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A. Christopher Bryant

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CONSTITUTIONAL NEWSPEAK: LEARNING TO LOVE THE AFFORDABLE CARE  
ACT DECISION

*A. Christopher Bryant\**

*Abstract*

In his classic dystopian novel, *1984*, George Orwell imagines a world in which language is regularly contorted to mean its opposite – as in the waging of war by the Ministry of Peace and infliction of torture by the Ministry of Love. A core claim of Orwell’s was that such abuse of language – which in his novel he labeled “Newspeak”—would ultimately channel thought. Whatever the merits of this claim as a theory of linguistics, constitutional developments too recent to be called history demonstrate that as a practical matter Orwell was on to something. The Court’s June 28 decision both upholding and invalidating the Affordable Care Act (“ACA” or “the Act”) is both a product and an example of constitutional Newspeak. For the last two years, the question of the constitutionality of the ACA deeply divided public opinion, the legal profession, the lower federal courts, and ultimately the Supreme Court of the United States. Throughout all the exhaustive and exhausting debates, editorials, discussions, arguments, and opinions, however, one legal proposition commanded complete accord: that Congress’s Commerce Clause powers were subject to judicially enforceable limits. It is no small irony, then, that this universally recognized legal proposition happens to be false. Indeed, it has not been true for almost a century, is not true today, and will not be true for the indefinite future.

Moreover, the falsity of this proposition cannot be news to anyone. Time and again, throughout the twentieth century and so far as we have come in the next, the Court has demonstrated that it is either unwilling or unable to impose meaningful constraints on Congress’s power under the Commerce Clause. To be sure, the Court has assiduously avoided acknowledging this reality. It has, instead, reliably carried forward in its opinions sententious declarations to the contrary – proclamations of its somber but inalienable duty to prevent Congress from straying past its bounds. Patently false, these claims nonetheless shaped and ultimately governed the Commerce Clause controversy generated by the ACA.

At every turn in the ACA litigation, the Act’s defenders were hindered

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by their not having the words to make their case forthrightly. This constraint not only accorded the challenger's constitutional claim more oxygen than it deserved, but may have also figured in the self-delusion necessary for so many, on and off the bench, to find the claim so compelling. During the greater part of the twentieth century, the reality of judicial abdication of any duty to enforce the enumerated powers scheme was at first merely unspoken, later became unspeakable, and ultimately came to be virtually unthinkable. The two-year-long debate over the constitutionality of the ACA was the culmination of six decades of constitutional Newspeak.

Or so this manuscript argues. It also explores some questions this account raises for the future health of our constitutional order.

### INTRODUCTION

For the last two years, the question of the constitutionality of the Affordable Care Act ("ACA" or "Act")<sup>1</sup> deeply divided public opinion, the legal profession, the lower federal courts and, ultimately the Supreme Court of the United States. Throughout all the exhaustive and exhausting debates, editorials, discussions, arguments, and, opinions, however, one legal proposition commanded complete accord: that Congress's Commerce Clause powers were subject to judicially enforceable limits. It is no small irony, then, that this universally recognized legal proposition happens to be false. Indeed, it has not been true for almost a century, is not true today, and will not be true for the indefinite future.

Moreover, the falsity of this proposition cannot be news to anyone. Time and again, throughout the twentieth century, and so far as we have come in the next, the Court has demonstrated that it is either unwilling or unable to impose meaningful constraints on Congress's power under the Commerce Clause. To be sure, the Court has assiduously avoided *acknowledging* this reality. It has instead reliably carried forward in its opinions' sententious declarations to the contrary – proclamations of its somber but inalienable duty to prevent Congress from straying past its bounds. There were in the ACA litigation only the slenderest of hints – and these merely inferences from shadows, really – that any distance separated what the Court says from what it does. These hints came in two Court of Appeals opinions authored by stalwart conservatives who, with candor bordering on impudence, indicated that they had tired of the Commerce Clause charade. Emperors and new garments come to mind.

But for the best allegory, look not to Hans Christian Anderson<sup>2</sup> but to George Orwell. In his classic dystopian novel, *1984*, he imagines a world in which language is regularly contorted to mean its opposite – as in the waging of war by the Ministry of Peace and infliction of torture by the Ministry of Love.<sup>3</sup> Lest this

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

2. HANS CHRISTIAN ANDERSEN, *The Emperor's New Clothes*, in ANDERSON'S FAIRY TALES BY HANS CHRISTIAN ANDERSEN 66 (World Publ'g Co. 1946).

3. See GEORGE ORWELL, 1984 at 4 (Signet, 1948-1950). To choose but one memorable example, on

connection be deemed too attenuated, recall that a core claim of Orwell's was that such abuse of language – labeled “Newspeak”—would ultimately channel thought.<sup>4</sup> Whatever the merits of this claim as a theory of linguistics,<sup>5</sup> constitutional developments too recent to be called history demonstrate that as a practical matter Orwell was on to something. For at every turn in the ACA litigation, the Act's defenders were hindered by their not having the words to make their case forthrightly. This constraint not only accorded the challenger's constitutional claim more oxygen than it deserved, but may have also figured in the self-delusion necessary for so many, on and off the bench, to find the claim so compelling. For most of the twentieth century, the reality of judicial abdication of any duty to enforce the enumerated powers scheme was at first merely unspoken, later became unspeakable, and ultimately came to be virtually unthinkable. The two-year-long debate over the constitutionality of the ACA was the culmination of six decades of constitutional Newspeak.

The ACA's constitutional near miss illustrates the danger of speaking as though a constitution long dead were still vital. The remedy, of course, is transparency. Unfortunately, that seems highly unlikely, at least in the foreseeable future. One question this state of affairs poses, and which this essay ventures to answer, is: why have the courts and the legal profession been so consistently unwilling to admit that the only constraints on congressional power are political ones? The stubbornness of the myth of a judicially enforceable enumerated powers doctrine no doubt has many causes, but they likely include the institutional advantages achieved by maintaining a doctrine as Delphic as the Court's Commerce Clause jurisprudence.

### I. Is There No Limit?

The Supreme Court's June 28 ruling that Congress's Commerce Clause power could not be used to mandate individual purchase of health insurance<sup>6</sup> represented a revival, however constrained, of long-ago discredited principles of economic substantive due process in federalism garb.<sup>7</sup> Not surprisingly, however, these principles would remain concealed, lurking below the surface of the opinions

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the novel's fourth page, one learns that emblazoned on the “Ministry of Truth” is the following message: “WAR IS PEACE, FREEDOM IS SLAVERY, IGNORANCE IS STRENGTH.” *Id.*

4. See *id.* at 298-299. (“The purpose of Newspeak was not only to provide a medium of expression for the worldview and mental habits proper to the devotees of IngSoc [*i.e.*, English Socialism], but to make all other modes of thought impossible. It was intended that when Newspeak had been adopted once and for all and Oldspeak forgotten, a heretical thought—that is a thought diverging from the principles of Ing—should be literally unthinkable, at least so far as thought is dependent on words.”).

5. See Jim Chen, *Law as a Species of Language Acquisition*, 73 WASH. U. L.Q. 1263, 1308n.262 (1995) (identifying the “Sapir-Whorf hypothesis” as positing “that the semantic and syntactic features of human language define the range of behavior and abstract thought” and dismissing the theory as “discredited”).

6. *Nat'l Fed of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2585-93 (2012).

7. See *infra* notes 49, 164 and accompanying text; see also Peter J. Smith, *Federalism, Lochner, and the Individual Mandate*, 91 B.U. L. REV. 1723, 1726 (2011) (“[B]ecause the objections to the individual mandate, though couched in federalism terms, have very little to do with federalism at all, it is difficult to see them as anything other than *Lochner* under a different guise”).

explaining that conclusion.<sup>8</sup> Nominally, the conclusion was justified as following ineluctably from the need to impose some meaningful, judicially enforceable limit on Congress's Commerce Clause authority.<sup>9</sup> Indeed, the "there must be a limit" argument echoed throughout the litigation and accounts for the intellectual respectability that the challenge to the mandate eventually secured.<sup>10</sup>

For someone unfamiliar with the minutiae of the twentieth-century's tortuous history of judicial attempts to cabin Congress's power under the Commerce Clause, this argument has great rhetorical force. Nothing could be more evident, nor has been so repeatedly and solemnly intoned throughout the U.S. reports, as the proposition that the text and the original understanding of the Constitution contemplated that the "enumeration [of congressional powers] presupposes something not enumerated."<sup>11</sup> But history, both remote and recent, belies that claim, at least insofar as the judiciary is concerned. For more than a century, the claim has cycled through periods of neglect, observance, and neglect such that anyone intimately familiar with this history would be compelled to conclude that this need for limits has been only most selectively invoked.<sup>12</sup> After recounting the salience of the supposed need-for-a-limit argument in the Affordable Care Act litigation, this part explores the lengthy record of judicial behavior that exposes that claim as a canard.

#### A. *The Constitutional Challenge to the Affordable Care Act*

When the lawsuits challenging the constitutionality of the ACA were filed within hours of President Obama signing the bill into law, the overwhelming consensus among legal commentators from across the ideological spectrum was that the legal claims were borderline frivolous and clearly destined to fail.<sup>13</sup> Their filing was explained away as a mere publicity stunt by partisan political actors.<sup>14</sup> To be sure, this view was not unanimously held. Most prominently, Professor Randy Barnett steadfastly insisted that Congress lacked power to impose a purchase mandate.<sup>15</sup> But throughout his long and distinguished career Professor Barnett had never shied away from a position at or even beyond the boundaries of the legal and academic mainstream.<sup>16</sup> The vast majority of commentators who addressed the merits of the lawsuits contemporaneous with their filing predicted a very lopsided

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8. See *infra* notes 49, 164 and accompanying text.

