

Fall 2010

## A Long, Strange Trip: My First Year Challenging the Constitutionality of Obamacare

Ilya Shapiro  
*University of Chicago Law School*

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Online ISSN: 2643-7759

### Recommended Citation

Ilya Shapiro, *A Long, Strange Trip: My First Year Challenging the Constitutionality of Obamacare*, 6 FIU L. Rev. 29 (2010).

DOI: <https://dx.doi.org/10.25148/lawrev.6.1.6>

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# A Long, Strange Trip: My First Year Challenging the Constitutionality of Obamacare

*Ilya Shapiro*\*

## I. INTRODUCTION

When I joined the Cato Institute in September 2007, I didn't really know what I was getting myself into. It was my sixth job in just over four years out of law school – after clerking, a political campaign, two large firms, and a short stint as a rule-of-law adviser in Iraq – and now it was time for something completely different. The life of a think tank scholar is odd enough: you're not an academic, but not a political player or activist either. The life of a think tanker specializing in constitutional law is stranger still, particularly given my responsibility for Cato's burgeoning *amicus* brief program. Sometimes I get to pretend I'm a scholar, sometimes an attorney, and sometimes a pundit. The job takes on all these aspects at different times, but it's nothing like what I had experienced in my young legal career; I'm no longer really a lawyer but I do play one on TV.<sup>1</sup> Whereas the role of a judicial clerk or law firm associate is well defined, the only set part of my current job description is that I have the privilege of editing the *Cato Supreme Court Review* – and that's more guidance than any of my colleagues get!

As it turns out, the open-ended nature of the job, and the podium that a Cato affiliation provides, placed me near the heart of the legal-

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\* Senior Fellow in Constitutional Studies, Cato Institute, and Editor-in-Chief, *Cato Supreme Court Review*; J.D., University of Chicago Law School; M.Sc., London School of Economics; A.B., Princeton University. Thanks to Jonathan Blanks, Trevor Burrus, and Michael Wilt for timely research assistance, and to Richard Albert for commenting on an earlier draft. I also owe a debt of gratitude to Randy Barnett, Richard Epstein, Bob Levy, and Roger Pilon for providing the foundations of my constitutional thinking and inspiration to do battle in this arena. If I hadn't been following in the footsteps of these giants, the journey this article covers would have been short and insignificant.

<sup>1</sup> See, for example, my appearance on *The Colbert Report* (Comedy Central July 8, 2010), <http://www.colbertnation.com/the-colbert-report-videos/340923/july-08-2010/automatics-for-the-people---ilya-shapiro---jackie-hilly>.

political storm that the latest attempt to reform the American health care system has become. I went from not being sure of which legal topics to research in 2010 – beyond generally watching the Supreme Court – to spending over half my time on one issue. I went from not knowing very much about health care law or policy to knowing (a bit) more but realizing that it's largely irrelevant to the constitutional debate. Perhaps most importantly, I went from a general understanding of provisions like the Commerce Clause and Necessary and Proper Clause to seeing how that high theory plays out in front-page news stories.

Similarly, as far as those diverse roles think tankers play, I have been called upon to synthesize and marshal complex legal ideas for academic, judicial, and popular consumption. Through several briefs, dozens of debates and panels, countless blog posts and media interviews, and now a law review article, I have been living and breathing the “Obamacare” constitutional debate.<sup>2</sup> The process has exercised my analytical and communicative abilities in novel ways and given me a unique perspective on the legal challenges this legislation spawned. It's also exposed me to every conceivable argument against my position – and to an evolution in points of emphasis.

And so, in writing this article I thought it would be more instructive to cover the constitutional issues attending the Obamacare lawsuits through the prism of how I've experienced them – rather than simply evaluating the law and showing why the individual mandate, at least, exceeds Congress's constitutional authority. After all, the arguments pro and con are well and thoroughly presented in the briefs and judicial opinions in the various cases. Were I merely to analyze the current state of those cases, this article would be overtaken by events before it even hit the presses.

But neither is this meant to be a foundational article of the sort Georgetown law professor Randy Barnett recently published to explain why the individual mandate is, among other defects, an uncon-

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<sup>2</sup> “Obamacare” refers of course to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 42 U.S.C. § 18001), as amended by the Health and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010). I use the term because most people colloquially refer to it that way—though those who support it use quotation marks—in large part because it's much easier to say than “PPACA,” “Affordable Care Act,” or any other more technical term. While thought in some quarters to be pejorative, I've never understood how that's the case (unless said with a sneer, but by that standard anything can be pejorative). Even the leading academic supporters of Obamacare's constitutionality, such as Yale law professors Akhil Amar and Jack Balkin (who both make cameo appearances toward the end of this article), say “Obamacare.” The one semi-accurate criticism I've heard is that the law was mostly written by Congress, not the White House—for which the president got plenty of heat from the Left. But that just means it would be better to call it Pelosi-Reid-care, which presumably is no more or less pejorative. In any event, that ship has sailed.

titutional “commandeering of the people.”<sup>3</sup> I’m afraid I break no new doctrinal ground here, letting my previous court filings and commentary speak for themselves.

No, echoing any endeavor where the process matters as much as the product, I instead aim to interweave enough of the legal substance here with a narrative designed to keep the story moving. While no “Hearts of Darkness” – the film about the production of “Apocalypse Now,” subtitled “A Filmmaker’s Apocalypse” – this journey has at least shown me the horror of unchecked federal power. It’s a journey that has still far to run of course, but at the very least we have reached the end of the beginning.

What follows, then, is an account of my (first) year battling Obamacare.

## II. PRELUDE TO A LEGAL ODYSSEY

In late 2009, as the debate in Congress over how to reform the health care system raged – remember how Sen. Joseph Lieberman (I-CT) killed the public option, then Majority Leader Harry Reid (D-NV) kept the Senate in session through Christmas Eve to pass Obamacare on a straight party-line vote – my attention was elsewhere. Yes, I remember cringing when House Speaker Nancy Pelosi’s response to a question about the constitutional concerns being raised by the individual mandate was, “Are you serious?”<sup>4</sup> (The former Speaker presumably believes that the Constitution is merely the refuge of the scoundrel who doesn’t have any policy arguments to make.) But my focus was on a different constitutional issue, the question of whether – and, just as importantly, *how* – the individual right to keep and bear arms recognized in *District of Columbia v. Heller*<sup>5</sup> would be applied to the states. The Supreme Court was hearing *McDonald v. Chicago*<sup>6</sup> in March – and would decide the case in favor of the would-be gun owners at the end of June – so I was doing all I could to push extension of the right to armed self-defense via the Privileges or Immunities Clause. Resurrecting this doctrine was more than just an academic point; using Privileges or Immunities instead of substantive due process would be more faithful to constitutional text and open the

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<sup>3</sup> Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J. L. & LIBERTY 581 (2010).

<sup>4</sup> See, e.g., Matt Cover, *When Asked Where the Constitution Authorizes Congress to Order Americans to Buy Health Insurance, Pelosi Says: ‘Are You Serious?’*, CNSNEWS.COM (Oct. 22, 2009), <http://www.cnsnews.com/node/55971>.

<sup>5</sup> 128 S. Ct. 2783 (2008).

<sup>6</sup> 130 S. Ct. 3020 (2010).

opportunity to strengthen protections for long-sighted economic liberties and property rights.<sup>7</sup>

I mention my *McDonald* work not to publicize it anew, but because that case put me in closer contact with Randy Barnett, who had quite literally written the book on the proper way to interpret the Constitution's lost passages.<sup>8</sup> I already knew Randy and his scholarship fairly well – he had given a landmark lecture on the Constitution's libertarian roots at our 2008 Constitution Day conference, which became a key article in the journal I edit<sup>9</sup> – but engaging with him on *McDonald* (in which debate he also prominently figured) set the stage for collaboration on Obamacare.

Indeed, one of the first events that began to crystallize my thinking about the constitutional issues attending Obamacare was the publication on December 9, 2009, of a Heritage Foundation memorandum that Randy co-authored, entitled “Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional.”<sup>10</sup> This paper argued that the proposed health care law “takes congressional power and control to a striking new level. . . . An individual mandate to enter into a contract with or buy a particular product from a private party, with tax penalties to enforce it, is unprecedented – not just in scope but in kind – and unconstitutional as a matter of first principles and under any reasonable reading of judicial precedents.”<sup>11</sup> Moreover, “if this precedent is established, Congress would have the unlimited power to regulate, prohibit, or mandate any or all activities in the United States. Such a doctrine would abolish any limit on federal power and alter the fundamental relationship of the national government to the states and the people.”<sup>12</sup> While this line of argument was not universally accepted – even UCLA's Eugene Volokh, among the most libertarian law professors, expressed skepticism at the forum Heritage held to release the paper of whether the Supreme Court would go along<sup>13</sup> – it was a serious shot across Obamacare's bow.

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<sup>7</sup> See generally Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 GEO. J.L. & PUB. POL'Y 1 (2010).

<sup>8</sup> RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

<sup>9</sup> Randy E. Barnett, *Annual B. Kenneth Simon Lecture: Is the Constitution Libertarian?*, 2008-2009 CATO SUP. CT. REV. 9 (2009).

<sup>10</sup> Randy Barnett, Nathaniel Stewart & Todd Gaziano, *Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional*, EXEC. SUMMARY LEGAL MEM. NO. 49, DEC. 9, 2009, available at [http://s3.amazonaws.com/thf\\_media/2009/pdf/lm\\_0049.pdf](http://s3.amazonaws.com/thf_media/2009/pdf/lm_0049.pdf).

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.* at 6.

<sup>13</sup> Eugene Volokh, Remarks at The Heritage Foundation Panel: Is the Personal Mandate to Buy Health Insurance Constitutional? (Dec. 9, 2009).

Notwithstanding the percolating constitutional arguments being made against the individual mandate, however, Obamacare passed the Senate. But an outcry arose about provisions that had been inserted at the last minute to appease recalcitrant (Democratic) senators: the Nebraska Compromise for Ben Nelson, the Louisiana Purchase for Mary Landrieu, some Florida Gator-Aid for Bill Nelson. A few weeks later, Republican Scott Brown won a stunning special election for “Ted Kennedy’s seat” in Massachusetts.<sup>14</sup> Many observers, myself included, hailed the Brown win as Obamacare’s death knell; surely such a loss in the bluest of blue states would make Democrats reconsider their suicidal push for an already-unpopular piece of legislation.

But no, Pelosi was true to her word in being willing to sacrifice her House majority for the health care bill. Even without the power to cut the state-specific carve-outs and other problematic provisions – Scott Brown’s filibuster-enabling forty-first Republican vote prevented the legislation’s return to the Senate – House Democrats passed and, on March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act.<sup>15</sup> Immediately dubbed Obamacare, the law is widely considered to be the most significant federal legislation since the enactment of Medicare and Medicaid in 1965.<sup>16</sup>

That same day, however, the attorneys general of Virginia and Florida filed separate lawsuits challenging Obamacare’s constitutionality, with 12 states joining Florida’s suit: Alabama, Colorado, Idaho, Louisiana, Michigan, Nebraska, Pennsylvania, South Carolina, South Dakota, Texas, Utah, and Washington.<sup>17</sup> Seven more states, plus the National Federation of Independent Business and two individuals, would join the multi-state suit when Florida amended its complaint: Alaska, Arizona, Georgia, Indiana, Mississippi, Nevada, and North Dakota.<sup>18</sup> Another six would join when newly elected executive officials assumed office in January 2011: Iowa, Kansas, Maine, Ohio, Wis-

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<sup>14</sup> Full disclosure: In my personal capacity, I provided some unpaid legal advice to the Brown campaign.

<sup>15</sup> See *supra* note 2.

<sup>16</sup> See, e.g., Richard Adams, *Joe Biden: ‘This is a big fucking deal,’* RICHARD ADAMS’S BLOG (Mar. 23, 2010, 17:13 GMT), <http://www.guardian.co.uk/world/richard-adams-blog/2010/mar/23/joe-biden-obama-big-fucking-deal-overheard>.

