

[[David Bernstein](#), [September 21, 2009 at 11:10am](#)] [Trackbacks](#)

Small Contribution to the Debate Over the Constitutionality of Mandatory Health Insurance:

My small contribution is that the Supreme Court would be much more likely to invalidate elements of Obamacare on which there is no firm, direct precedent if the Republicans sweep the 2010 midterm elections than if they don't. In my view, it's no coincidence that *Lopez*, the first case to invalidate a federal law on commerce grounds since the 1930s, came after the Republican sweep in 1994, and no coincidence that *Raich* backtracked on federalism at a time when neither the incumbent Republicans nor certainly the Democrats were spending any political capital on either limited government in general or federalism specifically, and indeed, when these issues seemed passe. The Supreme Court, institutionally, does not like to be exposed on controversial issues without any support from the political branches. The most ideological Justices (e.g., Thomas) may not care, but the swing voters do. So one thing I think we can be pretty sure of: if the Democrats still control the House and Senate in 2011, any constitutional challenge to health care reform will go nowhere.

UPDATE: Oh, and by the way, [I wrote something for Cato in 1992](#) suggesting that there might be five votes on the Court to revive the Commerce Clause to some degree ("given the changes in the ideological composition of the Court since 1981, Rehnquist might one day find himself leading a Court whose opinions take the requirements of the commerce clause seriously, with potentially salutary results"). At the time, in mainstream con law circles the notion that the Commerce Clause had, or would soon have, any bite at all was considered absurd, about as likely as the Supreme Court declaring Texas to be an independent republic. Ya never know.