9. See *infra* notes 47-57 and accompanying text.

10. See *infra* notes 25-46 and accompanying text.

11. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.)1,195 (1824).

12. See *infra* notes 62-108 and accompanying text.

13. See, e.g., Mark Arsenault, *Making a Case vs. Obama's Health Care Law*;

*Legal Scholar's Opposition Gets Attention*, BOSTON GLOBE, April 2, 2011, at 222A2; James B. Stewart, *Commerce, Health Care and Broccoli*, N.Y. TIMES, Mar. 31, 2012, at B1.

14. See, e.g., David A. Fahrenthold & N.C. Aizenman, *Health Law Fight Shifting to Courts*, WASH. POST, Feb. 3, 2011, at A1 (noting that initially lawsuits challenging the ACA were "widely dismissed as a quixotic political tactic").

15. See Arsenault, *supra* note 13, at A2.

16. See *id.*

Supreme Court victory for the Administration, should the challenges even make it that far.<sup>17</sup>

U.S. District Judge Hudson's August 2, 2010 denial of the government's motion to dismiss<sup>18</sup> in one of these cases pierced that confident consensus with a sliver of doubt, which in turn grew considerably when four months later he invalidated the individual insurance mandate.<sup>19</sup> As Professor Barnett was himself quick to recognize, this ruling, which after all reflected the view of a single Article III judge, ought not to have had a significant impact on public discourse.<sup>20</sup> Nevertheless, the decision shifted the legal academy to a grudging concession of the challenges' intellectual legitimacy.<sup>21</sup>

The rallying cry raised by the challengers of the ACA was that there had to be some limit on federal authority, implying that in the wake of a ruling sustaining the Act there would be none. In a pedantic sense, this claim was false, as the government's lawyers repeatedly and patiently explained<sup>22</sup> and as the Supreme Court dissenters on the Commerce Clause question ultimately protested.<sup>23</sup> Nevertheless, this claim had enormous rhetorical force and was centrally responsible for the unexpected success of the challengers' Commerce Clause contention. That contention appealed to so many because, notwithstanding its inconsistency with seventy years of Commerce Clause jurisprudence, it was almost certainly correct as a matter of constitutional first principles. Even the Act's most ardent defenders shied away from the notion that the Framers of the Constitution had envisioned a central government with the power to order virtually every legal resident to buy a qualifying commercial product.<sup>24</sup>

The significance of the need-for-a-limit argument to the challengers' success on the Commerce Clause question is reflected at every stage of the ACA litigation. In the decisive sentence in the first judicial opinion to invalidate the mandate, Judge Hudson observed that the government's "broad definition of the economic activity subject to congressional regulation lacks logical limitation."<sup>25</sup> Six weeks later, Judge Vinson echoed this observation in his opinion likewise invalidating the mandate.<sup>26</sup> After extensive discussion of nineteenth-century understandings of the

17. See, e.g., Michael Kranish, *Health Mandate Tests the Reach of Government; No Direct Legal Precedent for Order to Buy Insurance*, BOSTON GLOBE, Mar. 25, 2010, at A1; Stewart, *supra* note 13, at B1.

18. *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 615 (E.D. Va. 2010).

19. *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F.Supp. 2d 768, 788 (E.D. Va. 2010).

20. See Fahrenthold & Aizenman, *supra* note 14, at A1.

21. Sheryl Gay Stolberg, *Just One Ruling, But an Outsize One*, N.Y. TIMES, Dec. 14, 2010, at A24.

22. See *infra* notes 139-141 and accompanying text.

23. See *N.F.I.B.*, 132 S. Ct. at 2623-24 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

24. Cf. Dan T. Coenen, *Originalism and the "Individual Mandate": Rounding Out the Government's Case for Constitutionality*, 107 NW. U. L. REV. COLLOQUY 55, 55-56 (2012) <http://www.law.northwestern.edu/lawreview/colloquy/2012/10/LRColl2012n10Coenen.pdf> (noting that the government's argument for the mandate "was overwhelmingly based on modern precedents and pragmatic considerations," but nevertheless maintaining that the government had "a powerful set of originalist arguments it could have made to the Court").

25. *Cuccinelli*, 728 F. Supp. 2d at 781.

26. See *Florida v. U.S. Dep't of Health & Human Servs.*, 780 F.Supp.2d 1256, 1286 (N.D. Fla. 2011).

Commerce Clause,<sup>27</sup> Judge Vinson demurred to the claim that Congress could “compel an otherwise passive individual into a commercial transaction with a third party.”<sup>28</sup> Were the courts to accede to such a claim, he reasoned, “it is not hyperbolizing to suggest that Congress could do almost anything it wanted.”<sup>29</sup>

The constitutional health of the ACA waxed and waned over the ensuing eighteen months, as it received decidedly mixed reviews in the Courts of Appeals on its way to the Supreme Court. The fear that to uphold the ACA would confer on Congress virtually unlimited authority was even more salient in the Federal Courts of Appeals. It was the lynchpin of the Eleventh Circuit’s opinion affirming Judge Vinson’s conclusion that the mandate was unconstitutional. Beginning “with first principles,” Judges Dubina and Hull emphasized that “in determining if a congressional action is within the limits of the Commerce Clause, we must look not only to the action itself but also its implications for our constitutional structure.”<sup>30</sup> They eschewed reliance on “semantic or formalistic categories” and thus dismissed as “immaterial whether” the mandate was more properly conceived as “regulating inactivity or a financial decision to forego insurance.”<sup>31</sup> What did matter, decisively, was that the government’s theory of the Commerce Clause “would allow Congress to regulate anything.”<sup>32</sup> Indeed, Judges Dubina and Hull deemed the government’s failure “to articulate cognizable, judicially administrable limiting principles” as demonstrating that under the government’s theory none existed.<sup>33</sup>

The call for limiting principles continued at the Supreme Court level. It supplied the premise of the challengers’ briefs.<sup>34</sup> And it dominated the oral argument. Justice Scalia asked whether the government’s theory would permit federal purchase mandates “in any market at all.”<sup>35</sup> The Chief Justice was concerned that the government’s argument might extend to a mandate to purchase cell phones.<sup>36</sup> Justice Alito worried that federally mandated purchases of burial insurance would be imminent, were the Act upheld.<sup>37</sup> And then twelve minutes

27. *See id.* at 1274-77. Judge Vinson hastened to add that the history was the alpha but not the omega of his analysis. *Id.* at 1277 (“To acknowledge the foregoing historical facts is not necessarily to say that the power under the Commerce Clause was intended to (and must) remain limited to the trade or exchange of goods, and be confined to the task of eliminating trade barriers erected by and between the states.”).

28. *Id.* at 1286.

29. *Id.*

30. *Florida v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1284 (11th Cir. 2011) (citation omitted).

31. *Id.* at 1287, 1293 (quoting *Lopez v. United States*, 514 U.S. 549, 569 (1995) (Kennedy, J., concurring) (other citations omitted)).

32. *Id.* (citing *United States v. Morrison*, 529 U.S. 598, 615 (2000)). *See also id.* at 1295 (“The government’s position amounts to an argument that the mere fact of an individual’s existence substantially affects interstate commerce, and therefore Congress may regulate them at every point of their life. This theory affords no limiting principles in which to confine Congress’s enumerated power.”).

33. *Id.* at 1298. *See also* *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 570 (6th Cir. 2011) (Graham, J., concurring in part and dissenting in part) (“The problem with the government’s line of reasoning here is that it has no logical end point . . .”).

34. *See* Brief for State Resps. on the Minimum Coverage Provision at 27, *N.F.I.B.*, 132 S. Ct. 2566 (No. 11-398).

35. Transcript of Oral Argument at 5, *N.F.I.B.*, 132 S. Ct. 2566 (No. 11-398).

36. *Id.* at 6.

37. *Id.* at 7-9.

into Solicitor General Verrilli's argument, broccoli reared its ugly head. Given the inevitability of participation in the food market, Justice Scalia inquired, what would prevent the government from making everyone buy broccoli?<sup>38</sup>

After Justice Breyer suggested that Verrilli's efforts to distinguish cell phones and burial services from health care were somewhat suspect,<sup>39</sup> Justice Kennedy generalized the concern raised by all the previous questions: "Can you identify for us some limits on the Commerce Clause?"<sup>40</sup> General Verrilli had barely finished his attempt<sup>41</sup> to answer, when Scalia replied that, under the government's theory, Congress could mandate the purchase of cars.<sup>42</sup> For good measure Scalia added that the Act could not be sustained under the Necessary and Proper Clause because to do so would violate an evident principle in the Constitution, which is that the Federal Government is not supposed to be a government that has all powers: that it's supposed to be a government of limited powers.<sup>43</sup> Justice Alito brought the circus full circle by rather imperiously demanding that Verrilli "express [his] limiting principle as succinctly as . . . possibl[e] . . . Congress can force people to purchase a product where the failure to purchase the product has a substantial effect on interstate commerce, if what?"<sup>44</sup> The question sounds like a trap because it was, and the yield was not pretty.<sup>45</sup> The Act's opponents crowed that Verrilli's rambling response proved the Act to be constitutionally deficient to any mind still open to reasoned persuasion.<sup>46</sup>

As expected, given the tone of the oral argument, the where's-the-limit contention figured prominently in the opinions of the five Justices who concluded that the mandate exceeded the Commerce Clause. The Chief Justice, at the very outset of his analysis, described the case as one concerning "two powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to the police power."<sup>47</sup> The distinction between activity and inactivity was crucial precisely because "[a]llowing Congress to justify federal regulation by pointing to the effect of inaction on

38. *Id.* at 13. See generally Paul Krugman, *Broccoli and Bad Faith*, N.Y. TIMES, Mar. 30, 2012, at A27 (discussing Justice Scalia's question at oral argument).

39. Transcript of Oral Argumen, *supra* note 35, at 15-16.

40. *Id.* at 16.

