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# Vertical Federalism, the New States' Rights, and the Wisdom of Crowds

Ronald D. Rotunda\*

## INTRODUCTION

When we think of the “separation of powers,” we usually think of the three branches of the federal government. We all learn in grade school<sup>1</sup> that the framers, in an effort to protect the liberties of the people, created three branches of the national government, each to serve as a check on the other.

We frequently compare this separation of powers to a three-layer cake, although the framers were not thinking of bakers and the kitchen. If they had, I suppose their metaphor would be a marble cake, because each of the branches shares some powers with the others. Congress enacts the laws, but the President can veto them, and the courts can invalidate them. The President nominates the major offices including the judges, but the Senate need not confirm them. The Executive Branch enforces the laws, but Judges interpret them, and Congress, within broad bounds, can limit the jurisdiction of the courts to review them.

The framers, however, were not thinking of three-layer cakes or marble cakes. They were more likely thinking of *The Principia*,<sup>2</sup> Sir Isaac Newton’s book published a century earlier. The framers’ desire to separate power mirrored, in part, their fascination with philosophical aspects of Newtonian physics—for every action there is an equal and opposite reaction.<sup>3</sup>

The three branches of government on the federal level—what we may call horizontal separation of powers<sup>4</sup>—often makes it difficult for the President to have his way, even when his party controls both Houses of Congress. Horizontal separation does not create a more efficient

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<sup>1</sup> E.g., COMMONWEALTH OF VIRGINIA, BOARD OF EDUCATION, STANDARDS OF LEARNING FOR VIRGINIA PUBLIC SCHOOLS 90 (1995); HEDLEY BEARE, CREATING THE FUTURE SCHOOL: STUDENT OUTCOMES AND THE REFORM OF EDUCATION 78 (2001).

<sup>2</sup> ISAAC NEWTON, PHILOSOPHIÆ NATURALIS PRINCIPIA MATHEMATICA (Andrew Mothe trans., 1729) (1687).

<sup>3</sup> JESSICA KORN, THE POWER OF SEPARATION: AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE LEGISLATIVE VETO 19 (1996); WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 54–56 (John Hopkins Univ. Press 1981) (1885). Wilson thought the framers created an “unconscious copy of the Newtonian theory” of celestial mechanics. I would not be too quick to adopt Wilson’s assumption.

<sup>4</sup> Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493 (2008).

government—dictatorships are efficient; democracies never are. However, horizontal separation helps preserve the liberties that our Constitution grants. The framers were concerned that the rights found in the Constitution were mere statements—“parchment barriers”—that would not be enough to protect the people from the abuse of power.<sup>5</sup> Thus, they sought to control power by separating it.

This separation of powers *within* the federal government is not the only method the framers designed to preserve liberty. They also embraced another form of Newtonian mechanics to balance power and thus preserve liberty—what we may call vertical separation—using the states to check the power of the federal government.<sup>6</sup> The states, no less than the three branches on the federal level, protect the liberty of the people by dividing power between the federal and the state governments.

Vertical federalism protects our liberties and makes us the envy of the world, first, because the states are an important counterbalance to the federal government. The framers used power to limit power. Second, because when the independent states go their independent ways they implement what the economists call the “wisdom of crowds.”<sup>7</sup>

#### VERTICAL FEDERALISM AND THE LIMITS ON FEDERAL COMMERCE AND SPENDING POWER

Look at any map of the United States and ask yourself, how many states have a border where no side is a straight line. The answer, only one—Hawaii. Our states are artificial constructs. The people of each of the states may speak with different accents, share different histories, and embrace diverse cultures, but they are not states in the sense of the modern nation-states of France, Great Britain, or Germany. Nonetheless, they are more than merely dotted lines on a map. They retain some reserved power that the federal government

<sup>5</sup> Thus, James Madison said in the *The Federalist No. 48*:

Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defence is indispensably necessary for the more feeble, against the more powerful members of the government. The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex.

THE FEDERALIST NO. 48 (James Madison) (emphasis added).

<sup>6</sup> Brannon P. Denning, *Vertical Federalism, Horizontal Federalism, and Legal Obstacles to State Marijuana Legalization Efforts*, 65 CASE W. RES. L. REV. 567 (2015).

<sup>7</sup> E.g., Sheng Kung Michael Yi, Mark Steyvers, Michael D. Lee & Matthew J. Dry, *The Wisdom of the Crowd in Combinatorial Problems*, 36 COGNITIVE SCI. 452–70 (2012) (showing that aggregate solutions outperform the majority of individual solutions. The wisdom of the crowd phenomenon is applicable to problem-solving and decision-making situations that go beyond the estimation of single numbers.).

cannot reach. Granted, the Court has steadily reduced this area of reserved powers, but there is a core that still exists. These limits on the federal government have made our country more powerful, not less, while protecting our freedom. The rights of the states impose chains on the federal government, and these chains make us free.

The term, “states’ rights” or “state sovereignty” became a code word of racial segregation in the 1940s and 1950s, when Southern politicians used it to justify “separate but equal.” We often forget that the original (and present) purpose of “states’ right” is not to protect *states*, as incorporeal entities. The purpose of states’ rights is to protect *us*, the people. James Madison wrote that our system of federalism provides “a double security . . . to the rights of the people.”<sup>8</sup> The thirteen states then, and the fifty states now, are shields to protect individual rights.

Before the Civil War, commentators typically referred to “*These United States*.”<sup>9</sup> The Constitution treats “The United States” as a plural noun.<sup>10</sup> While “the United States” is now a singular noun, what is important is not the customs of modern grammar but the fact that in this one nation composed of many states, the states still have a reserved power that limits the undeveloped appetite of the central government in self-restraint. That reserved power protects our rights.

Until the Civil War, many of the decisions of the U.S. Supreme Court focused on making one nation out of the many states. In the early years, the Court used the dormant commerce clause to create an economic common market by invalidating many state laws that interfered with trade among the states. From *Dred Scott*<sup>11</sup> until *Lochner v. New York*,<sup>12</sup> the Court was relatively quiet. From *Lochner* until 1937, the Court was active in creating economic rights that did not have a textual basis in the Constitution. However, since the Court Packing Plan of 1937, the Court has almost abdicated its role in the economy. Instead, it turned its focus to cases expanding civil liberties.<sup>13</sup> In recent years, it has imposed some limits on the

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<sup>8</sup> THE FEDERALIST No. 51 (James Madison).

<sup>9</sup> E.g., Robin Gonzalez, *When Did “The United States” Become a Singular Noun?*, 109 (July 27, 2013, 11:15 AM), <http://io9.gizmodo.com/when-did-the-united-states-become-a-singular-noun-9497716> 85.

