WILL THE SUPREME COURT BE FAITHFUL TO ITS OATH TO UPHOLD THE CONSTITUTION IN THE OBAMACARE CASE?

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INTRODUCTION

My assignment for this symposium was to say something about "judicial abdication in enforcing limits on government power," and, in particular, to focus on the Patient Protection and Affordable Care Act (known to its critics as "Obamacare," and hereafter referred to as the "PPACA").[1] The thesis I will advance is a very simple one. If the United States Supreme Court declines to declare the PPACA's "individual mandate"[2] unconstitutional,[3] it will be the most striking and disturbing judicial abdication in enforcing limits on governmental power that we have seen at least since the New Deal. Furthermore, it will be the virtual destruction of a vital part of our structure of constitutional government. This seems obvious to me for reasons I will try to elaborate here. But, what is perhaps most shocking about the upcoming Supreme Court decision on the PPACA is that there is virtual unanimity among the denizens of the American legal academy that the Supreme Court should *not* restrain this exercise of dubious governmental power. This is because, according to both folks on the left and the right in the legal academy, the PPACA is constitutional.[4] Moreover, there is plen-

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[1] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (amended by the Health Care and Education Reconciliations Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010)).

[2] *Id.* § 1501 (requiring that most adult Americans must purchase health insurance by 2014, or pay a specified monetary penalty).

[3] The case on this issue (and others involved in the constitutionality of the PPACA) is *Florida v. United States Department of Health & Human Services*, 132 S. Ct. 604 (2011) (No. 11-398), on writ of certiorari to the U.S. Court of Appeals for the Eleventh Circuit. It was argued in March of this year, and, presumably, will be decided in early summer.

[4] See, for example, samples coming from the right and the left in the American legal academy, at least insofar as they exist at Harvard, the comments of former Reagan Solicitor General, and now Har-

ty of doctrinal support that the Court could turn to in order to avoid what I believe to be its constitutionally-mandated task of throwing out at least the individual mandate, which is the most important part of the PPACA.[5]

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vard Law Professor Charles Fried. Professor Fried, in testimony before the Senate Judiciary Committee, made clear that "the business of insuring health care, which represents nearly 18 percent of the national economy, is 'of course' commerce, and so, 'the health care mandate is a regulation of commerce, explicitly authorized by Article I [of the Constitution].'" Simon Lazurus, *Hand-Wringing on Health Care*, SLATE (Jan. 9, 2012, 11:20 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/01/obamacare_in_the_supreme_court_why_the_commerce_clause_reliance_shouldn_t_be_second_guessed.html (alteration in original). In addition, see the comments of Fried's Harvard Colleague Laurence Tribe for whom Barack Obama served as a research assistant, who recently served in the current President's administration and who, writing as part of symposium on the SCOTUSblog website, stated:

> Even when displayed in their best light, none of the constitutional arguments against the individual mandate ""including objections rooted in the mandate's alleged failure to respect the vaunted activity/inactivity distinction"" can survive rigorous analysis. What those arguments leave in their wake is a deeply felt but constitutionally ungrounded view that the mandate, and the law of which it is a part, are misguided as a matter of national policy. Even if that view were correct, the attempt to couch objections to this law in constitutional garb would remain unsustainable. This is a policy emperor who wears no constitutional clothes.

Laurence Tribe, *The Limits of Intuition*, SCOTUSBLOG (Aug. 4, 2011, 2:56 PM), http://www.scotusblog.com/2011/08/the-limits-of-intuition/. See also, for two further samples of prominent American legal academic opinion on the issue: (1) the views of Erwin Chemerinsky, Dean and Distinguished Professor of Law, University of California, Irvine School of Law:

> Under current constitutional law, the federal health care law is clearly constitutional. It is not even a close question. The key issue is whether Congress has the authority to require that all individuals either purchase health insurance by 2014 or pay a penalty to be collected by the Internal Revenue Service. Opponents contend that the minimum coverage provision is unconstitutional as exceeding the scope of Congress's powers. But this is constitutional both under Congress's authority to regulate commerce among the states and as an exercise of congressional power to tax and spend for the general welfare.

Erwin Chemerinsky, *The Health Care Law Is Constitutional*, SCOTUSBLOG (Aug. 5, 2011, 5:57 PM), http://www.scotusblog.com/2011/08/the-health-care-law-is-constitutional/; and (2) the views of Professor Mark Hall, the Fred and Elizabeth Turnage Professor of Law and Public Health at Wake Forest University:

> The Sixth Circuit's opinion in the *Thomas More* case lays out exactly what we're likely to see when one of these constitutional challenges to the Affordable Care Act reaches the Supreme Court. Judge Martin, a Carter appointee, agreed with the district court, and most law professors, that upholding the individual mandate is an easy case. Health insurance and health care finance are thoroughly economic and extensively interstate, clearly within the wheelhouse of Congress's commerce power. Since this power is plenary, Congress may regulate any logical way it chooses, including a purchase mandate, as long as individual rights are not violated, which they obviously aren't . . . .