41. That General Verrilli's answer was so uninspiring reveals little about the ACA but much about the emptiness of the Court's previous paeans to judicially enforceable limits on the commerce power. See *infra* notes 62-108 and accompanying text.

42. Transcript of Oral Argument, *supra* note 35, at 19-20.

43. *Id.* at 28 ("JUSTICE SCALIA: An equally evident constitutional principle is the principle that the Federal Government is a government of enumerated powers and that the vast majority of powers remain in the States and do not belong to the Federal Government. Do you acknowledge that that's a principle?")

GENERAL VERRILLI: Of course we do, Your Honor.").

44. *Id.* at 43.

45. Of course the Court is itself the author of this confusion. For a century the Court itself had assiduously avoided articulating any limits on Congress's Commerce Clause power while at the same time insisting on their existence and importance. See *infra* notes 62-109 and accompanying text.

46. See, e.g., Editorial, *Strong Case Against Health Care Reform Law Isn't So Surprising*, WATERLOO-CEDAR FALLS COURIER, Apr. 1, 2012, at F1; Michael W. McConnell, *The Liberal Legal Meltdown Over Obamacare*, WALL ST. J., May 25, 2012, at A13.

47. *N.F.I.B.*, 132 S. Ct. at 2578.



commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation.”<sup>48</sup> Although autonomy justifications echoed throughout the Chief Justice’s opinion,<sup>49</sup> the mandate’s only identified constitutional infirmity was that, were it upheld, there would remain no judicially enforceable limits on Congress’s power under the Commerce Clause.<sup>50</sup> The Act would be a precedent “permitting Congress to reach beyond the natural extent of its authority, ‘everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.’”<sup>51</sup>

The purported need for a judicially enforceable limit on the Commerce Clause played an even greater role in the joint dissent of Justices Kennedy, Scalia, Thomas, and Alito. Indeed, it did *all* the work. While “in one respect” the case presented novel and challenging constitutional issues, it was from a broader perspective “easy and straightforward.”<sup>52</sup> The apparent difficulty melted away because it was

absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, . . . that there are structural limits upon federal power—upon what it can prescribe with respect to private conduct . . . . Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct . . . .<sup>53</sup>

This “clear principle” supplied both the alpha and the omega for the dissent’s analysis.<sup>54</sup> Were the Act upheld, the Commerce Clause would “become a font of unlimited power.”<sup>55</sup> This conclusion followed deductively because, as the dissent explained, “[i]f all inactivity affecting commerce is commerce, [then] commerce is everything.”<sup>56</sup> Having joined that iron-clad inference with the “fundamental precept” that “the Federal Government cannot do everything,” the joint dissent declared victory.<sup>57</sup>

48. *Id.* at 2587.

49. *Id.* (stressing that the government’s theory would “empower Congress to make those decisions,” *i.e.*, what to do or to buy, for the individual); *see also id.* at 2588 (“The Government’s theory here would effectively [[]]. . . [] establish[] that individuals may be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have them do.”).

50. *Id.* at 2589. (According to the Chief Justice, the Court’s cases have “always recognized that the power to regulate commerce, though broad indeed, has limits”). *Id.* (citation and internal quotation marks omitted).

51. *Id.* (quoting THE FEDERALIST NO. 48, at 309 (J. Madison)).

52. *Id.* at 2642–43 (joint dissenting opinion).

53. *Id.* at 2643.

54. *Id.*

55. *Id.* at 2646

56. *Id.* at 2649.

57. *Id.* at 2647. (Anticipating the theme of this essay, Justice Thomas, in his short, separate dissent, observed that the Court had only itself to blame, as the Court’s laxity in enforcing principled limits had “encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits”). *Id.* at 2677 (Thomas, J., dissenting).

In short, the need-for-a-limit argument, when joined with the assertion that to allow congressional regulation of inactivity would permit no meaningful limit on the commerce power, was the syllogism that harassed the individual mandate throughout the litigation and provided the indispensable underpinning of the argument that ultimately convinced five justices that the mandate exceeded that power. And were the Court writing on a blank slate, the syllogism might well have been unanswerable.<sup>58</sup> In the light cast by the troubled history of the Court's efforts to enforce the enumerated powers doctrine, however, it becomes clear that the syllogism rested upon perhaps the most stubborn and virulent example of constitutional Newspeak.

### B. *The Wages of Commerce Clause History*

“2 + 2 = 5”<sup>59</sup>

Early in the new century, the Supreme Court narrowly upheld the use of the Commerce Clause to exterminate commerce as a means of regulating it. Congress had done so for the rather transparent reason that the subject of trade was thought to be destructive to the citizenry's moral welfare. In dissent an indisputably buttoned-down Justice, who none doubted abhorred the noxious article, railed against the majority in almost apocalyptic terms, warning that the case made a mockery of the Constitution's enumerated power scheme.

Of course, all this might be said of the Supreme Court's 2005 ruling in *Gonzales v. Raich*,<sup>60</sup> which will be examined in due course.<sup>61</sup> But it also describes the Court's ruling a century earlier in *Champion v. Ames (The Lottery Case)*.<sup>62</sup> The threat to the moral order then was the “pestilence of lotteries” not the scourge of medical marijuana, and the dissenter was Chief Justice Melvin Fuller, not Justice Clarence Thomas. But the parallel between the cases demonstrates how little progress had been made in the intervening century.

Writing for himself and three other Justices, Chief Justice Fuller depicted the case as the beginning of the end of American federalism.<sup>63</sup> What Fuller found so alarming about the federal prohibition on interstate shipment of lottery tickets was that in enacting the ban, Congress had for perhaps the first time exercised its power over interstate commerce to deter private conduct it deemed a menace to public

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58. Cf. Gary Lawson & David B. Kopel, *The PPACA in Wonderland*, 38 AM. J.L. & MED. 269, 270 (2012) (concluding that the mandate exceeded congressional power “[a]ccording to the original meaning of the Constitution” but “express[ing] no view on whether the Supreme Court will find the act unconstitutional, for the Supreme Court often deviates from original meaning”). *But see* Coenen, *supra* note 24, at 56. (arguing that “a proper originalist understanding of the constitutional text” supports upholding the minimum coverage provision).

59. ORWELL, *supra* note 3, at 290.

60. 545 U.S. 1 (2005).

61. *See infra* notes 106–108 and accompanying text.

62. 188 U.S. 321 (1903).

63. *See id.* at 375 (Fuller, C.J., dissenting).

morality.<sup>64</sup> This novel use of the commerce power threatened to displace state regulatory authority in ways that no prior statutes had.<sup>65</sup> Fuller explained that “[t]he power of the State to impose restraints and burdens on persons and property in conservation and promotion of the public health, good order and prosperity” was “a power originally and always belonging to the States, not surrendered by them to the General Government nor directly restrained by the Constitution of the United States, and essentially exclusive . . . .”<sup>66</sup> Fuller concluded that to permit Congress to convert, in effect, its power over the channels of interstate commerce into a “general police power would be to hold that it may accomplish objects not entrusted to the General Government, and to defeat the operation of the Tenth Amendment.”<sup>67</sup> Acquiescing in the federal prohibition was “a long step in the direction of wiping out all traces of state lines, and the creation of a centralized Government.”<sup>68</sup> Concluding, Fuller lamented that “[o]ur form of government may remain notwithstanding legislation or decision, but, as long ago observed, it is with governments, as with religions, the form may survive the substance of the faith.”<sup>69</sup>

Fuller’s apoplexy might be amusing were his opinion not so prophetic. In fact *The Lottery Case* was merely the first of dozens of times that the need-for-a-limit argument would be neither answered nor even rebuffed so much as ignored by a Supreme Court majority opinion approving some challenged exercise of federal power. An exhaustive treatment of this history is here as unnecessary as it would be unwelcome. Not only has the familiar story been fully developed elsewhere,<sup>70</sup> but for present purposes even a cursory recounting amply makes the pertinent point—namely, that the Supreme Court abdicated any responsibility to enforce the enumerated powers scheme decades before Barack Obama was born.

In the first third of the twentieth century the Court repeatedly condoned congressional use of its authority over interstate commerce to achieve an ever expanding array of police-power objectives. Congress’s enumerated powers were deemed sufficiently expansive to protect the nation from the dangers of tainted food,<sup>71</sup> narcotics,<sup>72</sup> prostitution,<sup>73</sup> adultery,<sup>74</sup> auto theft,<sup>75</sup> intoxicating spirits,<sup>76</sup> and,

64. *See id.* at 364–65.

65. *See id.*

66. *Id.*

67. *Id.* at 365.

68. *Id.* at 371 (Fuller, C.J., dissenting).

69. *Id.* at 375 (Fuller, C.J., dissenting).

70. *See, e.g.,* DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: 1888–1986*, at 93–98, & 173–180 (1990).

71. *See* *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911).

72. *See* *United States v. Doremus*, 249 U.S. 86 (1919); *Nigro v. United States*, 276 U.S. 332 (1928). *See generally* A. Christopher Bryant, *Nigro v. United States: The Most Disingenuous Supreme Court Opinion, Ever*, 12 *NEV. L.J.* 650 (2012).

73. *See* *Hoke v. United States*, 227 U.S. 308, (1913).

74. *See* *Caminetti v. United States*, 242 U.S. 470 (1917).

75. *See* *Brooks v. United States*, 267 U.S. 432 (1925).