<sup>10</sup> See U.S. CONST. art. II, § 3 (“Treason against the United States, shall consist only in levying War against *them*, or in adhering to *their* Enemies, giving *them* Aid and Comfort.”) (emphasis added).

<sup>11</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1857); see also Ronald D. Rotunda, *Dred Scott After Nearly Two Centuries*, VERDICT (Oct. 26, 2015), <https://verdict.justia.com/2015/10/26/dred-scott-after-nearly-two-centuries>.

<sup>12</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>13</sup> See 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE chs. 14–16 (5th ed. 2012).

power of Congress under the Commerce Clause<sup>14</sup> and the Spending Clause.<sup>15</sup> It has also focused on horizontal separation of powers.<sup>16</sup>

In the last few decades, the Court is turning its attention to another area—vertical separation of powers. The Court still decides dormant commerce clause cases, civil liberties cases, and horizontal separation of powers cases, of course, but to its menu of cases, it has added a new course, vertical separation of powers.

Commentators often note that the Court is an anti-democratic institution, and so it is when it invalidates a law that impinges on, for example, free speech. In contrast, when the Court is enforcing vertical integration, it is helping the democratic process. It is also making our union more effective because it takes advantage of the wisdom of crowds.

The most recent case demonstrating that there are limits to the federal power over commerce and the federal power to attach conditions to federal spending is *National Federation of Independent Business v. Sebelius*.<sup>17</sup> Yes, *Sebelius*. Granted, the Court (5 to 4) upheld the constitutionality of the Affordable Care Act, popularly called Obamacare. However, to reach that result, the majority engaged in a creative reinterpretation of the statute—reading the law so that what the statute says is not a tax is really a tax. Later, the Court reinterpreted the law so that it read “state” to mean “state *or* federal”—again, to save the law.<sup>18</sup>

The Court’s multiple exercises in dramatic statutory reinterpretation should not mask the significant holding that a clear majority in *Sebelius* did embrace. First, the Court held (5 to 4) that Congress does not have the constitutional power under the Commerce Clause to regulate omissions (the failure to buy medical insurance) because an omission is not a commercial act. Omissions are not commerce and an omission is not an act; it is just an omission, the failure to act. Second, the Court held (6 to 2), for the first time, that Congress exceeded its power under the Spending Clause. Let us now analyze each of these holdings.

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<sup>14</sup> See 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.10 (5th ed. 2012).

<sup>15</sup> See *id.* at ch. 5.

<sup>16</sup> See *id.* at chs. 6–8.

<sup>17</sup> 132 S. Ct. 2566 (2012).

<sup>18</sup> See *King v. Burwell*, 135 S. Ct. 2480 (2015); see also the discussion in Ronald D. Rotunda, *King v. Burwell and the Rise of the Administrative State*, 23 U. MIAMI BUS. REV. 267 (2015).

THE COMMERCE POWER AFTER *SEBELIUS*

One can summarize the federal commerce power as follows. Congress may use its commerce power to regulate:

- [1] any instrumentality of interstate commerce (a railroad, an automobile, a telephone, even if no one crosses a state law);<sup>19</sup> or
- [2] crossing state line, even if the crossing does not involve a commercial act;<sup>20</sup> or
- [3] a commercial act (even an insignificant one) within one state that affects commerce among other states when that commercial act is added to other such acts and “taken together with that of many others similarly situated,” the effect on commerce “is far from trivial.”<sup>21</sup>

Applying these tests, in 1995, in *United States v. Lopez*,<sup>22</sup> the Court invalidated a law as not within the commerce power. This case marked the first time since 1937 that the Court held that the commerce power could not justify a federal law. However, the Court did not overrule any cases and followed the three-prong approach that it has used since 1937.

In *Lopez*, the federal government prosecuted a person who was merely holding a gun near a school. Holding a gun is not an instrumentality of interstate commerce. It is not crossing a state line. It is not a commercial act.

For all the wailing and gnashing of teeth by commentators worried that the Court was turning back to *Lochner*,<sup>23</sup> all the *Lopez* Court did was apply

<sup>19</sup> See, e.g., *United States v. Darby*, 312 U.S. 100 (1941); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

<sup>20</sup> Congress, for example, could forbid an individual from crossing a state line with his paramour. See *Caminetti v. United States*, 242 U.S. 470 (1917) (non-commercialized vice); see also *Campion v. Ames*, 188 U.S. 321 (1903) (lottery case); *Heart of Atlanta Motel*, 379 U.S. at 256.

<sup>21</sup> *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942) (“The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.”); see also *Perez v. United States*, 402 U.S. 146 (1971).

<sup>22</sup> 514 U.S. 549 (1995).

<sup>23</sup> Commentators incorrectly predicted that the Court would surely reject the commerce clause challenge. E.g., Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1174 n.65 (1995) (“The Fifth Circuit’s decision in *Lopez* will likely be reversed because it flies in the face of most Commerce Clause jurisprudence.”); *id.* at 1210 n.43 (“Ultimately, the Court can be expected to reject this claim [in *Lopez*].”); Eric W. Hagen, *United States v. Lopez: Artificial Respiration for the Tenth Amendment*, 23 PEPP. L. REV. 1363, 1392 (1996) (*Lopez* gave “artificial respiration” to the Tenth Amendment.); Eric Grossman, *Where Do We Go from Here? The Aftermath and Application of United States v. Lopez*, 33 HOUS. L. REV. 795, 854 (1996) (incorrectly predicting, “it would not be a federal crime for felons in states where firearms are

precedent. Search Westlaw and you will find 346 federal cases that treat *Lopez* as “negative.”<sup>24</sup> One might think that lower federal courts are supposed to follow Supreme Court precedent, not call it into doubt, or recognize their disagreement.

*Lopez* did not overturn any case law. The majority did not argue that gun violence does not affect commerce. Of course it does. All crimes affect commerce. The victims of violence seek care in hospitals. They suffer. They buy medicine instead of ice cream. If there were no crime, that would affect commerce too. But, possessing a gun near a school is not an “economic activity.”

*Lopez* cited with approval other cases with a broad view of the commerce power. For example, *Perez v. United States*<sup>25</sup> upheld a federal law that regulated loan sharking. That case, explained *Lopez*, involved an economic activity (and an illegal one) that affects commerce in other states. Even though the economic activity does not cross a state line, it follows the third prong of the commerce power.