Mark Hall, *A Sixth Sense: What Judge Sutton's Opinion Foretells*, SCOTUSBLOG (Aug. 4, 2011, 1:17 PM), http://www.scotusblog.com/2011/08/a-sixth-sense-what-judge-sutton%E2%80%99s-opinion-foretells/.

[5] Also before the Supreme Court in the case is the request by petitioners to throw out the entire PPACA, on the grounds that the "individual mandate" is not severable from the rest of the statute, and that, if it fails the test of constitutionality, so does the whole PPACA. This was, in fact, the decision of the District Court that is ultimately on appeal before the Supreme Court. For a lucid exposition of this decision "clarifying" the Judge's position that the PPACA is unconstitutional, and the individual mandate is not severable, see *Florida v. United States Department of Health & Human Services*, 780 F. Supp. 2d 1307, 1310-17 (N.D. Fla. 2011). For Judge Vinson's original lengthy opinion, see *Florida v.*

I. FEDERALIST 78

We might begin with the basics, and the most basic beginning is always *Federalist 78*. Here, Hamilton famously defended the power of judicial review, or the ability of the courts to determine that acts of the legislature exceed the permissible bounds of the Constitution. Hamilton faced critics of the proposed federal constitution who worried that the power of judicial review would give courts' untrammeled power to exercise their own will rather than to engage in neutral application of the constitution and laws. In response to those fears, Hamilton engaged in a ringing defense of popular sovereignty, which, even at that time, was the only legitimate basis for American law.[6] When judges undertake to determine if legislation falls within constitutional bounds, Hamilton explained, they are not exercising "will," but only "judgment," insofar as their task is simply to measure particular legislative acts for conformance with the American people's expressed desires as set forth in the Constitution that they adopted.[7]

The mandates of the Constitution, Hamilton explained, are the directions to the peoples' agents, which are both the courts and the legislatures, and those mandates prevent the agents from straying from the directions of the principals, which are the people themselves.[8] Neither the courts nor the legislatures should ever forget that they are the servants—the agents—of the sovereign people. Then, when acting as the people's agents by reigning in the legislatures, the courts are simply correcting the errant acts of other agents, and not acting contrary to the wishes of the people themselves. So long as the courts understand this, said Hamilton, they would be the "least dangerous branch" of government, as indicated before, exercising only judgment and not will, and possessing neither the sword of the executive, nor the purse of the legislature.[9] The courts merely remind the American people what it is they had done by adopting the Constitution.[10]

Some, of course, have difficulty accepting Hamilton's theory about judicial review, which simply reflects the implementation of popular sovereignty. This is because the Constitution's first ringing phrase, "We the People," excluded women, blacks, and persons without substantial landed

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United States Department of Health & Human Services, 780 F. Supp. 2d 1256 (N.D. Fla.), *aff'd in part, rev'd in part by* 648 F.3d 1235 (11th Cir.), *cert. granted*, 132 S. Ct. 604 (2011). I will not deal with the issue of severability here.

6 For the story of how popular sovereignty became the only legitimate basis for the American polity and legal institutions, see generally GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 532-36 (2d prtg. 1998).

7 THE FEDERALIST NO. 78, at 464-66 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

8 *Id*. at 466.

9 *Id*. at 464.

10 *See generally id.*

property.[11] That kind of wealth was generally required before one could exercise their franchise in late eighteenth century America, and the people's representatives who ratified the federal Constitution served in office as a result of that restricted franchise.[12] The fifty-five framers of the Constitution were an even more elite band, and many of them were slave-owners. Not surprisingly, from time to time in our history, the Constitution has been derided, and its moral authority has been somewhat weakened. It remains true, however, that if the document did not exactly spring directly from the sovereignty of the people, our franchise is now exceptionally broad. There is no longer a property requirement for voting, poll taxes are forbidden, and there are rigorous anti-discrimination statutes in effect. Moreover, if it did not do it then, the American polity now is about as close to reflecting the sovereignty of all the people as it has been at any time in our history, if not political history itself. Amendment of the Constitution has been done and remains theoretically possible. Therefore, it might still make some sense to suggest that the Constitution now reflects the will of the people.