<sup>17</sup> See Complaint, Florida v. U.S. Dep’t. of Health & Human Servs., No. 3:10-cv-91-RV-EMT (N.D. Fla. Mar. 23, 2010), available at [http://myfloridalegal.com/webfiles.nsf/WF/MRAY-83TKWB/\\$file/HealthCareReformLawsuit.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MRAY-83TKWB/$file/HealthCareReformLawsuit.pdf).

<sup>18</sup> See Amended Complaint, Florida v. U.S. Dep’t. of Health & Human Servs., No. 3:10-cv-00091-RV-EMT (N.D. Fla. May 14, 2010), available at [http://myfloridalegal.com/webfiles.nsf/WF/JFAO-85FNM9/\\$file/Complaint.pdf](http://myfloridalegal.com/webfiles.nsf/WF/JFAO-85FNM9/$file/Complaint.pdf).

consin, Wyoming.<sup>19</sup> *The Hill* newspaper asked a variety of commentators whether this multi-state lawsuit was “a real legal challenge or a political stunt” and I concluded my response by explaining that “if the challenges to this health care ‘reform’ fail, nobody will ever be able to claim plausibly that the Constitution limits federal power.”<sup>20</sup>

Contrary to many pundits’ dismissal of these challenges as legally frivolous and political sour grapes, these were real lawsuits, with serious lawyers behind them. Virginia’s solicitor general Duncan Getchell was the longtime head of appellate litigation at McGuire Woods and former nominee to the Fourth Circuit, for example, while the multi-state case was led by Baker Hostetler’s David Rivkin initially and then by former U.S. solicitor general Paul Clement on appeal. It was difficult to predict how courts would react, however, because the new health care law was and is unprecedented – quite literally, without legal precedent – both in its regulatory scope and its expansion of federal authority over states and individuals.

As the Congressional Budget Office said in 1994, “The government has never required people to buy any good or service as a condition of lawful residence in the United States.”<sup>21</sup> Nor has it ever said that every man and woman faces a civil penalty for declining to participate in the marketplace. *Never* have courts had to consider such a breathtaking assertion of raw power under the guise of regulating commerce – not even at the height of the New Deal, when the Supreme Court ratified Congress’s regulation of wheat grown for home consumption on the awkward theory that such behavior, when aggregated nationally, affected interstate commerce. Even in that case, *Wickard v. Filburn*, the government claimed “merely” the power to regulate what farmers grew, not to *mandate* that people become farmers, much less to force people to purchase agricultural products.<sup>22</sup>

Put simply, neither the Commerce Clause (alone or as executed via the Necessary and Proper Clause) nor the taxing power, nor any other provision the government – or anyone – has been able to identi-

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<sup>19</sup> See Motion for Leave to File Second Amended Complaint, Florida v. U.S. Dep’t. of Health & Human Servs., No. 3:10-cv-00091-RV-EMT (N.D. Fla. Jan. 18, 2011), available at <http://aca-litigation.wikispaces.com/file/view/Motion+to+amend+complaint.pdf>; Second Amended Complaint, Florida v. U.S. Dep’t. of Health & Human Servs., No. 3:10-cv-00091-RV-EMT (N.D. Fla. Jan. 18, 2011), available at <http://aca-litigation.wikispaces.com/file/view/Second+amended+complaint.pdf>.

<sup>20</sup> Sydelle Moore, *The Big Question: Is the Healthcare Lawsuit a Legal Issue or a Stunt?*, THE HILL’S CONGRESS BLOG (Mar. 24, 2010, 10:13 AM), <http://thehill.com/blogs/congress-blog/politics/88793-the-big-question-is-the-healthcare-lawsuit-a-stunt?page=3> (comments of Ilya Shapiro).

<sup>21</sup> Cong. Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance* 1 (1994).

<sup>22</sup> 317 U.S. 111 (1942).

fy provides a constitutional warrant for an “economic mandate” of the kind contemplated here. Not even, as House Judiciary Committee Chairman John Conyers suggested, the “good and welfare clause.”<sup>23</sup>

Obamacare’s opponents raised several other constitutional points. These include: infringing on state sovereignty; commandeering state officials to enforce federal law; forcing states to enter into coercive (Medicaid) contracts; and violating the spending power – all tied to the Tenth Amendment. The individual mandate, among other issues, has also been raised in lawsuits filed on behalf of individuals, associations, classes, and other non-state plaintiffs. For example, the Thomas More Law Center, a Christian public interest law firm, also filed suit while the ink was still drying on President Obama’s signature. More than 20 lawsuits would be brought – and more are no doubt coming regarding as-yet unexplored parts of the law – triggering an intense legal and political debate about the very first principles of our republic.<sup>24</sup>

### III. THE DEBATE CHALLENGE

Not that you would know that any question about Obamacare’s constitutionality existed by asking the nation’s legal faculties. About a week after the first lawsuits were filed, I came across an article in the *Seattle Times* documenting a panel on the new health care law that the respected University of Washington Law School held.<sup>25</sup> Four professors took the stage, none expressing any constitutional doubts. Liberal bloggers gleefully reported that the organizers “can’t find anyone” to argue against the legislation.<sup>26</sup>

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<sup>23</sup> Ilya Shapiro, *Individual Mandate Is Constitutional – If You Rewrite the Constitution*, CATO @ LIBERTY (Mar. 23, 2010, 11:22 AM), <http://www.cato-at-liberty.org/individual-mandate-is-constitutional-if-you-rewrite-the-constitution/>. As I wrote in that blog post, “even if you excuse Conyers’s casual use of language, what he probably means—the General Welfare Clause of Article I, Section 8—is not a better answer.” *Id.* That clause does not grant Congress any new authority, but instead limits Congress’s use of the powers enumerated elsewhere in that section to legislation that promotes the general (as opposed to regional or parochial) welfare.

<sup>24</sup> For the latest on all the various Obamacare lawsuits, see generally Health Care Lawsuits, [healthcarelawsuits.org](http://healthcarelawsuits.org) and ACA Litigation Blog, [acalitigationblog.blogspot.com](http://acalitigationblog.blogspot.com).

<sup>25</sup> Nick Perry, *UW Panelists Say Lawsuits Challenging Health Bill Lack Merit*, SEATTLE TIMES, Mar. 30, 2010, available at [http://seattletimes.nwsour.com/html/localnews/2011483297\\_healthdebate31m.html](http://seattletimes.nwsour.com/html/localnews/2011483297_healthdebate31m.html).

<sup>26</sup> Zachary Roth, *Debate Planners Can’t Find Anyone to Argue that Health Reform Is Unconstitutional*, TPM (Mar. 31, 2010, 10:09 AM), [http://tpmmuckraker.talkingpointsmemo.com/2010/03/debate\\_planners\\_cant\\_find\\_anyone\\_to\\_argue\\_that\\_heal.php](http://tpmmuckraker.talkingpointsmemo.com/2010/03/debate_planners_cant_find_anyone_to_argue_that_heal.php); see also Zaid Jilani, *College Debate Organizers Unable to Any Law Professors to Argue Health Reform Is Unconstitutional*, THINK PROGRESS (Mar. 31, 2010, 12:16 PM), <http://thinkprogress.org/2010/03/31/college-debate-health/>.



Well, I read this, and thought, ok, the academy is quite left-wing, but surely these people can identify the leading libertarian and conservative scholars, people like Randy Barnett and Richard Epstein, or even my boss, Cato's vice president for legal affairs, Roger Pilon. And didn't the Federalist Society have a lawyers' chapter in Seattle – let alone a student chapter at UW law school? Surely it wouldn't have been too hard to find *someone* to take the position that the government can't make you buy stuff.<sup>27</sup>

I typed up a quick note about this humorous episode for Cato's blog, concluding melodramatically that if none of the “big shots” were available, that I would debate the constitutionality of Obamacare “anytime, anywhere” so long as my expenses were covered.<sup>28</sup> My media colleagues were so enthused by my blog post that they asked me to record a sort of public service announcement making the same declaration.<sup>29</sup> This 30-second video went viral, and the rest is what is detailed below.

My first two debates came at the end of April in Chicago. I had a dry run of sorts at John Marshall Law School – though my “opponent,” Andrea Kovach from the Sargent Shriver National Center on Poverty Law, turned out to be a health policy activist and not a constitutional lawyer – before a much-anticipated homecoming at my alma mater, the University of Chicago Law School. A crowd of 75 people watched me take on my former professor, David Strauss. David was gracious to me personally, complimenting my achievements and saying that I was an exemplary alumnus, but he was utterly contemptuous of my arguments. Libertarians were “outside the mainstream” and my position on federal power was antiquated, representing an outmoded desire to return to a long-eclipsed jurisprudence that was incompatible with modern society. Strauss's refusal to confront seriously my legal position detracted from his presentation. Not surprisingly, then, he got the brunt of the difficult inquiries during Q & A –

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<sup>27</sup> See Ilya Shapiro, *U.S. Can't Force People to Buy Stuff*, CNN.COM (Dec. 13, 2010), [http://articles.cnn.com/2010-12-13/opinion/shapiro.court.mandate.health\\_1\\_individual-mandate-health-insurance-economic-activity?\\_s=PM:OPINION](http://articles.cnn.com/2010-12-13/opinion/shapiro.court.mandate.health_1_individual-mandate-health-insurance-economic-activity?_s=PM:OPINION).

<sup>28</sup> Ilya Shapiro, *Will Debate Constitutionality of Obamacare Anytime, Anywhere*, CATO @ LIBERTY (Mar. 31, 2010, 3:02 pm), <http://www.cato-at-liberty.org/will-debate-constitutionality-of-obamacare-anytime-anywhere/>.

<sup>29</sup> See Ilya Shapiro, *Ilya Shapiro Accepts Challenge to Debate Obamacare*, YOUTUBE (April 1, 2010), [http://www.youtube.com/watch?v=\\_xbawZ3BtGc](http://www.youtube.com/watch?v=_xbawZ3BtGc); Ilya Shapiro, *More on the (Un) Constitutionality of Obamacare*, CATO @ LIBERTY (Apr. 2, 2010, 12:53 PM), <http://www.cato-at-liberty.org/more-on-the-unconstitutionality-of-obamacare/>.

even from students who would otherwise agree with him – and the consensus seemed to be that I won the debate.<sup>30</sup>

Next I journeyed to Oberlin College in the bucolic Cleveland suburbs. While I had no debate opponent there – Oberlin lacks a law school, for one thing – I was honored to be part of the school's Ronald Reagan Political Lectureship Series. And also to meet Milton Friedman's granddaughter, who is, unsurprisingly, an economics major. The arguments I made there were still very much a work in progress, but I had certainly honed my main Commerce Clause point: that there was no legal precedent for the federal government to mandate, as opposed to regulate (*Wickard*; the Civil Rights Cases)<sup>31</sup> or prohibit (*Gonzales v. Raich*)<sup>32</sup> economic activity. The Supreme Court may well provide one, but that would be breaking new ground.

I then made my first-ever visit to Utah, to speak alongside Attorney General Mark Shurtleff at the annual Utah Taxpayers Association conference. The trip was most notable for its brevity: I was away from home for 30 hours, of which about five were awake and non-traveling. I also made the acquaintance of state Rep. John Dougall, a passionate advocate for federalism but also one who recognizes the difference between that and nullification.

Two days later, May 13, I returned to my old stomping grounds in Jackson, Mississippi (where I'd clerked), for a wide-ranging discussion of Obamacare's effects on the medical field, the business community, and the state government.<sup>33</sup> It was the first time I'd ever been flown in to moderate an event rather than be a featured speaker. It turns out that my hosts, the local Federalist Society chapter and the Mississippi Center for Public Policy, had invited me to frame the debate. About 140 people came out for this luncheon at the Capitol Club, including, to my great honor, Judge E. Grady Jolly, at whose knee I learned most of what I know about legal process and the proper role of a judge. There wasn't too much disagreement on the panel, but the varied perspectives distinguished the event from many that I had done and would do.