76. *See* *James Clark Distilling Co. v. Western Md. Ry. Co.*, 242 U.S. 311 (1917). (In *Clark Distilling*, the Court rejected a constitutional challenge to the Webb-Kenyon Act, which prohibited shipment of intoxicating liquors into a state only if the shipment violated state law. *Id.* at 312. A few weeks after the decision in *Clark Distilling*, Congress enacted the Reed Amendment, which further extended the federal

perhaps most dreadful of all, oleomargarine.<sup>77</sup> Sometimes these rulings provoked dissents like Fuller's—denouncing such broad interpretations of congressional authority as fundamentally inconsistent with a structure according the central government only limited authority.<sup>78</sup> At other times, no one on the High Court even questioned the encroachment on the reserved powers of the states.<sup>79</sup> Be that as it may, the tide of federal power flowed unchecked. To be sure, in rare bolts out of the blue, the Court invalidated an occasional ill-fated federal statute.<sup>80</sup> It was as if on these occasions the Court suddenly awoke to its constitutional responsibilities, though these bouts of conscientiousness invariably proved short in duration<sup>81</sup> and in any event were never suffered to interfere with congressional efforts to preserve Edwardian morality.<sup>82</sup>

So matters stood when the clash between President Roosevelt and the Court forced the latter into unambiguous retreat.<sup>83</sup> Unconditional surrender came in the form of the Court's unanimous decision in *Wickard v. Filburn*.<sup>84</sup> The case has come to stand principally for the so-called "aggregation principle."<sup>85</sup> According to this doctrine, rather than consider an individual's contribution in isolation, courts are to aggregate all similarly situated individuals when assessing whether they have a sufficiently "substantial effect" on interstate commerce to trigger congressional power.<sup>86</sup> For present purposes, the most telling aspect of this 1942 ruling was that Justice Jackson's opinion for the Court did not even pretend to preserve any judicially enforceable limit on Congress's Commerce Clause authority.<sup>87</sup> This deficiency was neither inadvertent nor unremarked. In a wonderfully telling exchange of letters between then-Judge Sherman Minton and Justice Jackson, the

prohibition on interstate transport of alcohol.) See also *United States v. Hill*, 248 U.S. 420 (1919) (upholding federal criminal prosecution of one who carried a single quart of liquor from Kentucky into West Virginia for personal use, even though West Virginia law permitted the conduct); *id.* at 428 (McReynolds, J., dissenting) ("[T]he Reed Amendment in no proper sense regulates interstate commerce, but is a direct intermeddling with the State's internal affairs.").

77. See *McCray v. United States*, 195 U.S. 27 (1904). (The tax was relatively transparent protectionism shielding the buttery industry from competition, justified by undocumented claims that artificially colored oleomargarine somehow endangered public health, or at the least engendered consumer confusion. *Id.*) For an insightful and deliciously ironic history of "the first battle in the margarine war," which culminated in the passage of 1886 Act ultimately challenged in *McCray*. See Geoffrey Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CALIF. L. REV. 83, 83 (1989).

78. See *Champion*, 188 U.S. at 371 (Fuller, C.J., dissenting).

79. See, e.g., *Brooks*, 267 U.S. at 432.

80. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 268 (1918).

81. See *Bryant*, *supra* note 72, at 652-55.

82. See generally A. Christopher Bryant, *The Third Death of Federalism*, 17 CORNELL J.L. & PUB. POL'Y 101, 116-29 (2007).

83. See THOMAS B. MCAFFEE ET AL., *POWERS RESERVED FOR THE PEOPLE AND THE STATES: A HISTORY OF THE NINTH AND TENTH AMENDMENTS* 143-61 (2006).

84. 317 U.S. 111 128-29 (1942).

85. See Jim Chen, *Filburn's Legacy*, 52 EMORY L.J. 1719, 1748 (2003) (noting that "*Filburn* has added the 'aggregation' maneuver to constitutional law's argumentative arsenal" and that "[t]hanks to *Filburn*, Congress may reach any economic actor trivial by itself as long as its contribution to the national economy, taken together with that of many other actors similarly situated, is far from trivial") (internal quotation marks and citations omitted).

86. See *Wickard*, 317 U.S. at 127-28.

87. See *id.* at 128-29.

latter pled guilty to the former's charge that his *Wickard* opinion had loosed the judicial reins on Congress's Commerce Clause power.<sup>88</sup> In a December 17, 1942 letter to Jackson, Minton wrote that he had "just finished reading your very interesting opinion in *Wickard*."<sup>89</sup> With a disarming insouciance, Minton urged "[l]et's be brutally frank."<sup>90</sup> If the Justices wished "to adopt an unlimited concept as to interstate commerce, why not say so [and] throw in the ash can those cases that disagree[?]"<sup>91</sup> Four days later, Jackson replied, conceding that

If we were to be brutally frank, as you suggest, I suspect what we would say is that in any case where Congress thinks there is an effect on interstate commerce, the Court will accept that judgment. All of the efforts to set up formulae to confine the commerce power have failed. When we admit that it is an economic matter, we pretty nearly admit that it is not a matter which courts may judge.<sup>92</sup>

The significance of this exchange is not that the interpretation of Supreme Court decisions should be governed by a quixotic search for authorial intent. Rather, the point is that the Court's opinion in *Wickard* meant what it said and that Jackson's failure therein to identify judicially enforceable limits on the commerce power was a self-conscious one. By 1942, any such limits had vanished.

As significantly, the Minton-Jackson correspondence documents the fact that the secret was an open one, apparent to any sophisticated reader.<sup>93</sup> Even so, no matter how widely and accurately perceived, this truth remained shrouded and at odds with the formal judicial narrative, which insisted on the existence of judicially enforceable limits on congressional authority, no matter how remote and fanciful. So began the era of Commerce Clause Newspeak, in which lawyers and judges were obligated to say one thing all the while knowing its opposite to be true.

Predictably, the Court's inability or refusal to make explicit its implicit abdication of the duty to cabin Congress's Commerce Clause power ensured that

88. See Letter from Sherman Minton, Judge, to Justice Robert H. Jackson, Justice, United State Supreme Court (Dec. 17, 1942) (on file with Robert H. Jackson Papers, Library of Congress, Manuscript Division) (copy on file with author). I thank John Q. Barrett for bringing this exchange of letters to light on the eve of the Court's ruling in *N.F.I.B. v. Sebelius*, 132 S. Ct. 2566 (2012).

89. *Id.*

90. *Id.*

91. *Id.* (In a self-disparaging flourish of deference, Minton hastened to add: "I suppose I am wrong and you are right—I never did have any finesse.") *Id.* Still, he stopped short of withdrawing his question. *Id.*

92. Letter from Robert H. Jackson, Justice, United State Supreme Court, to Sherman Minton, Judge (Dec. 21, 1942) (unsigned carbon copy of typed letter) ,(on file with ),Robert H. Jackson Papers, Library of Congress, Manuscript Division),... Jackson added that, as he read them, prior decisions had signaled a sort of "strategic retreat by the courts from the effort to control the action of Congress in the field of interstate commerce." *Id.*

93. Nor was Minton-Jackson correspondence an isolated instance. To the contrary, Jackson seems to have felt a compulsion to confess that he had in *Wickard* written the epitaph to judicial enforcement of the enumerated powers scheme. See generally Barry Cushman, *Continuity and Change in Commerce Clause Jurisprudence*, 55 ARK. L. REV. 1009, 1053 (2003) (discussing Jackson's memorandum to his law clerk).

the need-for-a-limit argument would still occasionally be asserted in litigation.<sup>94</sup> For six decades, the Court invariably rejected the claim.<sup>95</sup> As the late Philip Frickey observed, “by the 1980s the Commerce Clause game seemed about over. Casebook editors were driven to dream up wild hypotheticals to try to find ways to encourage students to consider whether the commerce power had any practical limits at all.”<sup>96</sup> Yet all the while, in the U.S. reports the legal fiction endured.<sup>97</sup>

Then in 1995 the Supreme Court shocked the legal community by striking down the Gun-Free School Zones Act on the ground that it was beyond the reach of Congress’s power to regulate interstate commerce.<sup>98</sup> Writing for a bare five-Justice majority, Chief Justice Rehnquist sought to demonstrate the invalidity of the 1990 statute without overruling any of the Court’s Commerce Clause precedents.<sup>99</sup> To the four dissenters, his careful parsing of the precedents missed the forest for the trees. The core teaching of the Court’s relevant post-New Deal jurisprudence was that the Court would not second-guess Congress’s conclusion that a matter fell within its Commerce Clause authority.<sup>100</sup> In any event, *Lopez* had little impact on the work of the lower federal courts. Between 1995 and 1999, the federal intermediate appellate courts rejected every Commerce Clause challenge to a federal statute.<sup>101</sup> It was as though the U.S. Courts of Appeals uniformly

94. See, e.g., *Perez v. United States*, 402 U.S. 146 (1971) (rejecting Commerce Clause challenge to a criminal conviction under a federal statute governing intrastate extortionate credit transactions).

95. See, e.g., Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 752 (1995) (describing the Court as “being ‘asleep at the constitutional switch’ for more than fifty years” that elapsed between the decisions upholding New Deal legislation and 1995); Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause* 74 TEX. L. REV. 719, 746 (1996) (concluding that since the New Deal, “the Court ha[dsd] engaged in only pretend review” under the Commerce Clause).

96. Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695, 701 & n.39 (1996). Professor Frickey’s examples included the following: (1) DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION’S THIRD CENTURY 789, 813, 817 (1993) (questioning whether congressional power could reach a child’s front-yard lemonade stand); (2) GERALD GUNTHER, CONSTITUTIONAL LAW 140 (12th ed. 1991) (contemplating federal prohibition on possession of all pills because it is difficult to distinguish dangerous pills from others); (3) GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 197, 209 (2d ed. 1991) (suggesting federal prohibition of shoplifting and federal regulation of the lawn, parking lot, and disposal of trash at carry-out restaurant).

97. See *Perez*, 402 U.S. at 156-57.

98. *United States v. Lopez*, 514 U.S. 549, 551 (1995).

99. *Id.* at 559-61.