But to accept Hamilton's reasoning today for what the courts do remains more than a bit problematic. First of all, by taking an objective look at what the United States Supreme Court has done at least since the New Deal, it becomes apparent that the Court has roamed far from the understanding of the framers. Decisions making the running of state and local educational establishments,[13] state and local law enforcement,[14] state redistricting,[15] and the legitimacy of state laws regarding abortion,[16] contracep-

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11 Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 383-84 (1997); *see also* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404-05 (1857) (holding African Americans were not encompassed by the language of the Declaration of Independence or Constitution and could not be citizens), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

12 *See* Richard Briffault, *The Contested Right to Vote*, 100 MICH. L. REV. 1506, 1509-10 (2002) (indicating that property requirements were prominent from the colonial period until the latter half of the nineteenth century).

13 The most famous of these, is, of course is *Brown v. Board of Education*, 347 U.S. 483 (1954) (deciding that segregated public schools violated the Fourteenth Amendment to the Constitution, and that the federal courts could order that the dual school systems maintained in many states be dismantled).

14 The most important decisions declaring the Bill of Rights' provisions gave the federal courts the power to mandate procedures for state and local law enforcement were *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (requiring that prisoners be read their constitutional rights upon arrest), and *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (ruling that evidence obtained by the police in violation of a suspect's Fourth Amendment rights to be free from unreasonable searches and seizures would not be permitted to be introduced in state or federal proceedings—the so-called "exclusionary rule").

15 Reynolds v. Sims, 377 U.S. 533, 568 (1964) (declaring that the only permissible basis for state redistricting was population—the so-called "one man, one vote" rule); Baker v. Carr, 369 U.S. 186, 197-98 (1962) (holding that redistricting by states could be examined by the Court for possible constitutional violations).

tion,[17] and consensual homosexual conduct[18] a matter for the federal courts, and for the federal courts to declare unconstitutional, cannot seriously be understood as the exercise of "judgment" rather than "will." I think it is fair to say that these decisions can only be understood as exercises of judicial legislation.[19] With regard to the specific problem that I address, it is difficult to understand what the Court has done in permitting Congress to regulate myriad state and local functions as consistent with the original understanding of the 1789 Constitution. This is especially so when considering how the Supreme Court Justices have consciously exercised their will and expanded the reach of the Commerce Clause since 1937.[20]

Even so, even at the higher reaches of the American legal academy, we still like to believe that ours is a government of laws and not men, that the rule of law endures, and that Montesquieu got it right when he argued that if the power of legislating be not separated from the power of judging, then liberty cannot prevail.[21] If we did not hold on to that belief, it is hard to understand how we could go on, because if judicial discretion to engage in arbitrary acts was all there was, we would be teaching in schools of fiat rather than schools of law.

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16 Roe v. Wade, 410 U.S. 113, 154-56 (1973) (finding a right in the Fourteenth Amendment for a woman to terminate a pregnancy before fetal viability, so that the states were thereafter no longer permitted categorically to bar abortion).

17 Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965) (declaring that "penumbras" and "emanations" from the First, Fourth, Fifth, and Ninth Amendments created a "right of privacy" in the Constitution, and this right prohibited the state of Connecticut from legally barring the use of contraception by married couples.)

18 Lawrence v. Texas, 539 U.S. 558, 578-79 (2003) (holding that states may not criminalize same-sex consensual sexual relations).

19 *See generally* STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION: RACE, RELIGION, AND ABORTION RECONSIDERED 49-58 (1994).

20 *Id.* at 143-49. For some key examples of the Supreme Court broadening the reach of Congress's power to regulate interstate commerce, see especially *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 (1937), permitting Congress to regulate collective bargaining at a steel production plant, on the grounds that a work stoppage at that plant might have an effect on interstate commerce, in effect reversing earlier decisions that had indicated that "manufacturing" was not "commerce," and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-62 (1964), indicating that the power to regulate interstate commerce gave the federal government the power to enforce federal laws forbidding discrimination in the provision of hotel accommodations by private parties because such travel involved "interstate commerce." Prior to the *Heart of Atlanta Motel* decision, it was believed that such anti-discrimination laws could only be invoked to prevent discriminatory behavior by state or local governments.

21 Montesquieu was quoted to that effect by Alexander Hamilton in *Federalist No. 78*. THE FEDERALIST NO. 78, *supra* note 7, at 464-65 ("For I agree that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'" (quoting 1 MONTESQUIEU, SPIRIT OF THE LAWS 186)).