Similarly, *Lopez* reaffirmed that the federal regulation of the production of wheat in *Wickard v. Filburn*<sup>26</sup> was a regulation to control the price of wheat. Price regulation certainly regulates economic activity. Growing wheat for sale or growing wheat so you do not have to buy it to meet your own needs is also an economic activity. “That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial,” amounting to over 20% of all wheat produced.<sup>27</sup>

Understanding *Lopez* is not rocket science. If the prohibited activity does not cross a state line and does not regulate an instrumentality of interstate commerce, Congress can still regulate if it meets the third prong—a commercial act (even an insignificant one) within one state that affects commerce among other states when that commercial act is added to other acts. Possessing a gun is not a commercial act. Growing wheat for sale (or growing wheat to avoid having to purchase it) is a commercial act.

Justice Breyer’s dissent in *Lopez* agreed that there must be some limits to the commerce power. However, he could not think of any. Granted, he does insist that the federal government could not regulate “any and all aspects

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manufactured to possess or receive them”) (footnote omitted).

<sup>24</sup> Plug in “514 U.S. 549” into Westlaw and you will see a list of hundreds of cases classified as “negative” treatment of *Lopez*.

<sup>25</sup> 402 U.S. 146 (1971).

<sup>26</sup> 317 U.S. 111 (1942).

<sup>27</sup> *Id.* at 127–28 (“Consumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production.”).

of education.”<sup>28</sup> However, his assertion is a real hoot. The federal government already regulates many aspects of education—even what schools must serve in school lunches.

The Court underscored the significance and limited reach of *Lopez* in *United States v. Robertson*,<sup>29</sup> which it issued only five days after *Lopez*. *Robertson* affirmed the power of Congress to prohibit investing funds of unlawful activities in a business (a gold mine) that bought and sold goods that crossed state lines. It was unnecessary to determine if the gold mine met the third prong of the commerce clause—the “affects” test. *Robertson* explained that the Court uses the affects test “to define the extent of Congress’ power over purely *intrastate* commercial activities that nonetheless have substantial *interstate* effects.”<sup>30</sup> The gold mine obviously never left the state, but evidence at the *Robertson* trial showed that the mine was engaged in “*interstate* activities.” For example, “Robertson purchased at least \$100,000 worth of equipment and supplies for use in the mine.”<sup>31</sup> Whether or not the gold mine was “substantially affecting interstate commerce,” it purchased supplies and equipment for use in the mine from interstate commerce, that defendant sought workers for the mine from out of state, and that defendant took \$30,000 worth of gold with him out of state.<sup>32</sup>

*Lopez* should not have been a surprise and should not have drawn any dissents when it said that the affects test requires a “commercial” act. The mother of all commerce clause cases, *Gibbons v. Ogden*,<sup>33</sup> talked of “commerce” and “commercial intercourse” more than 100 times. Chief Justice John Marshall argued that the federal commerce power is very broad. “Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.”<sup>34</sup> Nonetheless, in the very next sentence he also acknowledged:

[Commerce] is not intended to say that these words comprehend that *commerce*, [1] which is completely internal, [2] which is carried on between man and man in a State, or between different parts of the same State, *and* [3] which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.<sup>35</sup>

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<sup>28</sup> *United States v. Lopez*, 514 U.S. 549, 624 (1995) (Breyer, J., dissenting) (“To hold this statute constitutional is not . . . to hold that the Commerce Clause permits the Federal Government to . . . regulate any and all aspects of education.”).

<sup>29</sup> 514 U.S. 669 (1995) (per curiam).

<sup>30</sup> *Id.* at 671 (emphasis in original).

<sup>31</sup> *Id.* (emphasis in original).

<sup>32</sup> *Id.*

<sup>33</sup> 22 U.S. 1 (1824).

<sup>34</sup> *Id.* at 194.

<sup>35</sup> *Id.* (emphasis and bracketed numbers added).



*Gibbons* did not authorize Congress to regulate an activity that (1) was completely within one state *and* (2) was not commercial.

*Lopez* applies *Gibbons* when it held that possessing a gun is not a commercial act. “The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”<sup>36</sup> The government did not even offer any evidence that Mr. Lopez had transported the gun across state lines.<sup>37</sup>

The Court applies the principle of *Lopez* in *United States v. Morrison*,<sup>38</sup> when it held that rape is not a commercial act and hence Congress cannot create a federal tort using its commerce clause power. The commerce clause does not reach “gender-motivated violence.” A rape is a horrible act. It also affects commerce in the sense that it is a subset of crime and crime affects commerce. But rape (unlike securities fraud or loan sharking) is not an economic activity. The federal statute at issue governed “gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce),”<sup>39</sup> so the question is whether rape is a *commercial* activity that substantially affects commerce. It is not.

Congress made findings that gender-motivated violence affects commerce, and the majority did not dispute that at all. The problem was that this finding is irrelevant. All violence affects commerce. If all violence miraculously ended, that miracle also would affect commerce. However, violence is neither a commercial act nor an economic activity. One cannot use the “affects” test on non-economic activity because then everything would be within the commerce power and it would convert the central government to a government not bound by enumerated powers. Even the dissent in *Lopez* and *Morrison* conceded that the commerce power had to have limits. “Where *economic* activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”<sup>40</sup>

This case, like *Lopez*, was five to four, with the same four justices dissenting—Souter, Breyer, Stevens, and Ginsburg. The Souter dissent

<sup>36</sup> *United States v. Lopez*, 514 U.S. 549, 567 (1995).

<sup>37</sup> *Id.* at 566; *see also* *United States v. Bass*, 404 U.S. 336 (1971) (interpreting a federal law, 18 U.S.C. § 1202(a), to require the felon transport the gun across state lines).

<sup>38</sup> 529 U.S. 598 (2000).

<sup>39</sup> *Id.* at 609. The *Morrison* majority had no problem with another portion of this law, § 40221(a), which “creates a federal criminal remedy to punish interstate crimes of abuse including crimes committed against spouses or intimate partners during interstate travel and crimes committed by spouses or intimate partners who cross State lines to continue the abuse.” S. Rep. No. 103–138, p. 43 (1993). The majority noted that the courts of appeals “have uniformly upheld this criminal sanction as an appropriate exercise of Congress’ Commerce Clause authority, reasoning that ‘[t]he provision properly falls within the first of *Lopez*’s categories as it regulates the use of channels of interstate commerce—i.e., the use of the interstate transportation routes through which persons and goods move.’” *Morrison*, 529 U.S. at 613, n.5.

<sup>40</sup> *Id.* at 610 (quoting *Lopez*, 514 U.S. at 560) (emphasis added).