100. See, e.g., *id.* at 604 (Souter, J., dissenting) (asserting that “[t]he practice of deferring to rationally based legislative judgments is a paradigm of judicial restraint” which is especially appropriate insofar as congressional regulation under the Commerce Clause is concerned because “[i]n judicial review under the Commerce Clause, [this judicial deference] reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress’s political accountability in dealing with matters open to a wide range of possible choices”) (internal quotation marks and citations omitted); *id.* at 616-17 (Breyer, J., dissenting) (“Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce – both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy.”).

101. See Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 385 n.85 (2000) (noting that the Fourth Circuit’s 1999 decision invalidating the civil-remedy provision of the Violence

interpreted *Lopez* as an aberration, properly limited to its particular facts.<sup>102</sup> The Supreme Court in turn side-stepped every call to clarify *Lopez*'s precedential significance, consistently denying petitions for certiorari in numerous post-*Lopez* Commerce Clause cases.<sup>103</sup>

Then in 2000 lighting struck again. The same five Justices who comprised the *Lopez* majority joined forces to invalidate the civil-remedy provision of the Violence Against Women Act.<sup>104</sup> The Chief Justice's majority opinion stressed the Court's reluctance to aggregate the effects of individual instances of intrastate, *non-economic* activity for the purposes of deciding whether the activity had the requisite substantial effect on interstate commerce. He wrote: "While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."<sup>105</sup> However hesitant and qualified, this statement held out the promise that henceforth a legal rule would guide the Court's efforts to cabin Congress's Commerce Clause power. The key inquiry would be whether the object of congressional regulation was truly "economic in nature." Reality was conforming to Newspeak.

Or so it briefly seemed. Elaboration of a distinction between the economic and non-economic aspects of the world would have been difficult in the best of circumstances. In fact, the effort collapsed almost as soon as it began. The next Commerce Clause case to come to the Supreme Court split the socially conservative and libertarian constituencies of the American political right. It had the same effect on the Rehnquist Court federalism five. When confronted with the evils of medical marijuana, the nominally pro-federalism Rehnquist Court, in one of its very last constitutional decisions, endorsed a reading of congressional power so broad as to be virtually unlimited. In his opinion for the Court in *Gonzales v. Raich*, Justice Stevens found that Angel Raich's possession of any amount of marijuana, even if for medicinal purposes at the direction of her treating physician and in conformity with state law, was on the economic side of the line and therefore within the power of Congress to punish via criminal penalty.<sup>106</sup> This was so notwithstanding the parties' stipulation that the cannabis Raich possessed had never been bought or sold and had been "grown using only soil, water, nutrients, equipment, supplies, and lumber originating from or manufactured within California."<sup>107</sup> As Justice Thomas lamented in dissent:

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Against Women Act was the first U.S. Court of Appeals ruling "to hold a federal statute unconstitutional based on a *Lopez* challenge").

102. See *id.*

103. See, e.g., *id.* at 396 (noting that prior its 2000 ruling on the Violence Against Women Act the Supreme Court had consistently "denied certiorari in cases that would have clarified the scope of *Lopez*").

104. 42 U.S.C. § 13981(c) (1999). The section authorized a victim of gender-motivated violence to bring a tort suit against an assailant in federal district court. *Id.*

105. *United States v. Morrison*, 529 U.S. 598, 613 (2000).

106. See generally *Gonzales v. Raich*, 545 U.S. 1 (2005).

107. See *Raich*, 545 U.S. at 575; Resp'ts Br. at 5, *Raich*, 545 U.S. 1 (No. 03-1454).

If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States. This makes a mockery of Madison's assurance to the people of New York that the "powers delegated" to the Federal Government are "few and defined," while those of the States are "numerous and indefinite." . . . One searches the Court's opinion in vain for any hint of what aspect of American life is reserved to the States.<sup>108</sup>

*Raich* was read widely as marking the end of the ill-fated sojourn launched by *Lopez*.<sup>109</sup> And just like that, the Court was back in the Newspeak business.<sup>110</sup>

### C. Defending the Individual Mandate

So matters stood when the ACA was signed into law in March 2010. In defending the Act, the government suggested two possible limits to its theory of the Commerce Clause. The first resonated widely as a practical matter, but translated awkwardly at best into a formal legal limit. The second was formally sound but substantively vacuous.

#### 1. Health care is unique

The first limit proffered by the government insisted that the power to mandate individual purchases of privately sold goods extended only to health care insurance (or at most to a narrow class of highly analogous products). According to this argument health care insurance was virtually unique. Few if any other products secured a means to pay for an individual's almost certain future consumption of a good (*i.e.*, health care) that would at some unpredictable time become both essential and so enormously expensive as to bankrupt all but the very wealthiest among

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108. *Raich*, 545 U.S. at 69, 70 (Thomas, J., dissenting) (quoting THE FEDERALIST NO. 45, at 313 (James Madison) (J. Cooke ed. 1961)).

109. See, e.g., Jonathan H. Adler, *Is Morrison Dead?: Assessing a Supreme (Drug) Law Overdose*, 9 LEWIS & CLARK L. REV. 751, 765, 777 (2005) (concluding that *Raich* repudiated *Lopez* and *Morrison*); Thomas W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 844 (2005) ("*Lopez* and *Morrison* have been largely confined to their facts."); John T. Parry, "*Society Must be [Regulated]*": *Biopolitics and the Commerce Clause in Gonzales v. Raich*, 9 LEWIS & CLARK L. REV. 853, 859 (2005) (*Raich* teaches "that *Wickard* is the heart of Commerce Clause doctrine, while *Lopez* and *Morrison* are, if not outliers, at least cases that merely police the outer boundaries of the doctrine to ensure that Congress is regulating economic activity in the broad sense defined by *Raich*."); Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915, 932 (2005) (expressing doubt that "a robust judicially-enforceable federalism has much future left" after *Raich*); Ilya Somin, *A False Dawn For Federalism: Clear Statement Rules After Gonzales v. Raich*, 2006 CATO SUP. CT. REV. 113, 118 (asserting that *Raich* "virtually eviscerated" *Lopez* and *Morrison*).

110. Cf. Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J.L. & PUB. POL'Y 519, 579 (2008) (noting that "the Court . . . [has] declared that Congress cannot interfere with areas of 'traditional state concern,' such as crime and education, but . . . [has] allowed Congress to pass over 3,000 criminal laws and establish a Department of Education.").



us.<sup>111</sup> What's more, both federal law and widely shared societal norms required that the good be supplied without regard to the individual's ability to pay when the crisis came, resulting in substantial shifting of costs from those without coverage to those already in the health insurance market.<sup>112</sup> These features of the health insurance, it was said, sufficiently differentiated it from automobiles and broccoli to cabin the asserted power to compel private purchases to the former and exempt the latter from congressional command and control.<sup>113</sup> This answer had the virtue of tracking underlying economic realities and political sensibilities. Thus, it convinced those willing to be persuaded, both on<sup>114</sup> and off<sup>115</sup> the bench.

To others, however, the answer lay beyond the realm of legality, providing no articulable principle of constitutional law that would withstand further pressure to expand federal power. When Justice Alito pressed the Solicitor General to "express your limiting principle as succinctly as you possibly can,"<sup>116</sup> even those ardently seeking the ACA's demise must have cringed when Verrilli answered:

We got two and they are—they are different. Let me state them. First with respect to the comprehensive scheme. When Congress is regulating—is enacting a comprehensive scheme that it has the authority to enact that the Necessary and Proper Clause gives it the authority to include regulation, including a regulation of this kind, if it is necessary to counteract risks attributable to the scheme itself that people engage in economic activity that would undercut the scheme. It's like—it's very much like *Wickard* in that respect, very much like *Raich* in that respect.

With respect to the—with respect to the—considering the Commerce Clause alone and not embedded in the comprehensive scheme, our position is that Congress can regulate the method of payment by imposing an insurance requirement in advance of the time in which the—the service is consumed when the class to which that requirement applies either is or virtually is most certain to be in that market when the timing of one's entry into that market and what you will need when you enter that market is uncertain and when—when you will get the care in that market, whether you can afford to pay for it or not and shift costs to other

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111. See Reply Br. for Pet. at 6, *N.F.I.B. v. Sebelius*, 132 S. Ct. 2566 (2012) (No. 11-398) (distinguishing the individual mandate from other hypothetical mandates for broccoli or cars or gym memberships or other forms of insurance).

112. See *id.* at 2-3 ("The minimum coverage provision addresses economic effects that already exist in the health-care market because the uninsured as a class routinely consume health care they cannot afford.").

113. See *id.* at 19.

114. See, e.g., *N.F.I.B.*, 132 S. Ct. at 2619-20 (Ginsburg, J., concurring in part and dissenting in part); see also *Thomas More Law Center v. Obama*, 651 F.3d 529, 565 (6th Cir. 2011) (Sutton, J., concurring in part) ("Regulating how citizens pay for what they already receive (health care), never quite know when they will need, and in the case of severe illnesses or emergencies generally will not be able to afford, has few (if any) parallels in modern life.").

115. See, e.g., Krugman, *supra* note 38, at A27.

116. Transcript of Oral Argument, *supra* note 35, at 43.

market participants.

So those—those are our views as to—those are the principles we are advocating for and it's, in fact, the conjunction of the two of them here that makes this, we think, a strong case under the Commerce Clause.<sup>117</sup>

Though General Verrilli's answer was much maligned in the press,<sup>118</sup> its deficiencies had far less to do with his oratorical skills than with difficulties identified by the Chief Justice earlier in the argument. As he had observed, the differences between health insurance and other products were issues of economics, not law. To police the line between health insurance and broccoli would require courts to re-examine congressional predictions about the economic effect of a purchase requirement, or lack thereof.<sup>119</sup> More precisely, the health-insurance-is-different argument assumed that the courts would henceforth differentiate between some permissible economic purposes (such as curing the perverse incentives created by other permissible congressional regulations) and other impermissible ones (such as stimulating demand for a product or otherwise sustaining its price).