II. WHAT THE DECISION ON THE PPACA MEANS

The upcoming decision on the PPACA, then, is a fundamental test of whether there is anything left in the rule of law, and of whether we still believe in Hamilton, Montesquieu, popular sovereignty, or the Constitution itself. This is because review of the PPACA involves the interpretation of perhaps the most important provision of the Bill of Rights, the Tenth Amendment, which is the cornerstone of our constitutional system of limited government and dual sovereignty. This Amendment, elegant in its simplicity, states that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[22] This has traditionally been interpreted to mean, first, that the federal government created by the Constitution is one of limited and enumerated powers. Second, it means that the "police power," the normal exercise of popular sovereignty—that is, the ability generally to regulate the polity—is lodged in the state and local governments, rather than the federal government.[23]

The Tenth Amendment's strictures, limiting the federal government to enumerated powers, are, of course, a restatement of our core principles, rejecting arbitrary government and preserving popular sovereignty. As Justice Kennedy recently reminded us, the notion of dual sovereignty (government exercised both by state and local governments and by the federal government), or, as we also refer to it, "Federalism," is an essential protection to individual liberty.[24] Our theory is that one sovereign with unlimited power (and the Framers had before them the example of an omnipotent English Parliament) was bound to act arbitrarily and take away individual liberty, but this would be less likely to occur if the power of one sovereign (e.g. the federal government) was checked by another (the state and local governments, or the people themselves). Indeed, as Madison noted in the famous *Federalis*t *No. 51*, if men were angels, no government would be needed, but since they were not, there was a need for government to police itself.[25] The Constitution's federal structure (as well as the notion, from

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22 U.S. CONST. amend X.

23 *See* United States v. Lopez, 514 U.S. 549, 567-68 (1995) (deciding congressional authority under the Commerce Clause may not be extended to the point where it usurps the general police power retained by the states).

24 *See* Bond v. United States, 131 S. Ct. 2355, 2364 (2011) (stating that "[f]ederalism secures the freedom of the individual," and protects our system of dual sovereignty).

25 THE FEDERALIST NO. 51, *supra* note 7, at 319 (James Madison) ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and, in the next place oblige it to control itself.").

Montesquieu, of the need to separate the executive, legislative, and judicial powers) was designed to do just that.[26]

III. THE CONSTITUTIONALITY OF THE PPACA'S "INDIVIDUAL MANDATE"

There are, perhaps, multiple constitutional difficulties with various provisions of the PPACA, but I am concerned with only one, the PPACA's "individual mandate." This provision has so far resulted in several declarations of unconstitutionality, and it is the one that everyone appears to concede is the core of the PPACA. The "individual mandate," requires all adult Americans to purchase (usually from private parties) health insurance. If the individual does not make such a purchase, he must pay a "penalty" to the federal government.[27]

In a move of considerable audacity (if not blatant hypocrisy), given the PPACA's proponents' prominent denials that the "penalty" was actually a "tax," government attorneys defending the PPACA's constitutionality have described this "penalty" as a "tax" repeatedly nevertheless. This is because defining it as a "tax" might make the individual mandate's constitutionality less of a problem (in light of the Sixteenth Amendment, Congress's taxing power is now virtually plenary). Moreover, if it was a "tax," the so-called "Anti-Injunction" Act might bar a challenge to the PPACA for several years.[28]

Judge Roger Vinson provided one of the crispest rejections of the assertion that the individual mandate's "penalty" is a "tax." Judge Vinson

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[26] *Id.* at 319-22. Madison proceeds to explain that this is done in the federal Constitution through the devices of separation of powers and dual sovereignty, the latter allowing the state governments to check the federal government, and vice versa. *Id.* at 320-22. The Tenth Amendment codifies this notion in the Constitution.

[27] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119, 242-49 (2010) (as amended by the Health Care and Education Reconciliations Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010)).

[28] See, for example, Judge Roger Vinson's comments on this argument:

> The Anti-Injunction Act [26 U.S.C. § 7421(a)] provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person . . . ." The remedy for challenging an improper tax is a post-collection suit for refund. As the Supreme Court has explained:
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> > The Anti-Injunction Act . . . could scarcely be more explicit—"no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court . . ." The Court has interpreted the principal purpose of this language to be the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference, "and to require that the legal right to the disputed sums be determined in a suit for refund." The Court has also identified "a collateral objective of the Act—protection of the collector from litigation pending a suit for refund."
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> *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736-37, 94 S. Ct. 2038, 40 L. Ed. 2d 496 (1974) (citations omitted) . . . .

Florida v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120, 1130-31 (N.D. Fla. 2010) (alterations in original).

emphasized the repeated denials by the President and other proponents of the PPACA that the "penalty" was a "tax," and also the fact that other provisions of the PPACA are clearly earmarked as "taxes," while this penalty is not.[29] Given that the government again asserts that the PPACA's individual mandate "penalty" is a "tax," the Supreme Court will have the final word on this.[30] Yet, given that most courts have rejected this argument, and its rather startling inconsistency with prior government claims, I am going to assume that this argument will fail in the Supreme Court. Thus, if the "individual mandate" is to pass constitutional muster, it must do so under the aegis of the Commerce Clause, to which I will now turn. This Clause of the Constitution permits the federal government "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[31] There are no international or Native American implications here. The only question, then, is whether the individual mandate is a permissible exercise of the power to regulate interstate commerce.