(joined by the other dissenters) is self-contradictory. It says that politics and the ballot box do not define the commerce power. A few sentences later, it says that the limits on the federal commerce power “should be a political choice and only a political choice.”<sup>41</sup> One of the nice things about being on the Supreme Court (besides no heavy lifting and indoor work) is that you can make self-contradictory statements with gay abandon because there is no appeal (except to the law reviews).

Perhaps the Souter dissent did not realize that the Court has always rejected the idea that the reach of the commerce power is a “political choice and only a political choice.” Even after 1937, when the Court abdicated a role in deciding economic policy, the Court still made clear that it decides if an act is within the commerce power. As Justice Black pithily explained, “Whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.”<sup>42</sup>

That brings us to *National Federation of Independent Business v. Sebelius*.<sup>43</sup> Recall that *Lopez* and *Morrison* already told us that Congress cannot use the “affects” prong of the commerce clause to regulate what is not an instrumentality of interstate commerce or does not cross a state line unless there is a (1) *commercial* (2) *act* that affects commerce. Holding a gun or sexually assaulting someone is not a commercial act. Not buying insurance is not a *commercial* act. It is not even an *act*. It is an omission.

Thomas Aquinas figured out over 700 years ago that acts are different from omissions.<sup>44</sup> Aristotle articulated that distinction over 1,600 years before Aquinas.<sup>45</sup> Chief Justice Roberts in his separate opinion, and Justices Scalia, Kennedy, Thomas, and Alito in their joint dissent all agree that Congress cannot use the commerce power to force people to enter into commerce, i.e., buy health insurance or buy medical care. *Sebelius* tells us that Congress also cannot use the affects prong to force people to enter into commerce. Not buying insurance is not a commercial act. It is an omission.

Congress cannot force people to buy things, even though the decision to buy (or a decision not to buy) affects commerce. If Congress could regulate

<sup>41</sup> *Id.* at 651 n.19 (Souter, J., dissenting, joined by Stevens, Breyer & Ginsburg, JJ.).

<sup>42</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring). Or, as the unanimous Court said in the companion case filed that same day, *Katzenbach v. McClung*, “Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court.” 379 U.S. 294, 303 (1964).

<sup>43</sup> 132 S. Ct. 2566 (2012).

<sup>44</sup> See SUMMA THEOLOGICA OF ST. THOMAS AQUINAS pt. II (1st pt.), question 71, art. 5 (Fathers of the English Dominican Province trans., 2d rev. ed. 1920) (1265–1274) (“Does every sin include action?”).

<sup>45</sup> See ARISTOTLE, NICOMACHEAN ETHICS bk. 3 (350 B.C.E.).

omissions that affect commerce, it can regulate everything and there would be no limits to the commerce power. Yet, the Court has said repeatedly and consistently that there are limits to the commerce power. Congress cannot regulate under the commerce power by claiming that an omission is an act.

Another way of looking at *Sebelius* is to understand that the Court agreed that the failure to buy insurance, like any failure to purchase something, affects commerce. If I rip my trousers and therefore have to go to the tailor to fix them or go to the store to buy another pair of trousers, I am affecting commerce. Failing to rip my trousers also affects commerce because it means I will not repair or replace them. All acts (or failures to act) affect commerce. However, all the prior case law requires—under the “affects” prong of the commerce clause—is something that is (1) *commercial* and is (2) an *activity*. Failing to act is not an activity.

The Solicitor General tried to distinguish these commerce cases by arguing that failure to buy medical insurance is “unique,”<sup>46</sup> because it is something we all will eventually use. Justice Ginsburg’s dissent (joined by Justices Breyer, Kagan, and Sotomayor) also argued that health insurance is “unique.”<sup>47</sup>

That argument, like a fly in your soup, is a little hard to swallow. There is nothing unique about medical care. What is true of medical care is also true of coffins. Eventually we will all need a coffin or some other way of disposing of our bodies. Can the government force us, now, to buy coffins or urns for ashes because none of us will be able to prevent the inevitable? At some point we will all be in the market for disposing of our mortal remains.

Similarly, we all eventually buy food and transportation. Could the government require us to buy a new car or bus tokens because those purchases (or refusal to purchase) will also affect commerce? The majority says no, although the failure to buy food, or cars, or bus tokens also affects commerce. The response of the dissent—health is “unique.”

We should always be wary whenever a judge says that the rule in a case is “unique.” That means that the judge cannot distinguish the case from other situations but does not want to apply the precedent to the other situations. Precedent is the lifeblood of the Court. Precedent binds the Court and limits what would otherwise be the almost limitless power of the Justices. Judges who find even this modest limit too confining respond by saying that the case is “unique.”

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<sup>46</sup> “The Government argues that the individual mandate can be sustained as a sort of exception to this rule, because health insurance is a *unique product*.” *Sebelius*, 132 S. Ct. at 2591 (emphasis added).

<sup>47</sup> “As several times noted, the *unique attributes* of the health-care market render everyone active in that market and give rise to a significant free-riding problem that does not occur in other markets.” *Id.* at 2623 (Ginsburg, J., dissenting) (emphasis added).

Five Justices agree that Congress cannot use the commerce power to force people to enter into commerce (the “individual mandate”), to regulate omissions, or to regulate a noncommercial act. One might argue that there is no holding on this point because Roberts did not join the joint dissent (Scalia, Kennedy, and Alito label their joint opinion a “dissent”). In addition, the joint dissent did not join any of the Roberts opinion. Even if one were to accept that argument, there still is a clear holding on this issue. Part III(C) of Chief Justice Roberts’ opinion is an opinion of the Court—not merely the comments of a plurality. Justices Breyer, Ginsburg, Sotomayor, and Kagan all join part II(C), where Roberts says:

*The Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity.* But from its creation, the Constitution has made no such promise with respect to taxes.<sup>48</sup>

All nine Justices agree with the first sentence of that quotation. First, four justices join Roberts in part III(C), so we have a holding. That may seem a little hard to believe after reading the Ginsburg dissent, but she, along with and Breyer, Kagan, and Sotomayor join part III(C) and the crucial sentence is right there, in part III(C). The four dissenters also agree in their separate dissent on this point. Granted, Scalia, Kennedy, Thomas, and Alito could have labeled their opinion more accurately as “concurring in part and dissenting in part,” but they all agree with Roberts and the other four—“our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity.”

#### THE SPENDING POWER AFTER *SEBELIUS*

*Sebelius* recognized and applied another significant limit to federal power—the Spending Clause. The Court limited federal power to bribe the states by taxing the taxpayers within each state and then telling the states that they must accept federal rules or the federal government will continue to tax the states’ taxpayers but then give that money to other states. The Court has always said that there are limits to the federal spending power,<sup>49</sup> but it has never found one before this case.