It was also about this time that a new line of discussion opened up: Heartland Institute health care policy analyst Greg Scandlen had

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<sup>30</sup> To watch the debate, see *Is Obamacare Constitutional?*, <http://www.megavideo.com/?v=GO8JFMWN>.

<sup>31</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

<sup>32</sup> 545 U.S. 1 (2005).

<sup>33</sup> Ilya Shapiro, *Quarterly Luncheon 5-13-2010 - Ilya Shapiro Part I*, YOU TUBE (May 14, 2010), [http://www.youtube.com/user/MississippiPolicy#p/u/9/CUQjXfcD3\\_Y](http://www.youtube.com/user/MississippiPolicy#p/u/9/CUQjXfcD3_Y) (first of five segments).

reviewed all of Obamacare and found that the 2,700 page law lacked a severability clause.<sup>34</sup> That revelation didn't necessarily mean that if a court overturned one piece, the entire piece of legislation would fall, but it was an important point that would gain in significance as litigation proceeded.

Two weeks later, as we approached the Memorial Day weekend that begins a seasonal reprieve from academic speaking engagements, I went to Seattle to debate Obamacare at the place that started this whole exercise: the University of Washington Law School. Professor Stewart Jay was my antagonist in an event sponsored by a bevy of student organizations – the Federalist Society, College Republicans, Students for Liberty, and College Democrats, among others – and he was a fitting one, with shoulder-length gray hair, wire-rimmed glasses, and Birkenstocks. Jay accused me of avoiding the legal substance – that my arguments consisted of political disagreements and “rhetorical flourishes” – and of asking courts to make policy rather than defer to Congress. It was all a bit rich coming from someone whose arguments focused on standing and ripeness and whose presentation centered on the need to reform a broken health care system. Indeed, Jay repeatedly criticized my unwillingness to tackle the issue of “spiraling premiums” – which I eventually addressed, though I had been under the impression that the debate concerned constitutional law, not why we need to reform the health care system.<sup>35</sup>

#### IV. WRITING DOWN MY THOUGHTS

My public events concluded for the time being – so I could spend the summer analyzing the opinions from the end of the Supreme Court term, commenting on Elena Kagan's nomination and confirmation process,<sup>36</sup> and editing our *Supreme Court Review* – my Obamacare focus shifted toward expressing my arguments in written form. In the days and weeks after Obamacare's enactment, Cato had developed some internal memoranda – both on the procedural and substantive aspects of the states' legal challenges – which we had shared with both the Virginia and Florida legal teams. Then *Health Affairs*,

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<sup>34</sup> *Read the Fine Print*, INVESTORS.COM (May 18, 2010, 6:58 PM), <http://www.investors.com/NewsAndAnalysis/Article.aspx?id=534458>.

<sup>35</sup> To watch the debate, see *The Second Health Care Reform Debate*, UWTV (May 27, 2010), <http://www.uwv.org/programs/displayevent.aspx?rID=31653&fID=6910>.

<sup>36</sup> Which, of course, had its own Obamacare moment, when Senator Tom Coburn (R-OK) famously asked whether Congress could require people to have three servings of fruits and vegetables every day. See, e.g., Sallie James & Ilya Shapiro, *Elena Kagan Balances Your Diet*, THE DAILY CALLER (July 2, 2010, 12:09 PM), <http://dailycaller.com/2010/07/02/elena-kagan-balances-your-diet/>.

the preeminent health care policy journal, asked me to participate in a point-counterpoint (to the envy of colleagues who actually knew something about health care policy). The public legal debate focused almost exclusively on Congress's power to regulate interstate commerce, so the salient part of my 2,500-word essay ran as follows:

Although the Court has rejected nearly all Commerce Clause challenges since the New Deal, two such lawsuits have been successful. In 1995 the Court struck down a law prohibiting the possession of guns near schools because it was not “part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” *United States v. Lopez*, 514 U.S. 549, 561 (1995). In seeking to distinguish “between what is truly national and what is truly local,” the Court limited the reach of the commerce power to exclude activity that is not directly economic in nature, even if it creates indirect economic effects. *Id.* at 567-68.

Similarly, the Court struck down the Violence Against Women Act because the gender-motivated violence it regulated had only an “attenuated” economic effect. *United States v. Morrison*, 529 U.S. 598, 615 (2000). The Court rejected the idea that Congress could “regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.” *Id.*

These cases demonstrate that the Court recognizes that some noneconomic activities are outside the Commerce Clause's scope. As Justice Kennedy explained, “Were the Federal Government to take over the regulation of entire areas of traditional state concern . . . the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.” *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring).

This precedent, taken at face value, suggests that courts should find the individual mandate unconstitutional. To do otherwise would be to expand the Commerce Clause to regulate economic *inactivity* – something the Supreme Court has never done.

To be sure, there are situations in which the government may force individuals to engage in a transaction or activity. Most notably, it can require hotels and restaurants to serve all patrons. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). But nobody has to operate a hotel or restaurant, or purchase lodging or food (and individuals are not commercial enterprises). These holdings may

arguably support requiring insurers to insure people without regard to preexisting conditions – with the likely effect that all health insurance companies would instantly cease operations (and thus nationalization of healthcare) – but they do not support forcing individuals to buy policies.<sup>37</sup>

That article set the stage for the initial round of briefing in the first major Obamacare lawsuit, at the motion-to-dismiss stage in the Virginia case. My colleagues and I decided that Cato needed to be involved here – the first time ever at the district court level – because the “rocket docket” of the Eastern District of Virginia would no doubt provide the first legal ruling in the matter. In an *amicus* brief (technically a “memorandum”) joined by the Competitive Enterprise Institute and Randy Barnett, we argued that the case was not about health care at all, but about federalism:

In other words, this case presents the Court with “the arduous . . . task of marking the proper line of partition between the authority of the general and that of the State governments.” The Federalist No. 37, at 227 (James Madison) (Clinton Rossiter ed., 1961). At issue is the constitutionality of the individual health insurance mandate – the requirement that individuals obtain a government-approved health insurance policy or pay a penalty – and potentially, given the lack of a severability clause, the entire health care reform scheme. Congress identified the Commerce Clause as the source of its authority, a position the Government now asserts in its Motion to Dismiss. Because Virginia and other *amici* persuasively refute that argument, we confine ourselves here to explaining the fundamental flaws in the Government’s fall-back positions on the Necessary and Proper Clause and taxing power.

Neither of the Government’s cursory arguments – comprising 9 pages of a 40 page memorandum that mainly relies on jurisdictional and Commerce Clause claims – legitimizes the individual mandate. The Necessary and Proper Clause is not an independent source of congressional power; instead, it enables Congress to carry out its enumerated powers or ends by means that are “appropriate” (Chief Justice Marshall’s term for “necessary”) and “plainly adapted to a [constitutional] end” (his definition of “proper”). *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421

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<sup>37</sup> Ilya Shapiro, *State Suits Against Health Reform are Well Grounded in Law—and Pose Serious Challenges*, 29 HEALTH AFFAIRS 1229, 1230 (June 2010) (endnotes inserted into text as direct citations).

(1819). Forcing someone to buy a product from a third party is not an “appropriate” or “proper” method “for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States.” U.S. Const. art. I, § 8, cl. 18. Even for matters within the scope of an enumerated power, Congress may not enact laws that are not “plainly adapted” to further an enumerated end, or that do so at the expense of the rights reserved to the States or the people under the Tenth Amendment. The Supreme Court enforced such limits in *Printz v. United States*, 521 U.S. 898 (1997), and should enforce such limits here, too.

Similarly, the individual mandate is not a tax – its non-compliance penalty is a civil fine – but if it were, it would be unconstitutional because it is neither apportioned (if a direct tax) nor uniform (if an excise tax). Moreover, Congress cannot use the taxing power as a backdoor means of regulating an activity unless such regulation is authorized elsewhere in the Constitution. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37-38 (1922).

As the Supreme Court recognized almost 150 years ago, “[n]o graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole,” than the Government’s unconstitutional assertion of power against its own citizens. *Ex Parte Milligan*, 71 U.S. 1, 118-19 (1866) (granting *habeas corpus* petition). The motion to dismiss this lawsuit must be denied.<sup>38</sup>

Thus our efforts shifted to the Necessary and Proper Clause – which I began to see as the ultimate battleground where all this would be decided – and the taxing power.

Coincidentally, a month later the *New York Times* reported that the government was shifting its argument away from the Commerce Clause and towards “the power to lay and collect taxes.”<sup>39</sup> This was a remarkable development; for months all “serious” politicians and academics had considered the Commerce Clause justification to be a no-brainer, but now the administration felt the need to go to an emergency back-up. Indeed,

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<sup>38</sup> Memorandum of the Cato Institute, Competitive Enterprise Institute, and Prof. Randy E. Barnett as Amici Curiae Supporting Plaintiff’s Opposition to Defendant’s Motion to Dismiss at 3-4, *Virginia v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010) (No. 3:10CV188-HEH).

<sup>39</sup> Robert Pear, *Changing Stance, Administration Now Defends Insurance Mandate as a Tax*, N.Y. TIMES, July 18, 2010, at A14, available at [http://www.nytimes.com/2010/07/18/health/policy/18health.html?\\_r=2](http://www.nytimes.com/2010/07/18/health/policy/18health.html?_r=2).

the law includes 10 detailed findings meant to show that the mandate regulates commercial activity important to the nation's economy. Nowhere does Congress cite its taxing power as a source of authority. . . . The law describes the levy on the uninsured as a 'penalty' rather than a tax.<sup>40</sup>

It was not at all clear, therefore, that the taxing power would provide any surer footing than the Commerce Clause. As Randy Barnett put it,

Now there are cases that say (1) when Congress does not invoke a specific power for a claim of power, the Supreme Court will look for a basis on which to sustain the measure; (2) when Congress does invoke its Tax power, such a claim is not defeated by showing the measure would be outside its commerce power if enacted as a regulation (though there are some older, never-reversed precedents pointing the other way), and (3) the Courts will not look behind a claim by Congress that a measure is a tax with a revenue raising purpose.

But I have so far seen no case that says (4) when a measure is expressly justified in the statute itself as a regulation of commerce (as the NYT accurately reports), the courts will look behind that characterization during litigation to ask if it *could have been* justified as a tax, or (5) when Congress fails to include a penalty among all the "revenue producing" measures in a bill, the Court will nevertheless impute a revenue purpose to the measure.

Now, of course, the Supreme Court can always adopt these two additional doctrines. It could decide that any measure passed and justified expressly as a regulation of commerce is constitutional if it could have been enacted as a tax. But if it upholds this act, it would also have to say that Congress can assert any power it wills over individuals so long as it delegates enforcement of the penalty to the IRS.<sup>41</sup>

That is, the government now essentially argued that if the Commerce Clause doesn't provide limitless federal authority, surely, the taxing power did.

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<sup>40</sup> *Id.*

<sup>41</sup> Randy Barnett, *So Much for the Commerce Clause Challenge to Individual Mandate Being Frivolous*, THE VOLOKH CONSPIRACY (July 18, 2010, 11:45 AM), <http://volokh.com/2010/07/18/so-much-for-frivolous-commerce-clause-challenge-to-individual-mandate/>; see also Randy E. Barnett, *The Insurance Mandate in Peril*, WALL ST. J., Apr. 29, 2010, available at <http://online.wsj.com/article/SB10001424052748704446704575206502199257916.html>.