There is no denying, as hinted earlier, that the Supreme Court has broadened the reach of the term "interstate commerce." In the early days of the Republic, courts understood this term to extend to navigation on interstate waters.[32] Yet, as late as the closing decade of the nineteenth century, it was not thought to extend to manufacturing within a state, but only to the trade that succeeded manufacturing.[33] By the 1930s, however, this more restrictive definition of "interstate commerce," was eroding. The Supreme Court declared that the power to regulate commerce extended to the regulation of collective bargaining between capitalists and laborers involved in the manufacturing of goods that eventually travelled in interstate commerce.[34] This was a watershed, but even more striking was the famous decision, *Wickard v. Filburn*.[35] There, the Court held that Congress could regulate the amount of a farmer's fields that could be planted with wheat con-

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29 *Id.* at 1133-41. Particularly noteworthy is Judge Vinson's footnote five to his opinion:

> Although it only matters what Congress intended, I note for background purposes that before the Act was passed into law, one of its chief proponents, President Barack Obama, strongly and emphatically denied that the penalty was a tax. When confronted with the dictionary definition of a "tax" during a much-publicized interview widely disseminated by all of the news media, and asked how the penalty did not meet that definition, the President said it was "absolutely not a tax" and, in fact, "[n]obody considers [it] a tax increase."

Id. at 1133 n.5 (alterations in original) (quoting *Obama: Requiring Health Insurance is Not a Tax Increase*, CNN POL. (Sept. 20, 2009, 2:43 PM), *available at* http://www.cnn.com/2009/POLITICS/09/20/obama.health.care/index.html).

30 *See* Petition for a Writ of Certiorari at 4-5, 26-29, Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir.), *cert. granted*, 132 S. Ct. 604 (2011) (No. 11-398), 2011 WL 5025286, at *4-5, *26-29 [hereinafter Government Petition].

31 U.S. CONST. art. I, § 8, cl. 3.

32 *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190 (1824).

33 *See* United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895); *see also* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935).

34 *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41-43 (1937).

35 317 U.S. 111 (1942).

sumed only by his household.[36] The Court reasoned that the farmer's failure to buy wheat for his own consumption needs (if multiplied by other farmers similarly situated) would result in a lessening of wheat purchased in interstate commerce, and thus it was subject to congressional regulation.[37] Odd as this decision was, the Supreme Court reaffirmed *Wickard* quite recently, in another decision, *Gonzales v. Raich*.[38] Following *Wickard*, the Court declared that Congress possessed the power to prohibit the growing of cannabis for home consumption (even where a state (California) permitted it).[39] The Court reasoned that, if that cannabis had to be purchased instead of home-grown, it would be purchased in a market involving interstate commerce, and Congress had the power to prohibit all purchases in that interstate market.[40] One could be forgiven if one took these two rather topsy-turvy decisions regulating non-participation in interstate commerce as if it were involvement in interstate commerce, to mean that there now are, indeed, no limits on the regulation of interstate commerce. One might be further forgiven if one implied that this is precisely what the proponents of the constitutionality of the individual mandate believe.

Even so, two important Supreme Court decisions, in addition to that of Justice Kennedy referred to earlier,[41] do indicate that that the Court believes there are limits to Congress's power to regulate interstate commerce.[42] The first of those decisions, *United States v. Lopez*,[43] decided in 1995, required the Court to determine whether the Gun-Free School Zones Act of 1990[44] passed constitutional muster.[45] Purportedly enacted pursuant to the interstate commerce regulatory power, the Act imposed federal criminal penalties for anyone not so authorized by law who carried a firearm within 1000 feet of any school.[46] The argument in support of the Act appeared to be that firearms near a school interfered with education, and interference with education would impede students' productive abilities, which would, in turn, result in less interstate commerce.[47] The Court decided that this effect on

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36 *Id*. at 115, 128-29.

37 *Id*. at 125-29.

38 545 U.S. 1 (2005).

39 *Id*. at 7, 22.

40 *Id*. at 19.

41 *See* Bond v. United States, 131 S. Ct. 2355, 2364 (2011) (Kennedy, J.).

42 As the Eleventh Circuit observed in a decision rejecting the constitutionality of the individual mandate, a decision which is now before the Supreme Court on a writ of certiorari: "[T]he Supreme Court has staunchly maintained that the commerce power contains outer limits which are necessary to preserve the federal-state balance in the Constitution." Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1241, 1269 (11th Cir.), *cert. granted*, 132 S. Ct. 604 (2011).