*Sebelius* held that Congress can put certain strings on its expenditure of federal funds. This rule reflects the old adage, “He who pays the piper can call the tune.” Congress can use the money it raises through taxes or the

<sup>48</sup> *Sebelius*, 132 S. Ct. at 2599 (emphasis added).

<sup>49</sup> U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”); see also 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 5.7 (5th ed. 2012).

money it borrows to bribe the states. When Congress fashions its bribe, it can tell a state, “Here is federal money to create a health care program subject to various restrictions. If you do not create the program and accept the restrictions, then you cannot have the money.” Congress can also tell the states, “If you do not accept various modifications to the federal program you are already implementing, Congress will take away the money for that program.”

What Congress cannot do is tell a state, “You must accept a *new and substantially different* program, or we will take away the money we have given you for another program.” Seven of the Justices embraced that principle in *Sebelius*. Hence, Congress could not take away all the funding for Medicaid if a state refused to accept this new program. Congress was imposing “a shift in kind, not merely degrees,” said Chief Justice Roberts, in a portion of the opinion that Justices Breyer and Kagan joined.<sup>50</sup> Forcing states either to accept an entirely new program or lose the largest single source of funds in the state budget is putting a “gun to the head” of the states.<sup>51</sup>

Roberts acknowledged that Congress could repeal the old Medicaid statute *and then* pass a new health care law that included *all* the provisions of the old Medicaid law *plus* the new Obamacare/ACA provisions. Then, states would lose everything (100% loss of all federal funds for all health care aid) if they did not accept the expanded coverage. That spending law would *not* be coercive, because there was no bait and switch. However, what Congress could do in theory it would not do in practice: if Congress repealed Medicaid, Congress would be inviting all of its members to rethink Medicaid from scratch.<sup>52</sup>

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<sup>50</sup> See *Sebelius*, 132 S. Ct. at 2605–06.

The Medicaid expansion, however, accomplishes a *shift in kind, not merely degree*. The original program was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children. Previous amendments to Medicaid eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133% of the poverty level. It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.

*Id.* (emphasis added) (citations and footnote omitted).

<sup>51</sup> *Id.* at 2604.

<sup>52</sup> *Id.* at 2566, 2606 n.14 (citations omitted) (“Justice Ginsburg suggests that the States can have no objection to the Medicaid expansion, because ‘Congress could have repealed Medicaid [and,] [t]hereafter, . . . could have enacted Medicaid II, a new program combining the pre-2010 coverage with the expanded coverage required by the ACA.’ But it would certainly not be that easy. Practical constraints would plainly inhibit, if not preclude, the Federal Government from repealing the existing program and putting every feature of Medicaid on the table for political reconsideration. Such a massive undertaking would hardly be ‘ritualistic.’ The same is true of Justice Ginsburg’s suggestion that Congress could establish Medicaid as an ‘exclusively federal program.’”).

Justice Ginsburg and Sotomayor argued that the states knew that if they accepted the original Medicaid program that Congress could change it. Ginsburg reasoned that “Future Congresses are not bound by their predecessors’ dispositions; they have authority to spend federal revenue as they see fit.”<sup>53</sup> Of course, one can say exactly the same thing about state legislatures. Prior state legislatures do not bind later ones. Ginsburg never got around to answering that response.

The joint dissent agreed that this federal spending condition was “coercive,”<sup>54</sup> although the joint dissent differed on whether the remedy is to strike the entire law because this provision was not severable.<sup>55</sup> The Roberts majority found a way to invalidate only part of the spending restriction, in a way that does look like the Court is amending the law.

In short, Congress cannot use its spending power to order states to accept the expanded federal coverage aid or suffer the loss of all funds in a substantially different program, the original Medicaid program.<sup>56</sup>

#### THE WISDOM OF CROWDS AND THE ROLE OF THE STATES

Separation of Powers—both vertically and horizontally—reflects a scientific principle, Newtonian mechanics: for every action there is an equal and opposite reaction. Vertical separation also reflects another principle from economics, the wisdom of crowds. This principle goes back to Adam Smith, author of *The Theory of Moral Sentiments* (1759),<sup>57</sup> and *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776).<sup>58</sup>

In his first book, Smith analyzed the role the great mass of people in deciding how to organize society in a very efficient way, without any order

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<sup>53</sup> *Id.* at 2630 (Ginsburg, J., dissenting) (“Future Congresses are not bound by their predecessors’ dispositions; they have authority to spend federal revenue as they see fit. The Federal Government, therefore, is not, as The Chief Justice charges, threatening States with the loss of ‘existing’ funds from one spending program in order to induce them to opt into another program.”).

<sup>54</sup> As the joint dissent noted,

[T]he offer that the ACA makes to the States—go along with a dramatic expansion of Medicaid or potentially lose all federal Medicaid funding—is quite unlike anything that we have seen in a prior spending-power case. In *South Dakota v. Dole*, the total amount that the States would have lost if every single State had refused to comply with the 21-year-old drinking age was approximately \$614.7 million—or about 0.19% of all state expenditures combined. . . . Under the ACA, by contrast, the Federal Government has threatened to withhold 42.3% of all federal outlays to the states, or approximately \$233 billion.

*Sebelius*, 132 S. Ct. at 2664 (citations omitted).

<sup>55</sup> *Id.* at 2667.

<sup>56</sup> The vote was seven to two on this spending clause issue, with Breyer and Kagan joining Roberts, and the four dissenters (Scalia, Thomas, Kennedy, and Alito).

<sup>57</sup> ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (1759).

<sup>58</sup> ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776).

imposed from on high. In *The Theory of Moral Sentiments*, he said (nearly two decades before *The Wealth of Nations*) that people act individually as if guided by an invisible hand.<sup>59</sup> His later book, which he published on March 9, 1776, a few months before our Declaration of Independence, elaborates on this principle. One should consider both books together, as Smith intended.

Over two centuries later, Nobel Laureate economist Frederick Hayek (trained as a lawyer) elaborated on this principle basic to Adam Smith—the wisdom of crowds. Hayek called it in his book a “fatal conceit.”<sup>60</sup> The conceit of some people is that they know best how to shape the world around them according to their wishes. Hayek drew his title from a principle articulated in Smith’s *Theory of Moral Sentiments*.<sup>61</sup>

The framers intended for states to have certain powers that the federal government could not override. The federal government cannot and should not decide every issue and impose its “one size fits all” solution on all of the states. States have an important role to play, because our fifty states share some of the characteristics of a crowd of fifty, and the crowd knows better than the central government.