In any event, a decision came down in the Virginia case at the end of a 10-day period during the height of a summer that saw hot district court opinions in three cases that were rapidly overshadowing the Supreme Court's upcoming docket.<sup>42</sup> On August 2, Judge Henry Hudson found that no procedural issue (not even the Anti-Injunction Act, the evaluation of which required ruling against the government's taxing power claim) barred Virginia's lawsuit and denied the government's motion to dismiss, agreeing with our characterization of the individual mandate as unprecedented:

The guiding precedent is informative, but inconclusive. Never before has the Commerce Clause and Necessary and Proper Clause been extended this far. At this juncture, the court is not persuaded that the Secretary has demonstrated a failure to state a cause of action with respect to the Commerce Clause element.<sup>43</sup>

And that goes for the government's arguments generally:

While this case raises a host of complex constitutional issues, all seem to distill to the single question of whether or not Congress has the power to regulate – and tax – a citizen's decision not to participate in interstate commerce. Neither the U.S. Supreme Court nor any circuit court of appeals has squarely addressed this issue. No reported case from any federal appellate court has extended the Commerce Clause or Tax Clause to include the regulation of a person's decision not to purchase a product, notwithstanding its effect on interstate commerce. Given the presence of some authority arguably supporting the theory underlying each side's position, this Court cannot conclude at this time stage that the Complaint fails to state a cause of action.<sup>44</sup>

In other words, at this first, early stage of litigation, Virginia's lawsuit survived and the government had a real fight on its hands. Just as importantly, nobody could any longer claim that the legal challenges to Obamacare were frivolous political ploys.

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<sup>42</sup> *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (SB 1070, Arizona's immigration-regulation law), *aff'd*, 641 F.3d 339 (9th Cir. 2011); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (gay marriage); *Virginia v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010) (Obamacare).

<sup>43</sup> *Virginia v. Sebelius*, 702 F. Supp. 2d 598, 612 (E.D. Va. 2010) (denying defendant's motion to dismiss).

<sup>44</sup> *Id.* at 615.



## V. MORE DEBATES, MORE JUDICIAL OPINIONS

Toward the end of summer 2010, as Obamacare lawsuits gained steam and the new academic year approached, more invitations started coming in relating back to my “debate challenge.” The first one I took, after putting the ninth *Cato Supreme Court Review* to bed, was at the University of Virginia on September 8. The national Federalist Society office was somewhat anxious about this event because UVA would be hosting the national student symposium, but it turned out to be a smashing success. More than 150 people attended a lively panel discussion featuring law professors Fred Schauer, Elizabeth Magill, and myself, with Julia Mahoney moderating with verve. It was all very well received, particularly my assertion that if the individual mandate survives legal challenge, the decision to attend law school would be considered an economic activity that Congress could regulate. The attendance was particularly impressive considering that Lady Gaga had a concert in Charlottesville that night.

My next event was a debate against legendary constitutional law professor Mark Tushnet at Harvard Law School, my first time appearing there in an official capacity. This event was hanging by a thread for a while – originally I was supposed to have been opposite Akhil Amar, then Charles Fried, and then Noah Feldman – but Tushnet stepped up to deliver a nice point-counterpoint, while focusing on what decisions upholding and striking down the individual mandate would mean as a matter of constitutional doctrine.<sup>45</sup> Before the debate began, I had a short discussion with first-year law student Joel Alicea, who in college had been publisher of the *Princeton Tory* – which I had helped edit in my own college days – and who had just published an op-ed refuting the government’s new claim that the individual mandate was constitutionally justified as an excise tax.<sup>46</sup>

A number of speeches and debates followed at the law schools of Loyola University (Chicago), the University of Kansas, and the University of Missouri, and for the Kansas City Federalist Society lawyers’ chapter. At the University of Illinois Law School, 175 people (in a room that sat 120) saw me elicit an admission from Dan Hamilton that the government can indeed require broccoli purchases. Hamilton countered, however, that my arguments threatened food safety regulations, child labor laws, and the like – though I don’t see how the ac-

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<sup>45</sup> For audio of the Harvard debate, see *The Constitutionality of the Individual Mandate* (Sept. 14, 2010), [http://www.law.harvard.edu/media/2010/09/14\\_fs.mp4](http://www.law.harvard.edu/media/2010/09/14_fs.mp4).

<sup>46</sup> Joel Alicea, *Obamacare and the Excise Tax*, NAT’L REV. ONLINE (Sept. 1, 2010, 4:00 AM), <http://www.nationalreview.com/articles/245270/obamacare-and-excise-tax-joel-alicea>.

tivity/inactivity distinction suggested by existing doctrine threatened anything more than one law: Obamacare.

The travel got so hectic that I ended up completing the first draft of Cato's brief for the summary judgment stage in the Virginia case between the hours of 1 and 5 a.m. in a Columbia, Missouri hotel room. Here, we presented a global summary of our position:

First, although Congress can regulate "economic activities that substantially affect interstate commerce," non-economic activities, including inactivity, are not subject to Congress's Commerce Clause power. They simply cannot be shoehorned into a regulatory scheme under the Necessary and Proper Clause as interpreted in the context of the commerce power. Second, the assertion in this case of the taxing power as associated with the General Welfare Clause also fails in that (a) as a threshold matter, the individual mandate is not a tax; (b) if it is a tax, it's unconstitutional because it is neither apportioned (if a direct tax) nor uniform (if an excise tax); and (c) Congress cannot use its taxing power as a backdoor means of regulating an activity unless such regulation is authorized elsewhere in the Constitution. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37-38 (1922). Third, an "economic mandate" of the kind at issue here – even if it were deemed "necessary" to Congress's regulatory scheme – constitutes a "commandeering of the people" that is constitutionally impermissible because it is not "proper."<sup>47</sup>

This brief was the first instantiation into legal advocacy of Randy Barnett's "commandeering of the people" concept.<sup>48</sup> I had had several conversations with Randy about how Congress's assertion of regulatory authority over interstate commerce via the Necessary and Proper Clause may fall not on its necessity – the individual mandate is indeed "necessary" for the proper functioning of a regulatory scheme that requires health insurers to cover people with preexisting conditions (cabining the issue of whether Congress can expand its own powers by creating such a necessity) – but on its propriety. In this latest brief, we planted our flag on that "proper" prong.

The electrons had barely cooled on our submission, however, when the first district court ruling on Obamacare's constitutional merits came down in the Eastern District of Michigan.<sup>49</sup> Judge George

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<sup>47</sup> Memorandum of the Cato Institute et al., *supra* note 38, at 3.

<sup>48</sup> See Barnett, *Commandeering the People*, *supra* note 3; see also James Taranto, *A Commandeering of the People*, WALL ST. J., July 23, 2010, available at <http://online.wsj.com/article/SB10001424052748703467304575383702986874016.html>.

<sup>49</sup> *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010).

Steeh dismissed the Thomas More Law Center's challenge to the individual mandate, but spent scant space on the Commerce Clause arguments, on which hundreds of pages had by this point been filed in these cases by top lawyers, legal experts, and academics. After granting that the plaintiffs had standing and that the case was ripe for adjudication – and rejecting the government's taxing power claims – Steeh used fewer than five pages responding to the plaintiffs' arguments, half of which recited existing doctrine.<sup>50</sup> And the novel conclusion we gained from this curt disposition is that Congress can now regulate people's "economic decisions," as well as do anything that is part of a "broader regulatory scheme."<sup>51</sup> If the Supreme Court eventually upholds that kind of reasoning, again, nobody would ever be able to claim plausibly that the Constitution limits federal power.

Indeed, finding the individual mandate constitutional would be the first interpretation of the Commerce Clause to permit the requirement that individuals engage in economic activity. The federal government would then have wide authority to require Americans to engage in activities of its choosing, from eating spinach and joining gyms (in the health care realm) to buying GM cars – particularly if those requirements were necessary to the functioning of a comprehensive regulatory scheme. Or, under Judge Steeh's "economic decisions" theory, Congress could tell people what to study in school or what job to take. That may be the unfortunate state of the law as soon as next year – once the Supreme Court has weighed in, though I doubt it would ever go so far – but it is not up to district courts to extend constitutional doctrine on their own.

A week later, however, Judge Roger Vinson issued his first ruling in the Florida case, echoing Judge Hudson in denying the government's motion to dismiss the challenges to the individual mandate – and also here to the new Medicaid rules (which the states had argued were coercive of their budgets and legislative prerogatives).<sup>52</sup> "While the novel and unprecedented nature of the individual mandate does not automatically render it unconstitutional," Judge Vinson observed, "there is perhaps a presumption that it is."<sup>53</sup>

Virginia's and Florida's lawsuits had been the most thoroughly briefed and argued, so the significant and lengthy opinions there conclusively established that the constitutional concerns being raised were serious. The deliberate consideration that these district courts gave to those arguments (unlike the Judge Steeh's perfunctory treat-

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<sup>50</sup> *Id.* at 891-95.

<sup>51</sup> *Id.* at 894.

<sup>52</sup> *Florida v. U.S. Dep't. of Health & Human Servs.*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010).

<sup>53</sup> *Id.* at 1164 n.21.

ment) indicated that the probability that the Supreme Court would ultimately strike down the individual mandate – never a certainty, not even now – continued to increase.

The pace of my debate tour was also increasing – as well as the media requests following each Obamacare ruling – beginning with a three-week West Coast swing that included events on other topics as well. During my first-ever trip to Oregon in mid-October, I was part of a unique “MD-JD-PhD” panel at Lewis & Clark University Law School<sup>54</sup> and gave an evening lecture in Portland that drew a nice crowd, including one of my judicial heroes, Ninth Circuit Judge Diarmuid O’Scannlain. My Willamette University event was less successful, for reasons out of my control or that of the Federalist Society student chapter that organized it.<sup>55</sup> It was nothing I hadn’t encountered elsewhere in other contexts, but still unfortunate.

My final West Coast Obamacare event was at Pacific University’s McGeorge Law School, sponsored by the Federalist Society and the school’s health law society. More than 50 people, including faculty and people from the community, filled the room and spilled into the adjoining stairwell, to hear one of the sharpest debates in which I’ve participated. Prof. John Sims, formerly of Public Citizen, went from patronizing my arguments, to assuring the crowd that Congress was merely solving a pressing national problem, to feigning disbelief at my statement that allowing the individual mandate would result in no principled limits on federal power (and then declining to specify what those limits might be). The audience was not having any of it: by the end of the event my arguments seemed to have unsettled everyone, except perhaps a few aging hippies. Several people came up to me afterwards saying I had won unanimously, that I had made many new Cato supporters, and that, effectively, the scales had fallen from their eyes on an issue they thought was just political mudslinging.<sup>56</sup>

I had five more events before Thanksgiving, at the law schools of the University of Maryland, University of Alabama, Cumberland University, and University of Michigan, and, of course, the Florida International University symposium that spawned this article. As part of Maryland’s 2010-11 Health Care Reform Speaker Series, I debated

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<sup>54</sup> You can view the video at *Health Care Reform: What It Means for the Market, the Constitution, and Oregon*, (Oct.12, 2010), <http://lawmedia.lclark.edu/LawMedia/Viewer/?peid=beca0c41832142d6a39a46a851a070981d>.

<sup>55</sup> The law school faculty begged off (“a month is not long enough to prepare for Shapiro” was one response—flattering but disingenuous), the American Constitution Society chapter was uncooperative, and the student government did its utmost to create headaches and limit advertising.

<sup>56</sup> They and others like them should support Cato and earmark donations to our Center for Constitutional Studies.

Columbia law professor Gillian Metzger, who had filed and continues to file “constitutional law professors” *amicus* briefs in various *Obamacare* cases. For the first time, I faced a debate opponent who both took my arguments seriously and focused on the taxing power.<sup>57</sup> The Commerce Clause and Necessary and Proper Clause points were solid, Metzger said in a formidable presentation, but the easiest way to win was to emphasize its (expansive) power to tax and spend for the general welfare.