43 514 U.S. 549 (1995).

44 18 U.S.C. § 922(q) (1994).

45 *Lopez*, 514 U.S. at 552.

46 18 U.S.C. §§ 921(a)(25), 922(q)(2); *Lopez*, 514 U.S. at 551 & n.1.

47 *Lopez*, 514 U.S. at 564.

interstate commerce was just too remote.[48] It also decided that to permit Congress to pass legislation on this theory would be to permit Congress to regulate anything, since virtually all activity, pursuant to this theory, could have an effect on interstate commerce.[49]

A similar holding followed a few years later in *United States v. Morrison*.[50] In that case, the Court reviewed the Violence Against Women Act,[51] which, *inter alia*, provided civil remedies for particular acts of violence against women.[52] The theory, similar to that articulated in the case of the Gun-Free School Zones Act, was that violence against women, and the threat of violence against women, would impede women's participation in interstate commerce.[53] Just as in *Lopez*, the Court observed that this legislative theory would set no limits to what Congress could do, and, in our system with federal powers that were supposed to be limited and enumerated, this could not be.[54]

Taking *Lopez* and *Morrison* together, these two cases, and particularly *Lopez*, appear to stand for two propositions. First, there must be some limits to Congressional Power under the Commerce Clause in order to preserve the nation's federalist structure. Second, the general police power (for example, to punish criminal acts, such as unauthorized carrying of firearms and violence against women, or even to regulate health care and insurance) must remain with the state and local governments,[55] and may not be usurped by the federal government.[56] Taking these precedents and these principles into consideration, then, is the individual mandate unconstitutional?

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48 *Id*. at 567.

49 *Id*. at 564.

50 529 U.S. 598 (2000).

51 Violence Against Women Act of 1994, Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1902 (codified as amended primarily in scattered sections of 42 U.S.C.)

52 *Morrison*, 529 U.S. at 605-06 (citing Violence Against Women Act § 40302, 108 Stat. 1941-42).

53 *Id*. at 615.

54 *Id*. at 615-18.

55 This was summed up very nicely recently by the Eleventh Circuit:

> The Supreme Court has placed two broad limitations on congressional power under the Commerce Clause. First, Congress's regulation must accommodate the Constitution's federalist structure and preserve "a distinction between what is truly national and what is truly local." [United States v. Lopez, 514 U.S. 549, 567-68 (1995)]. Second, the Court has repeatedly warned that courts may not interpret the Commerce Clause in a way that would grant to Congress a general police power, "which the Founders denied the National Government and reposed in the States." *Morrison*, 529 U.S. at 618 . . . *see also Lopez*, 514 U.S. at 584 . . . (Thomas, J., concurring) ("[W]e *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power.").

Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1284 (11th Cir.), *cert. granted*, 132 S. Ct. 604 (2011) (fourth alteration in original).

56 Compare Florida District Judge Vinson's summary of what he decided when he determined the individual mandate to be unconstitutional, reported in *Florida v. United States Department of Health and Human Services*, 780 F. Supp. 2d 1307 (N.D. Fla. 2011):

The proponents of the PPACA's constitutionality point out that there are few areas of national concern more important than health care, and that, at this point, the business of health care accounts for about one-sixth of the American economy.[57] There is no doubt that elements of health care thus impact interstate commerce, as medical supplies, medical personnel, and medicines clearly are sold or travel in interstate commerce. Nevertheless, the regulation of insurance is, generally speaking, a function of the state police power—each state regulates the insurance industry on its own. The PPACA is an unprecedented attempt to create a federal structure of insurance activity and health care regulation of a kind never before seen in America.[58] For this reason alone, there might be doubts about the constitu-

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> I . . . concluded that the government's arguments in this case—including the "economic decisions" argument—could authorize Congress to regulate almost any activity (or inactivity). This could not be reconciled with a federal government of limited and enumerated powers. I thus concluded that the meaning of the term "commerce" as understood by the Founding Fathers would not have encompassed the individual mandate, not because of some vague "original intent," but because it would have violated the fundamental and foundational principles upon which the Constitution was based: a federal government with limited enumerated powers which can only exercise those specific powers granted to it.

Id. at 1310. For a similar powerful summary of the Founders' conception of a limited role for the federal government under the Commerce Clause, see, for example, the comments of the Eleventh Circuit, in the course of its decision throwing out the individual mandate:

> In enforcing these limits, we recognize that the Constitution established a federal government that is "'acknowledged by all to be one of enumerated powers.'" [United States v. Comstock, 130 S. Ct. 1949, 1956 (2010) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819))]. In describing this constitutional structure, the Supreme Court has emphasized James Madison's exposition in The Federalist No. 45: "'The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.'" [Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (quoting THE FEDERALIST No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961)); *see also Lopez*, 514 U.S. at 552 (quoting same)]. In that same essay, Madison noted that the commerce power was one such enumerated power: "The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained."[THE FEDERALIST NO. 45, *supra*, at 293].

