com/watch?v=_wOUMd3bMRI.
 33. Letter from Seema Verma, Administrator of the Centers for Medicare and Medicaid Services, to Governor C. L. “Butch” Otter and Dean L. Cameron, Director, Idaho Dep't of Ins. (Mar. 8, 2018), <https://www.cms.gov/CCIIO/Resources/Letters/Downloads/Letter-to-Otter.pdf>.
 34. *Texas v. United States*, Case No. 4:18-ev-00167 (filed Feb. 26, 2018).
 35. See, e.g., *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (“It is this Court’s prerogative alone to overrule one of its precedents.”) (citations and internal punctuation omitted).
 36. See *supra* note 23.
 37. The outcome in *NFIB v. Sebelius* resembled the one in *Oregon v. Mitchell*, 400 U.S. 112 (1970). That case involved the constitutionality of the Voting Rights Amendment Act of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970), a statute setting 18 as the voting age in federal and state elections. Four justices concluded that Congress had that power, 401 U.S. at 135-52 (opinion of Douglas, J.); *id.* at 229-79 (opinion of Brennan, J., joined by White & Marshall, JJ.), and four went the other way, *id.* at 152-213 (Harlan, J., concurring in part and dissenting in part); *id.* at 343 (opinion of Stewart, J., joined by Burger, C.J., and Blackmun, Jr.). Justice Hugo Black cast the deciding vote. He decided that Congress could set the voting age in *federal* elections but not in *state* elections. *Id.* at 119-31 (opinion of Black, J.); The result was that, with five justices voting to uphold the act in part and five voting to strike it down in part, there were two different majorities. *NFIB v. Sebelius* resulted in a similar breakdown. See also *Furman v. Georgia*, 408 U.S. 238 (1972) (in nine separate opinions, the Court held by a 5-4 vote that standardless capital sentencing procedures are unconstitutional even though each of the five justices in the majority wrote separately and offered a separate
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and different rationale, while each of the four dissenting members wrote separately but also joined the opinions issued by the other three dissenters); *Nat. Mut. Inc. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949) (upholding by a 5-4 vote the constitutionality of a federal statute permitting residents of the District of Columbia to sue under diversity jurisdiction even though a majority of the Court rejected the rationale offered by each of the two opinions written to sustain the act).

38. 430 U.S. 188 (1977).
39. Fortunately, a majority of justices adopted that rule in *Marks. Id.* at 3 (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds....’ *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)”). Ironically, the authority on which the *Marks* Court relied for its interpretative rule was itself a non-majority opinion.
40. 564 U.S. 522 (2011).
41. *Hughes v. United States*, No. 17-155, O.T. 2017 (to be argued Mar. 27, 2018).
42. See, e.g., *DHS v. Regents of the Univ. of Calif.*, No. 17-1003, O.T. 2017 (Feb. 26, 2018) (order denying a petition for a writ of certiorari before judgment but noting, “It is assumed that the Court of Appeals will proceed expeditiously to decide this case.”).
43. See, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989) (granting such a petition); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (same).