Many politicians and others are confident they know what must be done and do not like the restrictions that our Constitution imposes on doing what they know should be done. In 2011, for example, Beverly Perdue, then-Governor of North Carolina, seriously proposed *suspending* elections to Congress “for two years,” so Congress can enact laws to spur the economy without worrying about elections.<sup>62</sup> After the inevitable criticism, she

<sup>59</sup> “They are led by an invisible hand to make nearly the same distribution of the necessities of life, which would have been made, had the earth been divided into equal portions among all its inhabitants, and thus without intending it, without knowing it, advance the interest of the society, and afford means to the multiplication of the species.” ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* pt. IV, ch. I, ¶ 10 (1789).

<sup>60</sup> F.A. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* (1989).

<sup>61</sup> Hayek drew his title from Adam Smith, who said:

The man of system, on the contrary, is apt to be very wise in his own conceit; and is often so enamoured with the supposed beauty of his own ideal plan of government, that he cannot suffer the smallest deviation from any part of it. He goes on to establish it completely and in all its parts, without any regard either to the great interests, or to the strong prejudices which may oppose it. He seems to imagine that he can arrange the different members of a great society with as much ease as the hand arranges the different pieces upon a chess-board. He does not consider that the pieces upon the chess-board have no other principle of motion besides that which the hand impresses upon them; but that, in the great chess-board of human society, every single piece has a principle of motion of its own, altogether different from that which the legislature might choose to impress upon it. If those two principles coincide and act in the same direction, the game of human society will go on easily and harmoniously, and is very likely to be happy and successful. If they are opposite or different, the game will go on miserably, and the society must be at all times in the highest degree of disorder.

ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* pt. VI, sec. II, ch. II, ¶ 42 (1759) (emphasis added).

<sup>62</sup> *North Carolina Governor Suggests Suspending Elections to Spur Economic Solutions*, FOX NEWS (Sept. 27, 2011), [www.foxnews.com/politics/2011/09/27/north-carolina-governor-suggests-suspending-elections-to-spur-economic.html](http://www.foxnews.com/politics/2011/09/27/north-carolina-governor-suggests-suspending-elections-to-spur-economic.html).

suggested she was joking, but the videos of her remarks do not support that interpretation.<sup>63</sup> She sounded deadly serious and no one in the crowd laughed.

Hubris is not limited to politicians. Louis Seidman, a law professor at Georgetown University, thinks that our nation “teeters at the edge of fiscal chaos” and “the culprit” is “our insistence on obedience to the Constitution, with all its archaic, idiosyncratic and downright evil provisions.”<sup>64</sup> Such people suffer from a fatal conceit—that they know better than any of us what is good for us and if we do not understand that, then these “wise” people should impose their will on us.

That economic principle of the wisdom of crowds explains why vertical separation not only helps to preserve our liberties but also to make our government better and more reflective of the wisdom of the people. The existence of the states does not mean that the government will enact laws or execute policy more quickly. It does mean that the states are more likely, over time, to enact laws that are better than the laws that the federal government imposes from on high. One size seldom fits all.

If we compare each state to a person, the states are like a small crowd of about fifty.<sup>65</sup> The crowd, as a group, is smarter than the smartest person in the crowd is. When states have rights and powers, the nation as a whole is better off. States’ rights serve to protect our liberties and make government work in a better way. The collective wisdom of the fifty states is better than one person’s wisdom, even if that person is an expert.

A fundamental postulate of democracy is that the people, overall, are more likely to be correct than a benevolent dictator or oligarchy. The collective wisdom is better than one person’s wisdom, even if that person is an expert. A larger group of people is more likely to come to a better solution than a smaller.

For example, the TV studio audience of *Who Wants to Be a Millionaire* guessed correctly 91% of the time, while the “experts” guessed only 65%

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<sup>63</sup> Matthew Boyle, *New Audio: NC Governor Struck Serious Tone on Suspending Congressional Elections*, DAILY CALLER (Sept. 28, 2011, 11:26 AM), <http://dailycaller.com/2011/09/28/new-audio-nc-governor-struck-serious-tone-on-suspending-congressional-elections>.

<sup>64</sup> Louis Michael Seidman, *Let's Give Up on the Constitution*, N.Y. TIMES (Dec. 30, 2012), [www.nytimes.com/2012/12/31/opinion/lets-give-up-on-the-constitution.html?\\_r=0](http://www.nytimes.com/2012/12/31/opinion/lets-give-up-on-the-constitution.html?_r=0). Lest one think that he was not making well-thought-out remarks, he amplifies the claim in his book, LOUIS SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE (2012). See, for example, *id.* at 12, where he criticizes those who “insist” that we follow the commands of people “who are not even biologically related to most of us.” One wonders if the Sherman Antitrust Act of 1890 binds me. The people who enacted that are a bunch of dead white males, not biologically related to Seidman or me. I have no kinship with the people who enacted the Affordable Care Act, popularly called Obamacare, but the law still binds me (I know that because I discovered that I cannot keep my health plan and my doctor. Oh, well.).

<sup>65</sup> I say “about” because the District of Columbia is the 51st jurisdiction with home rule powers. Similarly, there are U.S. territories, such as Guam, the Northern Marianas Islands, Puerto Rico, American Samoa, and the Virgin Islands. All these territories have some home rule powers.



correctly.<sup>66</sup> Sir Francis Galton, a nineteenth century polymath and statistician, marveled at what he saw at a 1906 country fair. Eight hundred people participated in a contest to guess the weight of an ox, slaughtered and dressed. Their median guess of 1207 pounds was within 1% of the true weight of 1198 pounds. Empirical studies show that groups are often smarter than the smartest people who are in them.

Democracies make, overall, better decisions. That is why, in the twenty-first century, democracies are on the top of the food chain. People strive to enter democracies while trying to escape dictatorships. More North Koreans seek to go to South Korea than vice versa. Ditto for East and West Germany.

The crowd has wisdom when there is a diversity of opinion within the crowd, the people act independently of each other, they are decentralized—that is, people give their own opinion rather than follow the cue of someone else (each of the people who guessed the weight of the ox made his own decision). If they do not act independently, they act like a herd.<sup>67</sup>

When we think of democracy, nowadays, we think of majority rule *subject to* individual rights and liberties. We often call this “liberal democracy,” which has nothing to do with liberals or conservatives. Dictatorship by the people is mob rule. Plebiscites, historically, are the tools of dictators, not of democracies. Individual rights, such as free speech, free exercise of religion, reduce the danger of slipping into dictatorship and acting like the herd. This is how we control, in democracy, what we would call “bubbles” if we were talking about the stock market.