Florida, 648 F.3d at 1283.

57 *See, e.g.*, Government Petition, *supra* note 30, at 2 ("Congress enacted the Patient Protection and Affordable Care Act . . . to address a profound and enduring crisis in the market for health care that accounts for more than 17% of the Nation's gross domestic product.").

58 *See, e.g.*, Brief of the Wash. Legal Found. & Constitutional Law Scholars as Amici Curiae in Support of Respondents at 32, U.S. Dep't of Health & Human Servs. v. Florida, 132 S. Ct. 604 (2011) (No. 11-398):

> Although in recent years the federal government has adopted numerous statutes regulating health care, it has never compelled ordinary citizens to purchase health insurance or other health care products . . . . It has never forced citizens to purchase products of any kind merely as a consequence of their status as residents of the United States.

Id. For the point that insurance has traditionally been a state-law concern, see, for example, the comments of the Eleventh Circuit:

> [I]nsurance qualifies as an area of traditional state regulation. This recognition counsels caution, and supplies reviewing courts with even greater cause for doubt when faced with an unprecedented economic mandate of dubious constitutional status. *Cf. Lopez*, 514 U.S. at 583 . . . (Kennedy, J., concurring) ("The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right

tionality of the PPACA—like the Gun-Free School Zones Act and the Violence Against Women Act, it operates in an area traditionally reserved for the exercise of the states' police power.[59] Still, while the federal legislation involved in the *Lopez* and *Morrison* cases required piling inference on top of inference to support the connection to interstate commerce, there is no doubt that health care is something that directly involves interstate commerce. Indeed, the PPACA's defenders, and, in particular the government lawyers who filed a Petition for Certiorari with the Court, suggest that the difference between *Lopez* and *Morrison* and the PPACA is that the PPACA seeks to regulate "economic activity," while bringing guns into schools and violence against women were not "economic" in nature.[60] But this misunderstands what *Lopez* and *Morrison* were really all about. They were not concerned with drawing distinctions between "economic" and "non-economic" activity, but rather were landmark opinions. They reminded us that there are limits to the federal government's reach no matter what the nature of the activity involved is. Moreover, they remind us that government should not exceed these limits by seeking to pile inference upon inference through impermissibly attenuated arguments to erode our system of federalism.

Taken in this light, there is an aspect of the PPACA's individual mandate of that does resemble the attenuated arguments in *Lopez* and *Morrison*, and that is the fact that the PPACA attempts to regulate "inaction" rather than "action." It imposes a penalty (again, not a "tax"[61]) when a consumer decides not to purchase health insurance. It does, then, not exactly regulate interstate commerce. Instead, it attempts to regulate a decision *not* to participate in interstate commerce.[62] It attempts to regulate, in short, a decision to

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> of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term.").

Florida, 648 F.3d at 1305. The Eleventh Circuit also observed, "The health care industry also falls within the sphere of traditional state regulation. A state's role in safeguarding the health of its citizens is a quintessential component of its sovereign powers." *Id.*

59 *See Florida*, 648 F.3d at 1305-06.

60 *See, e.g.*, Government Petition, *supra* note 30, at 24 ("Health care and the means of paying for it are 'quintessentially economic' in a way that possessing guns near schools and domestic violence are not." (quoting Thomas More Law Ctr. v. Obama, 651 F.3d 529, 557-58 (6th Cir. 2011) (Sutton, J., concurring) (internal citations omitted) (finding the PPACA constitutional), *petition for cert. filed*, July 26, 2011 (No. 11-117)) (internal quotation marks omitted)).

61 *See supra* text accompanying notes 28-30.

62 The far-reaching nature of this attempted regulation is perhaps best captured by some language from the Eleventh Circuit's decision that this exercise of federal power is unprecedented and out of bounds:

> In sum, the individual mandate is breathtaking in its expansive scope. It regulates those who have not entered the health care market at all. It regulates those who have entered the health care market, but have not entered the insurance market (and have no intention of doing so). It is overinclusive in *when* it regulates: it conflates those who presently consume health care with those who will not consume health care for many years into the future. The government's position amounts to an argument that the mere fact of an individual's existence sub-

do nothing, rather than to do something. Thus, the plaintiffs in *Wickard* and *Raich*, at least, made decisions to act: in the one case to grow wheat, and in the other to grow cannabis. But in the case of the individual mandate, the regulated activity is the decision to do nothing. Of course, the PPACA's proponents argue that sooner or later everyone will either need to purchase health care insurance or will need the provision of health care services (which, if insurance doesn't exist, the state will have to pay for or supply). Thus, everyone affected by the individual mandate will—sooner or later—be involved in the interstate business of health care. Yet, this argument suffers from the attenuated nature of the arguments supporting the legislation in *Lopez* and *Morrison*.