My Michigan debate against Nick Bagley, newly on the faculty after most recently working in the DOJ Civil Division’s appellate section, was equally hard-hitting, though Bagley caricatured my position. More than 120 people attended – with a definite majority opposed to me, at least at the start – but the event almost didn’t come off because of a “Planes, Trains, and Automobiles” adventure that morning. After taking an early flight to Cleveland, my connecting flight to Flint kept getting pushed back for mechanical reasons – I jokingly blamed Flint native Michael Moore – until I decided to just rent a car and make the 2.5-hour drive to Ann Arbor. I arrived half an hour late, missing most of Bagley’s presentation – which was predictable, so my rebuttal was unaffected – but later learned that the eventual connecting flight would have caused me to miss the event entirely, thereby retroactively validating my transportation decision.

Right after Thanksgiving, on November 30, a second district court ruled for the government. In a lawsuit brought by Liberty University in Lynchburg, Judge Norman Moon found the individual mandate to be a lawful exercise of Congress’s powers under the Commerce Clause because

individuals’ decisions about how and when to pay for health care are activities that in the aggregate substantially affect the interstate health care market. . . . Far from ‘inactivity,’ by choosing to forgo insurance, Plaintiffs are making an economic decision to try to pay for health care services later, out of pocket, rather than now, through the purchase of insurance. As Congress found, the total incidence of these economic decisions has a substantial impact on the national market for health care by collectively shifting billions of dollars on to other market participants and driving up the prices of insurance policies.<sup>58</sup>

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<sup>57</sup> For video of the Maryland debate, see LAW AND HEALTH CARE PROGRAM SPEAKER SERIES: GILLIAN METZGER & ILYA SHAPIRO (Nov. 4, 2010), <http://video.law.umaryland.edu/OpenPlayer.asp?GUID=E0E0DC18-B076-47B9-8F13-6091BBA80176>.

<sup>58</sup> *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 633 (W.D. Va. 2010).

This analysis echoed that of the Michigan judge in the Thomas More Law Center case – and is fatally flawed because everything is an “economic decision” that “substantially affects the national market” in *something*.

I made that point the very next day on a panel at the American Legislative Exchange Council’s annual policy summit, and again a few days later at the annual conference of the Council of State Governments. The latter, held in Providence, featured a reprise of my debate with Gillian Metzger, though this time we were introduced by the governor of Rhode Island, Don Carcieri, and moderated by the governor of Vermont, Jim Douglas. Both of these events marked a fitting way to close out my public schedule for the year, as state legislators and executive officials began asking questions about the lawsuits and what kind of legal flexibility they had in implementing health care reform.

But that wasn’t all that 2010 had in store for Obamacare litigation. On December 13, Judge Hudson issued a second ruling in Virginia’s favor, striking down the individual mandate.<sup>59</sup> “Yes, Virginia, there are limits on federal power,” I began my reaction. “Today is a good day for liberty. And a bad day for those who say that Congress is the arbiter of Congress’s powers.”<sup>60</sup> Hudson thus vindicated the idea that ours is a government of enumerated and thus limited powers. Even if the Supreme Court has broadened over the years the scope of congressional authority to legislate under the guise of regulating commerce or to tax for the general welfare, “the constraining principles articulated in this line of cases . . . remains viable and applicable to the immediate dispute.”<sup>61</sup>

This was just one district court, but – far beyond arguments over whether the claims are political sour grapes – we could now see the day where this unprecedented assertion of federal power is definitively rejected as fundamentally contrary to our constitutional order. As Judge Hudson said, “Despite the laudable intentions of Congress in enacting a comprehensive and transformative health care regime, the legislative process must still operate within constitutional bounds. Salutatory goals and creative drafting have never been sufficient to offset an absence of enumerated powers.”<sup>62</sup>

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<sup>59</sup> *Virginia v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010).

<sup>60</sup> Ilya Shapiro, *Yes, Virginia, There are Limits on Federal Power*, CATO @ LIBERTY (Dec. 13, 2010, 1:21 PM), <http://www.cato-at-liberty.org/yes-virginia-there-are-limits-on-federal-power/>.

<sup>61</sup> *Sebelius*, 728 F. Supp. 2d at 788.

<sup>62</sup> *Id.* at 780.

Hudson's ruling provoked a media feeding frenzy. Over the next week, I provided commentary to more than 20 radio outlets and was invited on television networks as diverse as Al Jazeera, Fox News, and CNN. For the latter, I went up to New York to appear on the short-lived "Parker Spitzer" program opposite *Slate* columnist Dhalia Lithwick.<sup>63</sup> It was fun – they even used my "broccoli" comment as the teaser leading into commercial before my segment – but not as much fun (let alone viewership) as the *Colbert Report*.

Finally, a few days before Christmas, we filed our brief in the appeal of the Michigan case to the Sixth Circuit.<sup>64</sup> By this point, because the taxing power was falling decidedly flat in courts' ears – not even courts' ruling for the government on other grounds had accepted it – we decided to elaborate and refine our Necessary and Proper Clause analysis. We argued that the outermost bounds of existing Commerce Clause jurisprudence – the "substantial effects doctrine" – also provided a way of considering the "necessity" prong of Necessary and Proper Clause analysis:

The distinction between economic and non-economic activity allowed the Court to determine when it was truly necessary to regulate intrastate commerce without engaging in protracted, and arguably impossible, attempts to evaluate the "more or less necessity or utility" of a measure. Alexander Hamilton, Opinion on the Constitutionality of a National Bank (February 23, 1791), in *Legislative and Documentary History of the Bank of the United States* 98 (H. St. Clair & D.A. Hall eds., reprinted Augustus M. Kelley 1967) (1832). This Necessary and Proper doctrine limits congressional power to regulating intrastate economic activity because this category of activity is closely connected to interstate commerce, without recognizing an implied federal power that would amount to a federal police power that the Supreme Court has always denied existed. *See, e.g., Lopez*, 514 U.S. at 567. Moreover, a power to regulate intrastate economic activity that has a substantial affect on interstate commerce is not so broad as to obstruct or supplant the states' police powers.

In other words, to preserve the constitutional scheme of limited and enumerated powers, the Court drew a judicially administrable line beyond which Congress could not go in enacting "neces-

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<sup>63</sup> Ilya Shapiro discusses legal challenges to Obamacare on *Parker Spitzer* (CNN television broadcast Dec. 18, 2010), available at [http://www.cato.org/mediahighlights/index.php?highlight\\_id=1598](http://www.cato.org/mediahighlights/index.php?highlight_id=1598).

<sup>64</sup> Brief of the Cato Institute and Prof. Randy E. Barnett as Amici Curiae in Support of Appellants, *Thomas More Law Ctr v. Obama*, No. 10-11156 (6th Cir. Dec. 22, 2010).

sary and proper” means to execute its power to regulate interstate commerce. **The “substantial effects” doctrine, as limited in *Lopez* and *Morrison*, thus established the outer doctrinal bounds of “necessity” under the Necessary and Proper Clause.**<sup>65</sup>

These outer bounds prevent Congress from reaching intrastate *non-economic* activity regardless of whether it substantially affects interstate commerce:

With the individual mandate, Congress addressed the requirement that it confine itself to regulating economic activity by redefining the word “activity” to include “decisions” or even “non-actions.” Yet the vital limiting principles on federal power cannot be brushed away by recourse to the admitted importance of reforming health care or the cost-shifting aspects of that market. **There is no “health care is different” constitutional exemption – and indeed Congress could have reformed the health care system in any number of ways that may have been better or worse as a matter of policy but would have been legally unassailable.** The reason for this lawsuit and dozens of others around the country, however, is that the health insurance mandate is supported by no Supreme Court precedent. As one district court recently said while striking down the individual mandate, “Every application of Commerce Clause power found to be constitutionally sound by the Supreme Court involved some sort of action, transaction, or deed placed in motion by an individual or legal entity.” *Virginia v. Sebelius*, [728 F. Supp. 2d 768, 781 (E.D. Va. 2010)].

If allowed to stand, the individual mandate would collapse the traditional distinction between acts and omissions by characterizing a failure to act as a “decision” not to act—thereby transforming inactivity into activity by linguistic alchemy. It would also then collapse the distinction between economic and non-economic activity by characterizing an activity as “economic” not based on the type of activity it is but on whether it has any economic effect. Since any activity, in the aggregate, can be said to have an economic effect, the line the Court drew between activity that Congress can reach and that which is outside its powers would be destroyed. The government’s novel theory would end our scheme of limited and enumerated powers, as well as erase the long-held constitutional distinction “between what is truly national and what is truly local.” *Lopez*, 514 U.S. at 567-68 (cit-

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<sup>65</sup> *Id.* at 8 (emphasis added).



ing *NLRB*, 301 U.S. at 30). All of this transgresses the current state of Commerce and Necessary and Proper Clause doctrine.<sup>66</sup>

Nor under existing law can Congress reach *inactivity* even if it purports to act pursuant to a broader regulatory scheme:

**The distinction between activity and inactivity provides the same type of judicially administrable limiting doctrine for what is “necessary” to execute the commerce power under an “essential to a broader regulatory scheme” theory as the economic/non-economic distinction provides for the substantial effects doctrine.** Now that Congress has, for the first time, sought to reach inactivity, all the Supreme Court need do is look back at its previous substantial effects doctrine cases, as it did in *Lopez*, to see that every case decided until now involved the regulation of activity, not inactivity.

Limiting Congress to regulating or prohibiting activity under both the “substantial effects” and the “essential to a broader regulatory scheme” doctrines would serve the same purpose as the economic/non-economic distinction. Such a formal limitation would help assure that exercises of the Necessary and Proper Clause to execute the commerce power would be truly incidental to that power and not remote. Doing nothing at all involves not entering into a literally infinite set of economic transactions. Giving a discretionary power over this set to Congress when it deems it essential to a regulation of interstate commerce would give Congress a plenary and unlimited police power over inaction that is typically far remote from interstate commerce. However imperfect, some such line must be drawn to preserve Article I’s scheme of limited and enumerated powers. Because accepting the government’s theory in this case would effectively demolish that scheme, the government’s theory is unconstitutional.<sup>67</sup>

Finally, even if not purchasing health insurance is considered an “economic activity” – which of course would mean that every aspect of human life is economic activity – there is no legal basis for Congress to require individuals to enter the marketplace to buy a particular good or service. Even the district court recognized that “in every Commerce Clause case presented thus far, there has been some sort of activity. In this regard, the Health Care Reform Act arguably presents an issue of first impression.”<sup>68</sup> And it is no more “proper”

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<sup>66</sup> *Id.* at 12-14 (emphasis added).

<sup>67</sup> *Id.* at 16-17 (emphasis added).

<sup>68</sup> *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 893 (E.D. Mich. 2010).

under the Necessary and Proper Clause for the federal government to “commandeer” individuals to execute federal regulation than to “commandeer” state officials:

What very few mandates are imposed on the people by the federal government all rest on the fundamental pre-existing duties that citizens owe that government. Such are the duties to register for the draft and serve in the armed forces if called, to sit on a federal jury, and to file a tax return. *See, e.g., Selective Draft Law Cases*, 245 U.S. 366, 378 (1918) (relying on the “supreme and noble duty of contributing to the defense of the rights and honor of the nation” to reject a claim founded on the Thirteenth Amendment). In the United States, there is not even a duty to vote. So there is certainly no comparable pre-existing “supreme and noble duty” to engage in economic activity when doing so is convenient to the regulation of interstate commerce.

There are also pragmatic reasons to believe that the individual mandate is not “proper.” In *New York v. United States*, Justice O’Connor explained that mandates on states are improper because, “where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.” 505 U.S. 144, 169 (1992). That proposition applies to the commandeering of individuals as well: the individual mandate has allowed Congress and the president to escape political accountability for increasing taxes on persons making less than \$250,000 per year by compelling them to make payments directly to private companies. It is the evasion of that accountability that explains why the mandate was formulated as a regulatory “requirement” enforced by a monetary “penalty.”