If we are searching for the best form of government, we have found a solution and it is liberal democracy. Democracy does not seem on the march today, with the dictatorships in Russia, China, Iran, North Korea, and so forth. Yet, like investors, we should look at the long range, not the short range. In 1974, there were only thirty-five electoral democracies in the world, representing less than a third of the countries. By 2013, there were more

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<sup>66</sup> JAMES SUROWIECKI, *THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES AND NATIONS* 3–4 (2005).

<sup>67</sup> The herd mentality accompanies bull markets that end in bubbles and the beginning of major declines. We tend to do what others do, but only those who do not follow the herd are the ones to make the real money. We all know that we should buy low and sell high, but it is much easier to buy when everyone else is buying enthusiastically and much harder to buy when doom and gloom abound. Economic empirical studies also bear out this fact that we tend to create bubbles in the stock market when we think we are smarter than others are, for then we follow the “greater fool” theory—we just follow others rather than adding to the wisdom of the group. Vernon L. Smith, Gerry L. Suchanek & Arlington W. Williams, *Bubbles, Crashes, and Endogenous Expectations in Experimental Spot Asset Markets*, 56 *ECONOMETRICA* 1119 (1988); see also SUROWIECKI, *supra* note 66, at 249–51 (discussing experiments). When we think the “smart money” is buying, then we buy. ROBERT J. SHILLER, *IRRATIONAL EXUBERANCE* 158 (2d ed. 2005). When people panic and sell, we sell. It is easier to buy high, when optimism abounds, and sell low, when pessimism is the order of the day, than to do the opposite.

countries (thanks in part to the break-up of the Soviet Union), and over 60% of them—120—were democracies.<sup>68</sup>

Admittedly, Russia has become a dictatorship without an ideology. However, Putin runs for election and *claims* the people freely elected him. Ditto for the sham elections in Venezuela, Iran, North Korea,<sup>69</sup> and other places. Even the absolute dictators like Supreme Leader Kim Jong-un hold elections. He won with 100% of the North Korean vote in March 2014.<sup>70</sup> Dictators pay lip service to democracy because hypocrisy is the tribute that vice pays to virtue. That is why Putin pretended that the people of Crimea freely voted for Russian annexation.

Over time, democracies will take over the world. We reached the tipping point in 2013, when 60% of the countries were real democracies and almost all the rest pretend to be. Consider for example, Mongolia, situated between Russia and China. Since 1991, Freedom House has consistently declared Mongolia a “free” country. Political parties rotate in and out of power, without the shedding of blood or mass demonstrations.<sup>71</sup> Mongolia, not Turkey, is the harbinger of what is to come.

Democracies do not have the same control over the economy as dictatorships. We have more free trade today than we had a half-century earlier. Market-based economies and democracy are linked. Francis Fukuyama noted, “Democracy has always rested on a broad middle class, and the ranks of prosperous, property-holding citizens have ballooned everywhere in the past generation.”<sup>72</sup> The break-up of the Soviet Union and the opening up of Russia and China, each with their own stock markets, will be as dramatic as discovering the new world in 1492. That prosperity makes the whole world more prosperous because of trade. Mutual trade leads to interdependence and interdependence leads to peace.<sup>73</sup> That is important for many reasons. In modern times, no democracy has gone to war against

<sup>68</sup> Francis Fukuyama, *At the “End of History” Still Stands Democracy*, WALL ST. J. (June 6, 2014, 2:52 PM), [www.wsj.com/articles/at-the-end-of-history-still-stands-democracy-1402080661](http://www.wsj.com/articles/at-the-end-of-history-still-stands-democracy-1402080661).

<sup>69</sup> Danielle Wiener-Bronner, *Yes, There Are Elections in North Korea and Here’s How They Work*, THE WIRE (Mar. 6, 2014, 11:59 AM), [www.thewire.com/global/2014/03/north-korea-elections-guide/358875](http://www.thewire.com/global/2014/03/north-korea-elections-guide/358875).

<sup>70</sup> Adam Withnall, *North Korea Elections: Kim Jong-un Wins 100% of the Vote*, INDEPENDENT (Mar. 10, 2014), [www.independent.co.uk/news/world/asia/kim-jongun-wins-100-of-the-vote-in-north-korean-elections-9180814.html](http://www.independent.co.uk/news/world/asia/kim-jongun-wins-100-of-the-vote-in-north-korean-elections-9180814.html).

<sup>71</sup> Larry Diamond, Francis Fukuyama & Stephen Krasner, *Mongolia’s Next Challenge: The Country Has Come Far, But Should Now Turn to Combating Corruption*, WALL ST. J. (Sept. 24, 2012, 12:58 PM), [www.wsj.com/articles/SB10000872396390444358804578015933209631870](http://www.wsj.com/articles/SB10000872396390444358804578015933209631870).

<sup>72</sup> Fukuyama, *supra* note 68.

<sup>73</sup> The economic sanctions against Russia because of Ukraine have hurt, at least a bit. Over time, they will hurt more. Putin responded by preventing the import of certain goods from the West. When there is a war, the first thing one country does is block goods from the adversary. Putin put a blockade around his own country. He did to his country what an adversary would do to it in time of war!

another. Democracy leads to peace.

### CONCLUSION

The purpose of what we often call “states’ rights” is not to protect the rights of states. It is to protect *us*. It protects our freedom by dividing power and making it more difficult for government to act. Unfortunately, Congress has steadily encroached on the power of the states by treating the commerce clause and the spending clause as having no limits. We may well be just one justice away from the Court overturning the rather modest limits imposed by *Lopez*, *Morrison*, and *Sebelius*. Recall that they all garnered strong dissents and the dissenters keep on dissenting.

Congress and the Court should know better. As Justice O’Connor reminded us:

The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: “Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.”<sup>74</sup>

Vertical separation allows the people to pursue local policies “more sensitive to the diverse needs of a heterogeneous society,” to permit “innovation and experimentation,” and to make government “more responsive by putting the States in competition for a mobile citizenry.”<sup>75</sup>

Or, as Justice Kennedy reminded us in a later case:

Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. . . .

Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.<sup>76</sup>

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<sup>74</sup> *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting, joined by Marshall & Stevens, JJ.)).

<sup>75</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

<sup>76</sup> *See Bond v. United States*, 564 U.S. 211, 221–22 (2011).

We are one Justice away from treating this principle of federalism as a quaint aphorism from a bygone era.