But if purchase mandates were among the lawful tools in Congress's Commerce Clause toolbox, what constitutional principle would be offended by future congressional use of these tools to stimulate demand or sustain price – objectives that the Court had long ago squarely held to be legitimate ends for the exercise of the commerce power?<sup>120</sup> Put differently, no judicially administrable standard existed to guide judicial reconsideration of the appropriateness of any particular purchase mandate once Congress had found it suitable.<sup>121</sup> As in the *Lochner* era,<sup>122</sup> the economic theories of legislators, including their ordering of preferences, would be measured against the economic theories and value judgments of judges.<sup>123</sup> The Chief Justice was right to be reluctant to engage the federal judiciary in that kind of inquiry, for which it lacks both political legitimacy and institutional competence.<sup>124</sup> Perhaps for these kinds of reasons, some of the Act's more candid out-of-court defenders conceded that the power to compel purchases

117. *Id.* at 43-44.

118. See, e.g., WATERLOO-CEDAR FALLS COURIER, *supra* note 46; see also David Savage, *Trial By Fire for Solicitor General*, L.A. TIMES, May 5, 2012, at 8.

119. Transcript of Oral Argument, *supra* note 35, at 38-40.

120. See, e.g., *Wickard*, 317 U.S. 111, 128 (“It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. . . . The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon.”).

121. See Transcript of Oral Argument, *supra* note 35, at 38-39 (Roberts, C.J.) (“[I]t would be going back to *Lochner* if we were put in the position of saying no, you can use your commerce power to regulate insurance, but you can't use your commerce power to regulate this market in other ways. I think that would be a very significant intrusion by the Court into Congress's power.”).

122. See *Lochner v. New York*, 198 U.S. 45 (1905); see generally Smith, *supra* note 7, at 1725.

123. Transcript of Oral Argument, *supra* note 35, at 38-39.

124. *Id.*; cf. *id.* at 77-78 (Paul Clement) (“I think that was the Chief Justice's point which was once you open the door to compelling people into commerce based on the narrow rationales that exist in this industry, you are not going to be able to stop that process.”).

extended to just about anything.<sup>125</sup>

The incongruity between the health-insurance-is-different argument and the Court's case law was likewise exhibited in the D.C. Circuit's opinion upholding the mandate. Writing for the court, Judge Silberman, a senior judge with impeccable conservative credentials,<sup>126</sup> noted that "at oral argument, the Government could not identify any mandate to purchase a product or service in interstate commerce that would be unconstitutional, at least under the Commerce Clause."<sup>127</sup> Judge Silberman further confessed that the court had been no more successful than the government's lawyers in identifying doctrinal limiting principles.<sup>128</sup> Their absence was admittedly a source of "some discomfort,"<sup>129</sup> but not sufficiently so to invalidate the act. In numerous passages of his opinion, Judge Silberman in effect called the Justices' bluff on their repeated claims that congressional power remained subject to limits. "The Framers, in using the term 'commerce among the states,' obviously intended to make a distinction between interstate and local commerce," Silberman observed.<sup>130</sup> But "Supreme Court jurisprudence over the last century has largely eroded that distinction."<sup>131</sup>

Citing Scalia's concurring opinion in *Raich*, Judge Silberman noted that "[a] single individual need not even be engaged in *any* economic activity—*i.e.* not participating in *any* local or interstate market—so long as the individual is engaged in some type of behavior that would undercut a broader economic regulation if left unregulated."<sup>132</sup> Silberman acknowledged that "a direct requirement for most Americans to purchase any product or service seems an intrusive exercise of legislative power" and "certainly is an encroachment on individual liberty."<sup>133</sup> But it was "no more so than a command that . . . gravely ill individuals cannot use a substance their doctors described as the only effective palliative for excruciating pain."<sup>134</sup> Reading between the lines of Silberman's opinion, one message stands out in relief: *Raich* had presented the Supreme Court with a federalism litmus test and Justices Scalia and Kennedy had failed miserably. These two, therefore, had only themselves to blame for the lack of legal limits on congressional authority, and

125. See, e.g., *The Constitutionality of the Affordable Care Act: Hearing Before S. Com. On Judiciary*, 112th Cong. 4 (2011) (statement of Charles Fried, Beneficial Professor of Law, Harvard Law School) ("As for veggies, I suppose forced feeding would indeed be an invasion of personal liberty, but making you pay for them would not, just as making you pay for a gym membership you can afford but do not use would not."); see also James B. Stewart, *How Broccoli Landed on the Supreme Court Menu*, N.Y. TIMES, June 14, 2012, at A1 (discussing statements of Dean Erwin Chemerinsky to the effect that Congress could mandate the purchase of broccoli or automobiles).

126. See David G. Savage, *GOP Lawyers See Tilt to Activist High Court*, L.A. TIMES, Apr. 1, 2012, at A1 (describing Judge Silberman as "a leader of the conservative legal movement").

127. *Seven-Sky v. Holder*, 661 F.3d 1, 14-15 (D.C. Cir. 2011).

128. See *id.* at 18 ("We acknowledge some discomfort with the Government's failure to advance any clear doctrinal principles limiting congressional mandates that any American purchase any product or service in interstate commerce. But to tell the truth, those limits are not apparent to us . . .").

129. *Id.*

130. *Id.* at 16.

131. *Id.*

132. *Id.* at 20 (citing *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (Scalia, J., concurring)).

133. *Id.*

134. *Id.*

Silberman refused to warp the law to save them from the consequences of their own perfidy.<sup>135</sup>

## 2. *Health care is economic*

The circumstances specific to health care insurance that made the case for an individual mandate so politically and economically compelling mapped onto Commerce Clause doctrine awkwardly, at best. But that same doctrine itself purported to supply limitations that as a theoretical matter should have alleviated fears that the ACA marked the end of the enumerated powers doctrine. As noted above, *Lopez* and *Morrison* suggested that congressional authority under the Commerce Clause ran out as regulation reached beyond things in themselves economic in nature.<sup>136</sup>

Not surprisingly, then, in defending the ACA the government chanted back to the judiciary this supposed limitation. Ideally, this response should have disposed of the case, as it reflected the only limit even suggested by the Court in the prior seventy-five years of Commerce Clause jurisprudence and the ACA was indisputably an economic regulation. Even assuming that the theory of the ACA reached so far as to permit the imposition of virtually any purchase mandate, purchases are by their very nature economic transactions. Whatever lay outside the set of all things economic, the only realm even impliedly held to exceed congressional authority, would remain immune from federal authority no matter how the challenges to the ACA were resolved.

So what explains the fact that the numerous august judges and justices, some of whom gave us the economic/non-economic distinction, found it so unsatisfactory in this case? Their reaction reveals what should have been apparent for years: namely, that the realm of *non-economic* activity is a chimera. The powers reserved by the Tenth Amendment and denied Congress may only be used to govern a fantasyland. After the Supreme Court's ruling in *Gonzales v. Raich*,<sup>137</sup> it is hard to imagine *anything* that is *not* economic for the purposes of assessing Congress's Commerce Clause authority. As the dissenters there pointed out, if Angel Raich's possession of a small amount of marijuana was economic in nature because it *could* be sold in an *illegal* market, then so too was Lopez's possession of a gun – an industrial article the subject of a billion-dollar trade, both legal and illicit.<sup>138</sup> Of course, once *Lopez* is sterilized as a precedent, not much remains of the Rehnquist Court's celebrated federalism revolution, which in turn explains why the government's invocation of the economic/non-economic distinction fell on so many deaf ears. Judges heard and understood the Supreme Court's numerous declarations of the

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135. Cf. *Thomas More Law Center v. Obama*, 651 F.3d 529, 555 (6th Cir. 2011) (Sutton, J., concurring in part) (“[T]he Court either should stop saying that a meaningful limit on Congress’s commerce powers exists or prove that it is so.”).

136. See *supra* notes 98-106 and accompanying text.

137. 545 U.S. 1 (2005); see *supra* notes 107-110 and accompanying text.

138. See *Gonzales v. Raich*, 545 U.S. 1, 50 (2005) (O’Connor, J., dissenting) (“To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic.”).

need for continued judicial enforcement of the enumerated powers doctrine against the background fact that the non-economic realm had disappeared. All references to that realm were so much constitutional Newspeak.

This point was illustrated nowhere so starkly as in an exchange between then-Acting Solicitor General Katyal and Senior District Judge Graham, who was sitting by designation on the Sixth Circuit panel considering the constitutionality of the ACA. Their colloquy illustrates how seven decades of constitutional Newspeak inhibited clarity in both communication and cognition.

JUDGE GRAHAM: I hear your arguments about the power of Congress under the Commerce Clause and I am having difficulty seeing how there is any limit to the power as you're defining it. *And I am starting with the premise that just about everything that human beings do, about every human function I can think of, has some economic consequences.*<sup>139</sup>

Judge Graham then described the aggregation principle of *Wickard* and explained how under it any individual's activity could be deemed a part of a whole that, when considered in the aggregate, has a substantial effect on interstate commerce.<sup>140</sup> He continued:

JUDGE GRAHAM: So you are always going to be able to satisfy this substantial effects standard. . . . Where ultimately is the limitation on Congress's power and how can the courts begin to restrain Congress when it begins to do something that may be invasive on an individual standpoint, such as to require someone to purchase a product or service that they don't want?

KATYAL: OK. So, Judge Graham, let me be very clear about this. I agree with every word you just said. So that means that we are not here saying that there are unlimited powers under Commerce. We think that *Lopez* and *Morrison* establish prohibitions that restrict, that forbid the type of adding up of . . .

GRAHAM (interrupting): What are they? What are they? Where are they? I want to find them. That's what I'm struggling with.

KATYAL: Right. So what *Lopez* and *Morrison* say is: you've got to be quintessentially . . . you've got to be economic in nature. And that it can't be the aggregation of a whole bunch of uneconomic activity. Zero plus zero plus zero is always going to equal zero.