The individual mandate crosses a fundamental line between limited constitutional government and limitless power cabined only by the vagaries of political will – which is to say, not cabined at all. If the word “proper” is to be more than dead letter, it at least means that acts which destroy the very purpose of Article I – to enumerate and therefore limit the powers of Congress – are improper. If the federal power to enact “economic mandates” were upheld here, Congress would be free to require *anything* of the citizenry so long as it was in the name of a comprehensive regulatory plan. **Unsupported by any fundamental, preexisting, or traditional duty of citizenship, imposing “economic mandates” on the people is improper, both in the lay and constitutional senses**

**of that word.** Allowing Congress to exercise such power would turn “citizens” into “subjects.”<sup>69</sup>

In short, the activity/inactivity distinction, like the economic/non-economic distinction, provides a judicially administrable line by which some laws are deemed too remote from the commerce power – and thus resists making Congress’s enumerated powers into a plenary police power.<sup>70</sup> Without it, no constitutional limits remain on federal power.

## VI. TESTIMONY, DEBATE, OPINION, SATIRE

The new year opened up a new front: testimony to state legislatures grappling with Obamacare’s damage to their budgets and trying to implement their citizens’ consistent opposition to the individual mandate. In light of November’s elections – which gave the balance of power in many places to Tea Party-supported Republicans – lawmakers in states with Democratic governors seemed especially keen to reinforce their ideas. I thus submitted testimony to the Montana Senate Judiciary Committee in favor of joining the Florida-led lawsuit<sup>71</sup> and to the Montana, Arkansas, and Ohio Houses of Representatives, respectively, in support of those states’ Health Care Freedom Acts<sup>72</sup> – simple pieces of legislation that preserve certain existing rights that individuals have regarding health care.<sup>73</sup> And I wrote a letter to North Carolina Governor Beverly Perdue regarding the constitutionality and desirability of the HCFA that her legislature passed.<sup>74</sup>

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<sup>69</sup> *Id.* at 21-22.

<sup>70</sup> *See id.* at 22-29.

<sup>71</sup> *Whether Montana Should Join the Florida-Led Lawsuit Challenging the Constitutionality of Obamacare Before the S. Judiciary Comm.*, 2011 Leg. 62nd Sess. (Mont. 2011) (written testimony of Ilya Shapiro), available at [http://www.cato.org/pub\\_display.php?pub\\_id=12697](http://www.cato.org/pub_display.php?pub_id=12697).

<sup>72</sup> *On the Montana Health Care Freedom Act and Its Relationship to Obamacare Before the H.R.*, 2011 Leg. 62d Sess. (Mont. 2011) (written testimony of Ilya Shapiro), available at [http://www.cato.org/pub\\_display.php?pub\\_id=12725](http://www.cato.org/pub_display.php?pub_id=12725); *On the Arkansas Health Care Freedom Act and Its Relationship to Obamacare Before the H.R.*, 2011 Leg., 88th Sess. (Ark. 2011) (written testimony of Ilya Shapiro), available at [http://www.cato.org/pub\\_display.php?pub\\_id=12726](http://www.cato.org/pub_display.php?pub_id=12726); *On the Ohio Health Care Freedom Act and Its Relationship to Obamacare Before the H.R.*, 2011 Leg. 129th Sess. (Ohio 2011) (written testimony of Ilya Shapiro), available at [http://www.cato.org/pub\\_display.php?pub\\_id=12789](http://www.cato.org/pub_display.php?pub_id=12789).

<sup>73</sup> *See, e.g.*, Clint Bolick, *The Health Care Freedom Act: Questions & Answers*, GOLDWATER INST. (Feb. 2, 2010), <http://www.goldwaterinstitute.org/article/4371>. The Goldwater Institute was instrumental in drafting Arizona’s HCFA, which the American Legislative Exchange Council adopted as a model for legislators to pursue as constitutional amendments or statutes.

<sup>74</sup> Letter from Ilya Shapiro, to Beverly Perdue, N.C. Governor, *Regarding the Constitutionality of North Carolina’s Health Care Freedom Act* (Mar. 1, 2011), [http://www.cato.org/pub\\_display.php?pub\\_id=12828](http://www.cato.org/pub_display.php?pub_id=12828).

In the first two months of 2011, I participated in seven public events relating to Obamacare, including debates at the University of Colorado-Boulder, Brigham Young University, Brooklyn Law School, the University of Akron, and the University of Arkansas,<sup>75</sup> as well as a lecture at the University of Wyoming and a special debate panel at the American Medical Association's National Advocacy Conference.<sup>76</sup> My first trip of the year took me to Colorado for the first time, beginning with an unexpected weekend in Steamboat Springs. There, the syndicated "Cari and Rob Show" let me use their guest condo for the weekend in exchange for my spending an hour in studio with them on Martin Luther King Day – which I did while still in ski attire.<sup>77</sup> The next day, January 18, I had the first of what would be three debates against Colorado-Boulder law professor Scott Moss, who had just signed a statement released by the Center for American Progress attesting to the individual mandate's constitutionality.<sup>78</sup> Moss firmly emphasized the taxing power argument. I retorted that the word "tax" does not appear in the section outlining the individual mandate or its associated penalty.

Moreover, Congress is great at levying taxes. It even levied "taxes" elsewhere in the Obamacare legislation – for example, on "high cost" employer-sponsored insurance plans (the so-called "Cadillac plans")<sup>79</sup> and on "indoor tanning services" (the "Snooki tax")<sup>80</sup> – so it presumably understands the distinction. The health care legislation levied various "taxes" elsewhere in its provisions but the section that identified all the "revenue provisions" failed to include any reference to the insurance mandate.<sup>81</sup> While Congress need not specify what

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<sup>75</sup> Tracie Dugan, *Legal Experts Argue Health-Care Overhaul*, NWAONLINE.COM (Feb. 23, 2011, 3:36 AM), <http://www.nwaonline.com/news/2011/feb/23/legal-experts-argue-health-care-overhaul-20110223/>.

<sup>76</sup> The latter presented the unusual spectacle of lawyers talking with doctors, though the handful of JD/MDs in the audience helped with translation. See *Nat'l Advocacy Conference Highlights*, AM. MED. ASS'N (Feb. 10, 2010), <http://www.ama-assn.org/ama/pub/advocacy/get-involved/national-advocacy-conference/highlights.shtml>.

<sup>77</sup> *The Cari & Rob Show: Ilya Shapiro Discusses Repealing Obamacare* (KRAI television broadcast Jan. 17, 2011), available at [http://www.cato.org/mediahighlights/index.php?radio\\_id=1342](http://www.cato.org/mediahighlights/index.php?radio_id=1342).

<sup>78</sup> Libby S. Adler, et al., *Over 100 Law Professors Agree on Affordable Care Act's Constitutionality*, CTR. AM. PROGRESS, [http://www.americanprogress.org/issues/2011/01/pdf/law\\_professors\\_ACA.pdf](http://www.americanprogress.org/issues/2011/01/pdf/law_professors_ACA.pdf) (last visited Mar. 2, 2011); see also Press Release, Ian Millhiser, Ctr. Am. Progress, *Clearly Constitutional – A Primer on the Constitutionality of the Affordable Care Act* (Jan. 18, 2011), available at [http://www.americanprogress.org/pressroom/releases/2011/01/clearly\\_constitutional.html](http://www.americanprogress.org/pressroom/releases/2011/01/clearly_constitutional.html).

<sup>79</sup> I.R.C. § 5000(A) (2010).

<sup>80</sup> I.R.C. § 5000(B) (2010).

<sup>81</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 847-73 (2010).

power it is exercising, there is no authority for courts to recharacterize a regulation as a tax when doing so is contrary to Congress's express and actual regulatory purpose.<sup>82</sup> Indeed, in this instance, the "hidden" justification – that the penalty is a tax – was specifically rejected by the president who signed the legislation.<sup>83</sup>

Moss and I went back and forth for a while and eventually discovered a shared penchant for quoting the TV show, "How I Met Your Mother." He urged the audience to "wait for it" before giving the point of his arguments, and I replied that, despite our differences on the legal interpretation, we agreed that when the Supreme Court ultimately ruled, it would be "legen . . . [took a sip of water] . . . dary."<sup>84</sup> Moss and I reprised our act two days later at BYU in front of about 200 people<sup>85</sup> – so we each had a chance to appear before sympathetic audiences – and would meet again at the University of Denver in April.<sup>86</sup>

Soon after I returned from my mountain-state tour, a different sort of avalanche hit: On January 31, Judge Vinson, granting summary judgment to the Florida plaintiffs, ruled the individual mandate unconstitutional and, finding that provision non-severable, *struck down all of Obamacare*.<sup>87</sup> The ruling vindicated the constitutional first principle that ours is a government of delegated, enumerated, and thus limited powers:

[T]his case is not about whether the Act is wise or unwise legislation, or whether it will solve or exacerbate the myriad problems in our health care system. In fact, it is not really about our health care system at all. It is principally about our federalist system, and it raises very important issues regarding the Constitutional role of the federal government.<sup>88</sup>

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<sup>82</sup> See, e.g., *Sonzinsky v. United States*, 300 U.S. 506, 513-14 (1937) ("Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts.").

<sup>83</sup> George Stephanopoulos, *Obama: Mandate Is Not a Tax*, ABC NEWS (Sept. 20, 2009, 9:00 AM), <http://blogs.abcnews.com/george/2009/09/obama-mandate-is-not-a-tax.html>.

<sup>84</sup> At that point, Moss yelled out from the side, "and look, we both [ ]suited up." Suffice it to say, these are all catch-phrases from the clever CBS sitcom in which, *inter alia*, former child star Neil Patrick "Doogie Howser" Harris plays the caricature of a loveable lothario (and Harris is gay in real life).

<sup>85</sup> For debate video, see *The Constitutionality and Proposed Repeal of Obamacare*, [http://www.law2.byu.edu/videos\\_index/Federalist%20Society%201-20-11.wmv](http://www.law2.byu.edu/videos_index/Federalist%20Society%201-20-11.wmv).

<sup>86</sup> Alas, Moss did not "suit up" for this last debate of our series.

<sup>87</sup> *Florida v. U.S. Dep't of Health & Human Servs.*, No. 3:10-cv-91-RV-EMT, 2011 WL 285683, at \*40-41 (N.D. Fla. Jan. 31, 2011).

<sup>88</sup> *Id.* at \*1.

Like Judge Hudson in the Virginia case, Judge Vinson recognized that the individual mandate represents an unprecedented and improper constitutional incursion: the federal government, under the guise of regulating commerce, cannot require that people engage in economic activity:

It would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause. If it has the power to compel an otherwise passive individual into a commercial transaction with a third party merely by asserting . . . that compelling the actual transaction is itself “commercial and economic in nature, and substantially affects interstate commerce” [see Act § 1501(a)(1)], it is not hyperbolizing to suggest that Congress could do almost anything it wanted. . . . **If Congress can penalize a passive individual for failing to engage in commerce, the enumeration of powers in the Constitution would have been in vain for it would be “difficult to perceive any limitation on federal power” [*Lopez*, 514 U.S. at 564], and we would have a Constitution in name only.**<sup>89</sup>

The government’s argument that health care is “unique” was not effective because “there are lots of markets – especially if defined broadly enough – that people cannot ‘opt out’ of.”<sup>90</sup> “Uniqueness is not an adequate limiting principle as every market problem is, at some level and in some respects, unique.”<sup>91</sup>

Unpersuasive also was the claim that not buying health insurance is an “economic decision” that, in the aggregate, substantially affects interstate commerce:

The problem with this legal rationale, however, is it would essentially have unlimited application. **There is quite literally no decision that, in the natural course of events, does not have an economic impact of some sort.** The decisions of whether and when (or not) to buy a house, a car, a television, a dinner, or even a morning cup of coffee also have a financial impact that – when aggregated with similar economic decisions – affect the price of that particular product or service and have a substantial effect on interstate commerce.<sup>92</sup>

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<sup>89</sup> *Id.* at \*22 (emphasis added).