When we forget these lessons, we take a path that restricts our liberties while enacting policies that do not reflect the wisdom of crowds. What is true of the wisdom of crowds as applied to democracy is true of the wisdom of crowds as applied to the fifty states.

Let us consider one recent example—Obamacare. Congress could have repealed federal laws that prohibit interstate competition in medical insurance and repeal other laws so that the federal government would get out of the way of states experimenting with health insurance.

Then, the people in each of states could have created their own medical insurance program to fit their local needs. If the people of one state wanted broad coverage, they could enact it. If the people in another state wanted to cover only catastrophic care, they could do that. If a state favored “single-payer” health insurance, it could do that. The states would not have to worry about commerce clause restrictions and the individual mandate, because they do not rely on the enumerated powers of Congress to enact laws.

If, over time, we would learn that the system in State No. 1 is better than State No. 2, the second state can copy the first. Imitation is the sincerest form of flattery. We are just as likely to learn that there is no system that is best, or that what the people in one state think is best is not what the people in other state prefer.

Instead, we have a law so massive and complicated that no one was able to read it before its enactment. Congress drafted the law so poorly that the Court has engaged in interpretive contortions in order to rewrite and thereby save it. Congress enacted all prior social welfare laws, Social Security, Medicare, and Medicaid, with bipartisan support. Obamacare did not attract a single Republican vote. Obamacare was unpopular when Congress enacted it and it remains unpopular today.<sup>77</sup> In fact, the more people learn about Obamacare, the more unfavorable they are towards it.<sup>78</sup>

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<sup>77</sup> The most recent polls show that only 43% of likely U.S. voters have a favorable opinion of the health care law, and less than a fifth has a “very favorable” opinion of it. 54% view the law unfavorably, including 37% who regard it “very unfavorably.” *Voters Are Still Down on Obamacare*, RASMUSSEN REPORTS (Mar. 3, 2016), [www.rasmussenreports.com/public\\_content/archive/health\\_care\\_update\\_archive/voters\\_are\\_still\\_down\\_on\\_obamacare](http://www.rasmussenreports.com/public_content/archive/health_care_update_archive/voters_are_still_down_on_obamacare).

<sup>78</sup> In October of 2014, polls showed that 53% viewed the Affordable Care Act unfavorably, a jump of eight percentage points. Jeffrey Young, *Obamacare Is More Unpopular than Ever, Poll Shows*, HUFFINGTON POST (Aug. 1, 2014, 4:59 PM), [www.huffingtonpost.com/2014/08/01/obamacare-poll\\_n\\_5639192.html](http://www.huffingtonpost.com/2014/08/01/obamacare-poll_n_5639192.html). Another poll, in February 2015, concluded, “voters are less supportive of government-imposed levels of health insurance.” In addition, “[m]ost think consumers are better off with less government involvement in the health care marketplace.” *Voters Are Less Supportive of Government-Imposed Levels of Health Insurance*, RASMUSSEN REPORTS (Feb. 2, 2015), [www.rasmussenreports.com/public\\_content/archive/health\\_care\\_update\\_archive/february\\_2015/voters\\_are\\_less\\_supportive\\_of\\_government\\_imposed\\_levels\\_of\\_health\\_insurance](http://www.rasmussenreports.com/public_content/archive/health_care_update_archive/february_2015/voters_are_less_supportive_of_government_imposed_levels_of_health_insurance).

Then there is the untidy little fact that the politicians lied to us in order to secure the necessary votes. By “lie” I do not mean they made a mistake. I do not mean that they were a little negligent in investigating the issues. I mean they knew one thing and told us another; they intentionally told us falsehoods.

Remember when the President told us (at least thirty-six times) that if you like your doctor and plan, you can keep it?<sup>79</sup> We know now that the politicians knew that was false when they told us.<sup>80</sup>

Remember when they told us that there was no tax? They lied about that too.<sup>81</sup>

Remember when they told us that, like the miracle of the loaves and fishes, the federal government would give us universal health care and it would cost less?<sup>82</sup> They lied about that too. We know that from emails that the federal courts are forcing the State Department to release. While the architects of Obamacare were telling us that the new law would save us money, they were emailing Hillary Clinton and telling her that all that was not true.<sup>83</sup>

One of the buzzwords of today is “diversity.” How ironic is it that while we purport to favor diversity we reject diversity when it comes to the states. Instead, we have national uniformity. Instead of listening to the wisdom of the framers, we travel down a path that restricts our freedom and while rejecting experimentation, variety, and the wisdom of the crowd. Politicians who lie to voters are not only rejecting the wisdom of the crowds, they are rejecting the fundamental postulate of democracy.

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<sup>79</sup> Washington Free Beacon, *36 Times Obama Said You Could Keep Your Health Care Plan*, YOUTUBE (Nov. 5, 2013), [www.youtube.com/watch?v=qpa-5JdCnmo](http://www.youtube.com/watch?v=qpa-5JdCnmo).

<sup>80</sup> E.g., Edie Littlefield Sundby, *You Also Can't Keep Your Doctor*, WALL ST. J. (Nov. 3, 2013), [www.wsj.com/articles/SB10001424052702304527504579171710423780446](http://www.wsj.com/articles/SB10001424052702304527504579171710423780446).

<sup>81</sup> Robert Pear, *Jonathan Gruber of M.I.T. Regrets “Arrogance” on Health Law*, N.Y. TIMES (Dec. 9, 2014), [www.nytimes.com/2014/12/10/us/jonathan-gruber-of-mit-regrets-arrogance-on-health-law.html?\\_r=0](http://www.nytimes.com/2014/12/10/us/jonathan-gruber-of-mit-regrets-arrogance-on-health-law.html?_r=0) (quoting Jonathan Gruber: “This bill was written in a tortured way to make sure [the Congressional Budget Office] did not score the mandate as taxes.”).

<sup>82</sup> President Barack Obama, Remarks to a Joint Session of Congress on Health Care (Sept. 9, 2009), [www.whitehouse.gov/the-press-office/remarks-president-a-joint-session-congress-health-care](http://www.whitehouse.gov/the-press-office/remarks-president-a-joint-session-congress-health-care).

<sup>83</sup> Email from Neera Tanden, President, Center for American Progress, to Hillary Clinton, U.S. Secretary of State, United States of America (Oct. 20, 2009), <https://wikileaks.org/clinton-emails/emailid/11015> (referring to the “dirty little secret” that the Administration does not have any good evidence of what works, and “we may have oversold what these bills will (or even can) do.” But, “the perfect can’t be the enemy of the good.”).