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139. Oral Argument at 43:43, *Thomas More Law Center*, 651 F.3d 529 (No. 10-2388) (emphasis added).

140. *See id.*

Here's what we're saying. We're saying in this market, what Congress is regulating is not the failure to buy something but the failure to secure [] financing for something that everyone is going to buy. So it is just about cash or credit or something like that. . . . Congress is reacting to the lion's share of people who buy health care and consume health care but without having financing. And that is quintessentially economic in the way that things like *Lopez* and *Morrison* are not. [pause] And that's the limit. So we're not here standing before you and saying that Congress should be able to force people to buy things. We're . . .

GRAHAM (interrupting): I'm having trouble seeing the limits but I accept your answer.<sup>141</sup>

As it turned out, Judge Graham "accept[ed]" Katyal's answer only in the sense that he agreed to disagree. In his dissent from the Sixth Circuit's ruling sustaining the ACA, he wrote that if "the mandate is upheld, it is difficult to see what the limits on Congress's Commerce Clause authority would be."<sup>142</sup> As tempting as it might be to dismiss the Graham-Katyal dialogue with analogies to ships in darkness, it would be a mistake to do so. The exchange reveals the fabric of constitutional Newspeak fraying under stress. Graham asked Katyal to describe what lay beyond Congress's grasp, given that all things under the sun could potentially be characterized as "economic."<sup>143</sup> Katyal answered that Congress was precluded from regulating whatever was not economic, a category Graham's question explicitly supposed, and which Katyal must have in any event known, to be an empty one. They used the same words, but gave them incompatible meanings. Graham asked in "Oldspeak"; Katyal answered him in Newspeak.

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In a characteristically colorful 1993 concurring opinion, Justice Scalia once likened the Court's intermittent invocation of its landmark, albeit much-maligned, Establishment Clause precedent, *Lemon v. Kurtzman*,<sup>144</sup> to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried."<sup>145</sup> Scalia explained that the secret of the precedent's survival was "that it [was] so easy to kill."<sup>146</sup> *Lemon's* malleable

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141. *Id.*

142. *Thomas More Law Center*, 651 F.3d at 573 (Graham, J., concurring in part and dissenting in part).

143. *Id.* (Judge Graham's skepticism of the efficacy of an economic/non-economic distinction was only too reasonable in the wake of *Gonzales v. Raich*).

144. 403 U.S. 602 (1971).

145. *Lamb's Chapel v. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment).

146. *Id.* at 399.

standard was available for his colleagues when it conveniently produced a result they desired but could just as conveniently be ignored when it suggested an outcome they found less attractive. As Scalia wryly observed, “[s]uch a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.”<sup>147</sup> One might similarly ponder why the Commerce Clause ghoul has remained so hearty, apparently impervious to decades’ neglect? The claim of a need for a limit on congressional authority, however transparently fallacious when invoked, nevertheless will not rest in peace. The concluding part of this essay ventures some explanations for this macabre feature of our constitutional condition.

## II. Decoding Newspeak

The discussion so far has demonstrated that for over one hundred years the there-must-be-a-limit argument has flowered in one case, only to be cut down in the next, only to emerge again in a future term of the Court like some stubbornly perennial weed. This cycle has recurred so frequently as to make the contemporary invocation of the argument literally incredible. Yet this argument at least ostensibly figured decisively in the case against the constitutionality of the ACA’s individual mandate, ultimately securing the support of a Supreme Court majority. This essay now considers what this apparent contradiction suggests about the longer-term significance of the ACA litigation and judicial enforcement of federalism more generally.

### A. Not a Revived Federalism Revival

Both friends and enemies of the Rehnquist Court’s *Lopez* and *Morrison* decisions have already suggested that *National Federation of Independent Businesses* may foretell future efforts on the part of the Roberts Court to reinvigorate the two earlier decisions.<sup>148</sup> When considered against the historical record, this understanding of the case seems ill-founded.<sup>149</sup> For better or worse, that history impeaches the Court’s implied promise to reign in congressional power.

It is beyond credulous to think that after a century of self-defeating fits and starts the Court is *now finally* willing and able to impose and enforce meaningful limits on congressional authority. For the first half of the twentieth century, the Court repeatedly asserted some role in policing the outer boundaries of the Commerce Clause, along with other explicit grants of power to Congress. But as often is the case, when confronted with a federal statute a majority of the Justices deemed beneficial, the Court abandoned all concern with the limits of congressional

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147. *Id.*

148. See, e.g., Randy Barnett, *We Lost. But the Constitution Didn't*. WASH. POST, July 3, 2012, at B116 (“The Supreme Court has definitively ruled that the commerce, necessary and proper clause, and spending power have limits.”); Neal K. Katyal, *A Pyrrhic Victory*, N.Y. TIMES, June 28, 2012, at A25 (“The health care decision [] contains the seeds for a potential restructuring of federal-state relations.”).

149. See *supra* notes 62-111 and accompanying text.

power to uphold the law.<sup>150</sup> Then, between 1942 and 1995, the Justices, and eventually the legal profession more generally, honored the spirit of the New Deal settlement, whereby Congress would be the judge of the scope of its own authority, at least where the object of regulation was in some sense economic.<sup>151</sup> *Lopez* and *Morrison* reflected the Rehnquist Court's attempt to make meaningful this last reservation on congressional power.<sup>152</sup> But even that modest effort foundered the first time the Court encountered a federal statute dividing the American political right-wing's social conservative and libertarian constituencies.<sup>153</sup> For more than a century, the Court has again and again failed to field a reliable majority consistently committed to limiting the powers of Congress. Nothing about the five-justice consensus in *National Federation of Independent Businesses* provides any reason to expect the future to be different.

This is not to say that the Court will never again invalidate a federal statute on the grounds that it exceeds the enumerated powers. What is certain, however, is that on the exceedingly rare occasions in which it may do so, the result will depend not on any principled limit to congressional jurisdiction but instead on some other, likely unspoken, objection to the condemned federal law. Some might speculate that even such a sporadic and indeterminate enforcement of the enumerated powers scheme is better than none.<sup>154</sup> But such a regime would in effect accord unelected, unaccountable, unrepresentative, life-tenured federal judges an occasional veto over federal statutes they disliked for reasons they need never even articulate, let alone defend. The ideological distortion worked upon the ordinary political process could, as the ACA litigation itself suggests, have enormous consequences utterly at odds with the most fundamental principles of representative government.<sup>155</sup> Only the predisposed could possibly believe that whatever minimal, haphazard constraint such an approach imposed upon Congress would not be more than counterbalanced by the awesome and indeterminate authority conferred upon the Supreme Court. Such a distribution of power could hardly be thought to serve the purported objective of "limited government."<sup>156</sup>

The contrast between the *Raich* and the *National Federation of Independent Business* cases illustrates the point. Although the Court's membership changed in the interim, in both cases Justice Kennedy played a pivotal role.<sup>157</sup> What explains

150. See *supra* notes 71-83 and accompanying text.

151. See *supra* notes 84-97 and accompanying text.

152. See *supra* notes 98-106 and accompanying text.

153. See *Gonzales v. Raich*, 545 U.S. 1, 1 (2005); see also *supra* notes 107-111 and accompanying text.

154. Cf. Richard A. Epstein, *The Federalism Decisions of Justices Rehnquist and O'Connor: Is Half a Loaf Enough?*, 58 STAN. L. REV. 1793, 1825-26 (2006) (applauding the eponymous Justices even though their efforts were sorely incomplete).

155. In addition, undisciplined judicial enforcement of the enumerated powers scheme obscures responsibility, and thus electoral accountability, for the encroachment of federal power on the traditional domains of state governments. See Graglia, *supra* note 95, at 770 (noting that a "major advantage of making the Court's withdrawal from Commerce Clause review explicit is that it would put responsibility for the expansion of federal power where it belongs, squarely on Congress").

156. See, e.g., *Br. of Private Resp'ts at 12, Dep't of Health & Human Servs. v. Florida*, 132 S. Ct. 2566 (No. 11-398) (explaining that the enumerated powers scheme protects against "substantively unchecked government").

157. Justice Kennedy was indispensable to the bare majorities, joining Justice Stevens's opinion for the



his endorsement of federal power in the former case but not the latter? One would search the U.S. reports in vain for any explanation of his decision to abandon his fellow federalists in *Raich*.<sup>158</sup> But nonetheless, the mystery is easily solved. Justice Kennedy has earned a reputation as an ardent supporter of drug prohibition,<sup>159</sup> but in other ways has demonstrated what have been termed “libertarian”<sup>160</sup> leanings, in both the social<sup>161</sup> and economic<sup>162</sup> spheres. While these preferences have been pretty thoroughly excised from the judicial opinions he has authored, they left tracks in his questioning at oral argument. Justice Kennedy’s “deportment” and tone at oral arguments in *Raich* and other drug cases transparently reflected that he had “little tolerance, judicial or otherwise, for those who use drugs or who resist drug control measures.”<sup>163</sup> Nor was it difficult to deduce his views on the ACA’s individual mandate, which during oral argument he characterized as an “unprecedented” alteration of “the relation of the individual to the government.”<sup>164</sup>

The skeptical might question whether a congressional requirement that an adult purchase insurance sufficient to guarantee payment for their own future health care costs or forfeit a relatively modest monetary penalty<sup>165</sup> really worked a greater intrusion upon either individual liberty or federalism values than a federal statute criminalizing Angel Raich’s non-commercial use of marijuana, which both she and her doctor thought indispensable to her efforts to mitigate her physical suffering and which California had chosen to permit.<sup>166</sup> Be that as it may, one need not reject Justice Kennedy’s priorities to see that they find no grounding in constitutional text,

Court in *Raich*, 545 U.S. at 1, and Chief Justice Roberts’s opinion on the Commerce Clause issue in *N.F.I.B. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) (No. 11-398).