<sup>90</sup> *Id.* at \*24 (giving the food market as an example; invoking the broccoli and GM-car hypotheticals).

<sup>91</sup> *Id.* at \*25.

<sup>92</sup> *Id.* at \*27 (emphasis in bold added).

Not even the Necessary and Proper Clauses saves the individual mandate because this clause

cannot be utilized to ‘pass laws for the accomplishment of objects’ that are not within Congress’ enumerated powers. . . . To uphold that provision via application of the Necessary and Proper Clause would authorize Congress to reach and regulate far beyond the currently established ‘outer limits’ of the Commerce Clause and effectively remove all limits on federal power.<sup>93</sup>

Judge Vinson then declined to sever the individual mandate from the rest of the legislation, or determine which other sections must fall with it because “[g]oing through the 2,700-page Act line-by-line, invalidating dozens (or hundreds) of some sections while retaining dozens (or hundreds) of others . . . would, in the end, be tantamount to re-writing a statute in an attempt to salvage it,” which courts cannot do.<sup>94</sup> “It would be impossible to ascertain on a section-by-section basis if a particular statutory provision could stand (and was intended by Congress to stand) independently of the individual mandate.”<sup>95</sup> And so,

notwithstanding the fact that many of the provisions in the Act can stand independently without the individual mandate (as a technical and practical matter), it is reasonably ‘evident,’ as I have discussed above, that the individual mandate was an essential and indispensable part of the health reform efforts, and that Congress did not believe other parts of the Act could (or it would want them to) survive independently.<sup>96</sup>

Judge Vinson emphasized that the case was “not about whether the Act is wise or unwise legislation. It is about the Constitutional role of the federal government.”<sup>97</sup> In feeling obligated to strike down all of Obamacare due to its singular fatal flaw, Vinson noted “that while the individual mandate was clearly ‘necessary and essential’ to the Act as drafted, it is not ‘necessary and essential’ to health care reform in general. It is undisputed that there are various other (Constitutional) ways to accomplish what Congress wanted to do.”<sup>98</sup>

While the practical effect of the ruling was disputed,<sup>99</sup> the fact that the judicial branch was checking the legislative branch’s assertion

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<sup>93</sup> *Id.* at \*33.

<sup>94</sup> *Id.* at \*38.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at \*39.

<sup>97</sup> *Id.* at \*40.

<sup>98</sup> *Id.* at \*41 n.30.

<sup>99</sup> Compare Michael F. Cannon & Ilya Shapiro, *President Should Heed Court and Stop Implementing ObamaCare*, PROVIDENCE J. (Feb. 16, 2011), available at <http://www.projo.com/>

of power was clear enough. And this is as it should be: If the only limit on federal power were Congress's own assessment of the wisdom of each assertion of such power, the Constitution would be obsolete. James Madison, the author of the Federalist Paper No. 51 explaining how man's non-angelic nature requires explicit limits on those who govern, would spin in his grave.<sup>100</sup> As even would Alexander Hamilton – perhaps the Framers most favorably disposed to strong central power – who cautioned that courts should not be in the business of evaluating the “more or less necessity” of a piece of legislation but rather define judicially administrable rules to guide (but also limit) Congress's actions.<sup>101</sup> The ruling, in a lawsuit that now had 26 states as plaintiffs – with two others making separate challenges – thus represented the most significant victory for federalism in this saga. It was again but one district court, but the tide was running in freedom's favor.

Not everyone saw it my way, of course, but Vinson's ruling did get major attention. The Senate Judiciary Committee held a hearing on the constitutionality of Obamacare<sup>102</sup> – one result of which was Randy Barnett being attacked by the *New York Times*.<sup>103</sup> The House would follow suit,<sup>104</sup> again bringing in Randy but also calling as a witness Virginia Attorney General Ken Cuccinelli, who had just recently

opinion/contributors/content/CT\_cannon16\_02-16-11\_E4MD8N3\_v7.1f400f4.html, and Roger Pilon, *After Florida, What's to Be Done about ObamaCare?*, CATO @ LIBERTY (Feb. 4, 2011, 4:58 PM), <http://www.cato-at-liberty.org/after-florida-what%e2%80%99s-to-be-done-about-obama-care/>, with Amy Goldstein & N.C. Aizenman, *State Officials Divided on Meaning of Judge's Health Care Ruling*, WASHINGTONPOST.COM, Feb. 1, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/01/AR2011020105041.html?hpid=moreheadlines>; see also Defendant's Motion to Clarify, *Florida v. U.S. Dep't of Health & Human Servs.*, No. 3:10-cv-91-RV-EMT (N.D. Fla. Feb. 17, 2011).

<sup>100</sup> Recall that Judge Vinson began his magisterial 78-page opinion by quoting the “if men were angels” passage from Federalist 51. *Florida v. U.S. Dep't of Health & Human Servs.*, No. 3:10-cv-91-RV-EMT, 2011 WL 285683, at \*2 (N.D. Fla. Jan. 31, 2011). Not coincidentally, I have a vanity license plate that says “FED 51.”

<sup>101</sup> Alexander Hamilton, *Opinion on the Constitutionality of a National Bank*, in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 95, 98 (H. St. Clair & D.A. Hall eds., 1832).

<sup>102</sup> *The Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. on the Judiciary*, 112th Cong., available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4964>. Better late than never, I suppose.

<sup>103</sup> Editorial, *A Debate Bigger Than Reform*, N.Y. TIMES, Feb. 10, 2011, at A24, available at [http://www.nytimes.com/2011/02/10/opinion/10thu2.html?\\_r=1](http://www.nytimes.com/2011/02/10/opinion/10thu2.html?_r=1). See Randy's response, also in the *Times*: Randy E. Barnett, Letter to the Editor, *Legality of Health Mandate*, N.Y. TIMES, Feb. 18, 2011, at A30, available at [http://www.nytimes.com/2011/02/18/opinion/118mandate.html?\\_r=1&ref=todayspaper](http://www.nytimes.com/2011/02/18/opinion/118mandate.html?_r=1&ref=todayspaper).

<sup>104</sup> Congressman Trent Franks (R-AZ) mentioned me during his questioning. See *The Constitutionality of the Individual Mandate: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Rep. Trent Franks), available at <http://judiciary.house.gov/news/ChairmanStatement02162011.html>.



filed a petition for expedited Supreme Court review of Judge Hudson's ruling.<sup>105</sup>

Yale law professor Akhil Amar, one of the nation's leading constitutional scholars and a "progressive originalist" of sorts – he joined Randy and others on a brief supporting our view of the Privileges or Immunities Clause in *McDonald*<sup>106</sup> – published a fiery op-ed in the *L.A. Times*.<sup>107</sup> Among other charges, Amar said his students understood the Constitution better than Vinson, likened the judge to his namesake Roger Taney (the Chief Justice who wrote the infamous *Dred Scott* opinion), and – most outrageously as a matter of *legal* argument – that breathing is an action subject to federal regulation! A reader of Cato's blog wrote in to say that this latter point reminded him of that classic song by the Police, "Every Breath You Take." What's ironic about this comment, perhaps inadvertently, is that the whole Obamacare battle boils down to competing views of federal power: Does the government have a general "police" power or is it limited to those powers listed in the Constitution? Feeling cheeky, I updated the song for our favorite constitutional debate:

Every breath you take  
 Every move you make, or  
 Decide not to take  
 Even when you flake  
 We're mandating you

Every single day  
 Every word you say  
 Every game you play  
 Even if you stay  
 We're coercing you

O don't you fuss

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<sup>105</sup> Petition for a Writ of Certiorari Before Judgment, *Virginia v. Sebelius*, No. 10-1014 (U.S. Feb. 8, 2011), available at <http://aca-litigation.wikispaces.com/file/view/Petition+for+cert.pdf>.

<sup>106</sup> Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners, *McDonald v. Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521), 2009 WL 4099504.

<sup>107</sup> Akhil Amar, *Constitutional Showdown: A Florida Judge Distorted the Law in Striking Down Healthcare Reform*, L.A. TIMES, Feb. 6, 2011, available at <http://www.latimes.com/news/opinion/commentary/la-oe-amar-health-care-legal-20110206,0,1370439.story>. More than fiery, I'd say the mild-mannered Amar was uncharacteristically intemperate. For more detailed criticism than I provide here, see Timothy Sandefur, *Akhil Amar's Embarrassing Attempt to Defend Obamacare*, PLF LIBERTY BLOG (Feb. 6, 2011, 4:37 PM), <http://plf.typepad.com/plf/2011/02/akhil-amars-embarrassing-attempt-to-defend-obamacare.html#tp> and the commentary linked therein.

You belong to us  
How we regulate every step you take

Every move you make  
Every vow you break  
Every smile you fake  
Every claim you stake  
We're mandating you

The Constitution's lost without a trace  
Since '37 we go every place  
Limits on government you can't replace  
Got rid of those so we're always in your face  
We're commanding you, no saying please

Every move you make  
Every vow you break  
Every smile you fake  
Every claim you stake  
We're mandating you<sup>108</sup>

And Akhil Amar wasn't the only academic giant weighing in against the Vinson ruling. Harvard law professor Laurence Tribe, liberal lion and one of the "deans" of constitutional law (who is even found in the pages of the *Cato Supreme Court Review*)<sup>109</sup> wrote an op-ed for the *New York Times*:

Since the New Deal, the court has consistently held that Congress has broad constitutional power to regulate interstate commerce. This includes authority over not just goods moving across state lines, but also the economic choices of individuals within states that have significant effects on interstate markets. By that standard, this law's constitutionality is open and shut. Does anyone doubt that the multitrillion-dollar health insurance industry is an interstate market that Congress has the power to regulate?<sup>110</sup>

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<sup>108</sup> Ilya Shapiro, *The Federal Government's Police Power*, CATO @ LIBERTY (Feb. 14, 2011, 9:00 AM), <http://www.cato-at-liberty.org/the-federal-governments-police-power/>.

<sup>109</sup> Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2007 CATO SUP. CT. REV. 23 (2007), available at <http://www.cato.org/pubs/scr/2007/tribe.pdf>.

<sup>110</sup> Laurence H. Tribe, *On Health Care, Justice Will Prevail*, N.Y. TIMES, Feb. 8, 2011, at A27, available at [http://www.nytimes.com/2011/02/08/opinion/08tribe.html?\\_r=2](http://www.nytimes.com/2011/02/08/opinion/08tribe.html?_r=2).

This time, instead of playing at satire, I wrote a letter to the editor.<sup>111</sup>

A week later, I gave a lecture at the fourth annual International Students for Liberty Conference, which attracted over 500 libertarian student activists.<sup>112</sup> I humbly channeled Roger Pilon in a 45-minute lecture that covered the basics of political philosophy, rights theory, and American constitutionalism – tying those themes together with reference to Obamacare in an attempt to answer the question, “are there any limits on federal power?”

A week after that, again on the last day of the month, a judge very different from Roger Vinson answered that question in the negative. Judge Gladys Kessler of the D.C. district court opined that the power to regulate interstate commerce includes the power to regulate “mental activity, i.e., decision-making.”<sup>113</sup> The activity/inactivity distinction is “of little significance” because “[i]t is pure semantics to argue that an individual who makes a choice to forgo health insurance is not ‘acting’. . . . Making a choice is an affirmative action, whether one decides to do something or not to do something.”<sup>114</sup>

As Randy Barnett said in an emailed press statement,

This decision makes crystal clear that the government is seeking the dangerous and unprecedented power to regulate the economic “decisions” of all Americans – including the decision to refrain from engaging in economic activity. If allowed by the Supreme Court, Americans would be reduced from citizens to the subjects of Congress, which would now have the discretionary power to run their lives.<sup>115</sup>

Indeed, Judge Kessler’s logic vindicates the “parade of horrors” (as they’ve been described by Obamacare proponents) that those on my side have raised as examples of what the government could do if the individual mandate passed constitutional muster. Judge Vinson had seen this danger:

<sup>111</sup> Ilya Shapiro, Letter to the Editor, *The Law and Politics of Health Reform*, N.Y. TIMES, Feb. 13, 2011, at WK7, available at <http://www.nytimes.com/2011/02/13/opinion/13health.html?ref=opinion>.