IV. CONCLUSION: WHY THE "INDIVIDUAL MANDATE" IS UNCONSTITUTIONAL

More to the point, the argument permitting the regulation of inaction, that is, the argument in support of forcing consumers to participate in the market, appears to open an illimitable area for the federal government's operation. It appears to suggest, for example, that Congress could dictate consumer choices in a myriad of ways. For example, Congress could force Americans to purchase environmentally-friendly products such as electric cars, or solar energy panels, on the theory that the decision not to purchase such items would have an effect on interstate commerce. More directly relevant to the health care area, the argument in support of the individual mandate is that forcing Americans to buy health insurance, whether they believe they need it or not, will provide a fund that will spread the costs of health care. This fund will lower the costs of such insurance to the point where everyone can be covered, even those with chronic conditions, or advanced age. Yet, this argument could easily be applied in other contexts. It does not take much imagination to see, for example, that healthier diets for Americans could result in reduced health care services costs. Thus, the critics of the PPACA have suggested that if the individual mandate is constitutional, it would be constitutional to force Americans to purchase and consume more green vegetables. The federal government, then, could force Americans to eat their spinach or broccoli, as a way of reducing health care costs, and thereby regulating interstate commerce.[63]

> stantially affects interstate commerce, and therefore Congress may regulate them at every point of their life. This theory affords no limiting principles in which to confine Congress's enumerated power.

Florida, 648 F.3d at 1295.

[63] See, to similar effect, Federal District Court Judge Roger Vinson's justification for his finding the "individual mandate" unconstitutional:

> I determined (consistent with the *Lopez* majority's rejection of the dissent's arguments [in that case]) that "market uniqueness" is not an adequate limiting principle as the same basic arguments in support of the individual mandate could be applied in other contexts outside the

The argument might be a somewhat fanciful one, but it illustrates the point that if the individual mandate, which regulates inaction, is constitutional, there are no easily discernible limits to constitutional power, and the principles of *Morrison* and *Lopez* are violated. Thus, federalism and the structure of government praised by Hamilton, Madison, and Justice Kennedy will have ceased to exist. The police power, which ought, of right, to belong to the states, will have been usurped by the federal government, and, in flat denial of the Tenth Amendment, we will have a federal government of unlimited and unenumerated power.

Significantly, the government lawyers who filed a petition seeking certiorari in an attempt to uphold the PPACA do not even attempt to rebut the argument that, if the federal government can regulate "inactivity" in this case, there is virtually nothing left that the federal government cannot do.[64] There may be some in Congress and in the Executive branch who would seek such a government, and who may even, in good faith, believe that such a federal government is required in our times. Such a federal government ought not to be possible, however, without a Constitutional Amendment. If the argument about the Constitution reflecting popular sovereignty still means anything, or in other words, if we still adhere to the rule of law, that kind of fundamental change should only come by a decision of the American people themselves. If the Court is to be faithful to the oath the Justices take to support the Constitution and laws of the United States,[65] they must reject the individual mandate.

> "unique" health care market, and could be used to require that individuals buy (under threat of penalty) virtually any good or service that Congress has a '"rational basis" to conclude would help the national economy, from cars to broccoli.

Florida v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1307, 1310-11 (N.D. Fla. 2011); *see also id.* at 1311 n.2 ("Although some have suggested that the possibility of Congress being able to claim such a power [i.e., the 'broccoli mandate'] is Constitutionally implausible, subsequent events have only reinforced the legitimacy of this concern. On February 2, 2011, two days after my order was entered, the Senate Judiciary Committee held a hearing to explore the Constitutionality of the individual mandate. The possibility of a 'broccoli mandate' was discussed at this hearing. Former Solicitor General and Harvard law professor Charles Fried testified (during the course of *defending* the Constitutionality of the individual mandate) that under this view of the commerce power Congress could, indeed, mandate that everyone buy broccoli."). For Professor Fried's sentiments, see Lazarus, *supra* note 4. *See also The Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (written testimony of Professor Charles Fried at 4-5), *available at* http://www.judiciary.senate.gov/pdf/11-02-02%20Fried%20Testimony.pdf.

64 *Cf.* Government Petition, *supra* note 30, at 18-23.

65 Their oath is as follows:

> I, [NAME], do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [TITLE] under the Constitution and laws of the United States. So help me God.

28 U.S.C. § 453 (2006).