<sup>112</sup> Both the numbers and energy boggle the mind even for those of us who weren’t in school that long ago. See, e.g., Gene Healy, *Young Libertarian Activists Point Way to Freedom’s Future*, WASH. EXAM’R., Feb. 21, 2011, available at <http://washingtonexaminer.com/opinion/columnists/2011/02/young-libertarian-activists-point-way-freedoms-future>.

<sup>113</sup> *Mead v. Holder*, 766 F. Supp. 2d 16, 36 (D.D.C. 2011).

<sup>114</sup> *Id.*

<sup>115</sup> Ilya Shapiro, *Not Just Breathing: Now the Feds Can Regulate Thinking*, CATO @ LIBERTY (Feb. 24, 2011, 9:01 AM), <http://www.cato-at-liberty.org/not-just-breathing-now-the-feds-can-regulate-thinking/>.

The important distinction is that “economic decisions” are a much broader and far-reaching category than are “activities that substantially affect interstate commerce.” While the latter necessarily encompasses the first, the reverse is not true. “Economic” cannot be equated to “commerce.” And “decisions” cannot be equated to “activities.” Every person throughout the course of his or her life makes hundreds or even thousands of life decisions that involve the same general sort of thought process that the defendants maintain is “economic activity.” There will be no stopping point if that should be deemed the equivalent of activity for Commerce Clause purposes.<sup>116</sup>

Vinson’s is a vision diametrically opposed to Kessler’s. As the *Wall Street Journal* put it, “Judge Kessler has shown that the real debate is between a government of limited and enumerated powers as understood by the Founders, and a government whose reach includes mental activity.”<sup>117</sup>

## VII. NON-CONCLUSION

The debate has certainly shifted. Where once Obamacare’s defenders said it began and ended with health care clearly being commerce – and constitutional lawsuits were frivolous and partisan – they’ve since cycled through the taxing power and Necessary and Proper Clause, only to resort to ad hominem rants about overturning the New Deal and “Lochnerism.”<sup>118</sup> In briefing at the appellate stage, meanwhile, the government has all but abandoned the once-favored tax arguments – having gone 0-for-6 in district courts, including Judge Kessler.<sup>119</sup> And instead of framing the activity regulated by the individual mandate as the “economic decision” not to buy insurance, Congress is now allegedly regulating “the practice of obtaining health care services without insurance, a practice that shifts significant health care costs to other participants in the health care market.”<sup>120</sup> (Under

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<sup>116</sup> *Florida v. U.S. Dep’t of Health & Human Servs.*, No. 3:10-cv-91-RV-EMT, 2011 WL 285683, at \*29 (N.D. Fla. Jan. 31, 2011).

<sup>117</sup> Editorial, *Review & Outlook: Regulating ‘Mental Activity’*, WALL ST. J., Feb. 28, 2011, available at [http://online.wsj.com/article/SB10001424052748703408604576164623704291908.html?mod=djemEditorialPage\\_h](http://online.wsj.com/article/SB10001424052748703408604576164623704291908.html?mod=djemEditorialPage_h).

<sup>118</sup> See, e.g., Simon Lazarus, *The Health Care Lawsuits: Unraveling A Century of Constitutional Law and The Fabric of Modern American Government*, AM. CONST. SOC’Y REP., Feb. 8, 2011, available at <http://www.acslaw.org/files/Lazarus%20-%20health%20reform%20lawsuits.pdf>.

<sup>119</sup> Brad Joondeph, *A Scorecard on the Taxing Power Question*, ACA LITIG. BLOG (Feb. 25, 2011, 11:26 AM), <http://acalitigationblog.blogspot.com/2011/02/scorecard-on-taxing-power-question.html>.

<sup>120</sup> Brief of Appellees at 25, *Liberty Univ. v. Geithner*, No. 10-2347 (4th Cir. Feb. 18, 2011), available at <http://aca-litigation.wikispaces.com/file/view/U.S.+brief+as+appellee.pdf>.

this theory, however, one could refrain from buying insurance by refraining from using medical services – but this option is not allowed under the statute, except for certain religious objectors.) Stay tuned on that front, as both sides refine the nuances of their positions and the case law on which they rely. Lawyers and media alike nervously anticipated the appellate arguments that were to be heard in the Fourth, Sixth, and Eleventh Circuits in May-June 2011, and in the D.C. Circuit in September.<sup>121</sup> Given the Supreme Court’s denial of Virginia’s petition for expedited review, observers eagerly awaited the appellate decisions that were expected in late summer or early fall.<sup>122</sup>

My personal tour, meanwhile, continued apace – I should make t-shirts – with spring 2011 events in Indianapolis, New Orleans, Delaware, New York,<sup>123</sup> Alabama, and Kentucky (where I missed one of my events due to the longest TSA-screening lines I’ve ever seen, in Houston the morning after the Final Four NCAA basketball championship). I also had a highly anticipated debate against Yale law professor Jack Balkin at UCLA on St. Patrick’s Day – where both of us spoke without notes from arm chairs and Balkin unveiled the novel theory that the individual mandate penalty was actually a “duty” that

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<sup>121</sup> In addition to the Sixth Circuit *amicus* brief Cato filed, we also filed briefs in the Fourth, Eleventh, and D.C. Circuits—all making Commerce Clause/Necessary and Proper Clause arguments the same as or similar to those detailed throughout this article. See Brief of the Cato Institute, Competitive Enterprise Institute, and Prof. Randy E. Barnett as Amici Curiae Supporting Plaintiff-Appellee/Cross-Appellant and Affirmance, *Virginia v. Sebelius*, Nos. 11-1057 & 11-1058 (4th Cir. Apr. 4, 2011), available at <http://www.cato.org/pubs/legalbriefs/Virginia-v-Sebelius-4th-Cir-final.pdf>; Brief of the Cato Institute Supporting Plaintiffs-Appellees and Affirmance, *Florida v. U.S. Dep’t of Health & Human Servs.*, Nos. 11-11021 & 11067 (11th Cir. May 11, 2011), available at <http://www.cato.org/pubs/legalbriefs/FloridaVHHS-11th-Cir-final.pdf>; Brief of the Cato Institute et al. Supporting Appellants and Reversal, *Seven-Sky v. Holder*, No. 11-5047 (D.C. Cir. May 23, 2011), available at <http://www.cato.org/pubs/legalbriefs/Seven-SkyVHolder-DCcirc-Final.pdf> (caption changed because the district court had found Margaret Peggy Lee Mead to lack standing, so Susan Seven-Sky became the new name plaintiff).

<sup>122</sup> See Jennifer Haberkorn, *Supreme Court denies fast track to Virginia health care lawsuit*, POLITICO PRO (Apr. 25, 2011, 10:51 AM), <http://www.politico.com/news/stories/0411/53655.html>. As this article went through final (non-substantive) editing, the Sixth Circuit released its ruling, affirming 2-1 the constitutionality of the individual mandate on Commerce Clause grounds. *Thomas More Law Ctr. v. Obama*, No. 10-2388, 2011 WL 2556039 (6th Cir. Jun. 29, 2011). The court rejected the taxing power argument, however, by a 2-0-1 vote (one judge not reaching the issue). *Id.* at \*17-21 (Sutton, J., concurring in part and delivering the opinion of the court in part). Then, right before this article went to print, the Eleventh Circuit affirmed 2-1 Judge Vinson’s ruling that the mandate exceeded federal power, but severed the provision from the rest of the law. *Florida v. U.S. Dep’t of Health & Human Servs.*, Nos. 11021 & 11067, 2011 WL 3519178 (11th Cir. Aug. 12, 2011). The panel also unanimously rejected the taxing power argument. *Id.* at \*68-76. Both of these decisions are beyond the scope of this article.

<sup>123</sup> For video of a wonderful debate I had at Fordham University Law School against Brooklyn Law School professor Nelson Tebbe (whom I had debated in front of about 200 people at his home institution in February), download the “2011-04-14 Federalist Society” file from <http://addie1.sugarsync.com/getfiles/yv8wmffq8a3i>.

the government could lawfully assess under Article I, section 8. The following month, I faced, together with my nominal doppelganger, George Mason law professor Ilya Somin, Balkin's colleague Akhil Amar and NYU's Rick Hills in a four-way "Oxford-style" debate at Amherst College. Amar threw out some bizarre arguments relating to public vaccination and national security, as well as arguing from the U.S. News rankings that no professor from a top-10 law school other than Richard Epstein supported "the Ilyas."<sup>124</sup> I rounded out the academic year at the University of Richmond Law School, where Virginia Delegate Joe Morrissey seemed to want to debate whether Obamacare was "good" and argued that because it was, it had to be constitutional.<sup>125</sup>

As I submitted the final substantive revision of this article, exactly a year had passed since my first Obamacare debate, the one against my former professor at the University of Chicago Law School. What a year it was, certainly not one I could have predicted when I was starting out at Cato. I suppose one could say that mine is one job the Obama administration has saved or created, and that Obamacare could also be called the "Legal Pundit Full Employment Act." On top of the wonderful, frustrating, and above all tiring experiences, my first year battling Obamacare provided a tremendous education in constitutional law and politics, and also in human psychology.

All the Obamacare legal challenges boil down to Congress's authority – or lack thereof – to require people to buy private insurance. Although unfortunately not dispositive of modern judicial decisions, the text of the Constitution demands that the Supreme Court strike down the individual mandate as an unconstitutional exercise of Congress's power to regulate interstate commerce. Finding the mandate constitutional would be the first interpretation of the Commerce Clause to permit the regulation of inactivity – in effect requiring an individual to engage in an economic transaction. Upholding Obamacare would grant the federal government wide latitude to mandate that Americans engage in activities of the government's choosing. An expansive holding here would fundamentally alter the relationship of the federal government to the states and the people. If the legal challenges fail, there will be no principled limits on federal power.

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<sup>124</sup> For more description and video of the Amherst debate, see Ilya Shapiro, *Battle of the Ilyas III: Together against Obamacare*, CATO @ LIBERTY (Apr. 14, 2011, 4:26 PM), <http://www.cato-at-liberty.org/the-battle-of-the-ilyas-iii-together-against-obamacare/> (video also available at <http://www.youtube.com/watch?v=JDwWvGXsPa8>).

<sup>125</sup> For local media coverage of the Richmond debate, see *CBS6 Live at 5*, WTVR (Apr. 21, 2011, 5:08:27 PM), <http://mms.tveyes.com/Transcript.asp?StationID=2890&DateTime=4%2F21%2F2011+5%3A08%3A27+PM&Term=Cato+Institute&PlayClip=TRUE>.

But will the Court go there, striking down such a large and important piece of legislation, the cornerstone of the Obama administration's domestic policy? On the one hand, the Court refrained from striking down such facially unconstitutional pieces of fundamental legislation as Social Security. On the other, that legislation was largely popular, and came during a time of great social upheaval. If, as the old saw goes, "the Court follows the election returns," the "shellacking" the Democrats received in November 2010 may have steered the spine of justices inclined to overturn Obamacare. In particular, if the conventional wisdom is correct that Justice Anthony Kennedy will be the swing vote in a 5-4 decision, then he may be swayed by what the American people seem to think is a gross infringement on liberty.

The only precise prediction I will make is that, whatever the ultimate result is of these lawsuits, the Supreme Court will not issue a decision ratifying a more expansive use of the commerce power than it did in *Raich*. It will either strike down this law or find some way to avoid the merits while effectively allowing the individual mandate to stand.