158. Justice Kennedy was the only Justice to vote with the majorities in both *Lopez* and *Raich* who did not to write a separate opinion. See *Raich*, 545 U.S. at 4.

159. See Ernest Young, *Just Blowing Smoke?: Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich*, 2005 SUP. CT. REV. 1, 7 (observing that Justice Kennedy “is well known for his hostility to drug use”); see also Ilya Shapiro, *A Faint-Hearted Libertarian at Best: The Sweet Mystery of Justice Anthony Kennedy*, 33 HARV. J.L. & PUB. POL’Y 333, 355-58 (2010) (reviewing HELEN J. KNOWLES, *THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY* (2009) (describing Justice Kennedy’s approach in drug cases).

160. See, e.g., HELEN J. KNOWLES, *THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY* 2-5 (2009).

161. Cf. Lino A. Graglia, *Lawrence v. Texas: Our Philosopher-Kings Adopt Libertarianism as our Official National Philosophy and Reject Traditional Morality as a Basis for Law*, 65 OHIO ST. L.J. 1139, 1140 (2004) (highlighting Justice Kennedy’s libertarian stance on anti-sodomy laws).

162. Jeffrey Rosen, *Economic Freedoms and the Constitution*, 35 HARV. J.L. & PUB. POL’Y 13, 15 (2012) (describing Justice Kennedy as “the libertarian justice most sympathetic” to “economic judicial activism”).

163. Lyle Denniston, *Commentary: Justice Kennedy and the “War on Drugs,”* SCOTUS BLOG (June 6, 2005, 8:30 PM), <http://www.scotusblog.com/2005/06/commentary-justice-kennedy-and-the-war-on-drugs/>; see also Randy Barnett, *The Ninth Circuit’s [sic] Revenge: In Gonzales v. Raich, the Circuit Court Won Big*, NAT’L REV. ONLINE (June 9, 2005, 7:41 AM), <http://old.nationalreview.com/comment/barnett200506090741> (asserting that Justice Kennedy’s “deportment” at oral argument in *Raich* supported the theory that his vote was based on extreme antipathy for illegal drugs).

164. Transcript of Oral Argument, *supra* note 35, at 11-12; see also Rosen, *supra* note 162, at 15 (discussing Justice Kennedy’s openness to “economic judicial activism”).

165. Cf. Michael Cooper, *Conservatives Sowed Idea of Health Care Mandate, Only to Spurn it Later*, N.Y. TIMES, Feb. 15, 2012, at A15.

166. See *Gonzales v. Raich*, 545 U.S. 1, 5 (2005).

history, or case law. Nor need one conclude that Justice Kennedy, or indeed anyone else wearing a black robe, acted in bad faith,<sup>167</sup> though to be sure at a minimum the ACA litigation illustrates the remarkable human capacity for self-serving self-deception.<sup>168</sup> But when the Court keeps two sets of constitutional books, a Justice has little choice but to fall back on such extra-constitutional preferences when choosing which of the ledgers to consult.

### B. The Hardiness of Newspeak

The more fundamental question raised by the ACA litigation is: why has the Court so stubbornly refused to acknowledge its unwillingness or inability to enforce the enumerated powers scheme? As noted throughout, at numerous points in the evolution of the various suits, the longing of the government lawyers and, in their turn, the lower court judges, to announce that the emperor had no clothes became palpable.<sup>169</sup>

What accounts for such intractable professional duplicity? In part, this stubbornness no doubt reflects the sheer courage and will required to proclaim the death, at least insofar as courts are concerned, of a principle so obviously central to our constitutional text, history, structure, and early case law as the enumerated powers scheme. Even though the Constitution of 1787 unmistakably restricted Congress to the powers therein “granted,”<sup>170</sup> out of an abundance of caution this inescapable inference was made explicit in the Tenth Amendment four years later.<sup>171</sup> Nor could anyone with even a passing knowledge of the debates in and around the state ratifying conventions be unaware that friends and foes alike conceded that the new central government’s powers would be limited to those enumerated.<sup>172</sup> The greatest constitutional clashes in the young republic’s early years concerned the extent of, and limits to, those powers<sup>173</sup> and the protection of the powers “reserved to the States.”<sup>174</sup>

In short, at least for most of the nation’s history, to deny that Congress’s enumerated powers were limited would have amounted to a confession that at least to this extent paeans to the majesty of the written Constitution were just so much patriotic Newspeak. To be sure, in the late twentieth century some constitutional

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167. See Dan M. Kahan, “Ideology in” or “Cultural Cognition of” Judging: What Difference Does It Make?, 92 MARQ. L. REV. 413, 417 (2009) (noting that judges might “sincerely bas[e] their decisions on their views of the law,” but that “what they understand the law to require might be shaped by their values—operating not as resources for theorizing law, but as subconscious, extralegal influences on their perception of legally consequential facts”).

168. *Cf. id.*

169. See *supra* notes 118, 142 and accompanying text.

170. U.S. CONST., art. I, § 12.

171. U.S. CONST., amend. X.

172. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 191-98 (1996); see generally PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION: 1787-88 (2011).

173. See MCAFFEE, ET AL., *supra* note 83, at 65-92.

174. U.S. Const., amend. X. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

scholars freely admitted as much.<sup>175</sup> But it should perhaps not be all that surprising that practicing lawyers, judges, and justices found it harder to take that step.<sup>176</sup> Of course, the real question was not necessarily the continuing authority of the enumerated powers scheme, let alone the written Constitution. All that was really in issue was whether the *judiciary* had any role in enforcing the limitation of Congress to its enumerated powers. As early as 1824, Chief Justice Marshall, writing for the Court in *Gibbons v. Ogden*,<sup>177</sup> acknowledged the awesome sweep of Congress's Commerce Clause power, adding:

The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the *sole* restraints on which they have relied, to secure them from its abuse.<sup>178</sup>

Yet, perhaps out of an institutional self-interest in preserving the myth that the Constitution means what judges say it does,<sup>179</sup> the Justices have been exceedingly reluctant to admit that there might be constitutional principles altogether beyond their ken.<sup>180</sup> As we have seen, these contending pressures produced a legal regime in which it was an open secret that the Court had extricated itself from the dilemma of identifying the outer boundaries of congressional authority.<sup>181</sup>

But if this secret equilibrium was so widely known, why and how did it become unstable? One lesson seems clear: the wages of constitutional duplicity include increased uncertainty and the resulting hazard of opportunistic judicial behavior. This danger was enhanced by professional, if not also judicial, ignorance of Commerce Clause history. To be sure, few lawyers are unfamiliar with the Court's retreat from any effort to limit congressional power during the period stretching from 1937 to 1995. But the four-decade failure predating the New Deal settlement is, unfortunately, less well known. This forgetfulness is reflected in the relatively wide appeal of the there-must-be-a-limit argument and the rarity with which this claim was refuted by reference to the utter failure of this same notion a century before. One hope for this piece is that it will marginally increase professional familiarity with the lessons that experience provides, perhaps to the end that past mistakes need not be repeated (or more to the point, tolerated).

Yet another lesson taught by the ACA litigation is that much confidence in the non-partisan purity of judicial decision-making is demonstrably misplaced. Whether self-consciously or not, judges and especially justices see disputes through

175. See Frickey, *supra* note 96, at 701.

176. Such honesty would certainly be "brutal." See *supra* notes 89-92 and accompanying text.

177. 22 U.S. (9 Wheat.) 1 (1824).

178. *Id.* at 197 (emphasis added).

179. See CHARLES E. HUGHES, ADDRESSES OF CHARLES EVANS HUGHES 185 (1908) (speech of May 3, 1907).

180. See Rachel E. Barkow, *More Supreme Than Court? The Rise and Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 260 (2002).

181. See *supra* notes 84-97 and accompanying text.

their ideological lenses no less than other more openly partisan political actors.<sup>182</sup> How else does one explain the way in which the case cleaved the federal judiciary along such starkly partisan lines?<sup>183</sup> One might forgive some impatience on the part of conservative jurists and commentators with this critique. For a generation, they have railed, until recently in vain, against the commitment of divisive and debatable disputes to the resolution of federal judges according to theories of constitutional meaning with at best highly attenuated connection to constitutional text, history, or precedent.<sup>184</sup> Yet, however tempting a “turn-about-is-fair-play” jurisprudence<sup>185</sup> might be, its indulgence can only prove destructive to rule of law values.<sup>186</sup> On the other hand, the American jurisprudential left is ill-situated to attack such usurpations, having celebrated an unbridled conception of judicial authority when better represented on the Supreme Court.<sup>187</sup> One can only hope that the ACA’s narrow escape will provoke a long overdue introspection about the perils of unconstrained judicial power.

### III. Conclusion

On June 28, 2012, the Supreme Court avoided a catastrophe by the narrowest of margins. For the continued vitality of the health care insurance reform, no doubt many are thankful. But it would be a grave error to conclude that the episode confirms the good health of our constitutional order. To the contrary, the Court’s resolution of the Commerce Clause question is symptomatic of an acute malady. This is not because the ruling is likely to prove the first of many decisions narrowing the scope of congressional authority. Only a willful blindness to the long history of ebb and flow in the Court’s dedication to federalism could permit such an expectation at this late date.

Rather, the Court’s Commerce Clause conclusion is troubling because it demonstrates the inability of federal judges to rise above their own partisan sympathies. This ideological taint is both facilitated and exacerbated by the Court’s loud persistence in the use of constitutional Newspeak. Most pertinently here, the Court regularly recites the fiction that congressional power is subject to meaningful, judicially enforceable limits. Perhaps attention to this aspect of the ACA litigation will finally produce some genuine commitment to judicial candor, humility, and self-restraint. Or perhaps we will just say as much without really meaning it. In

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182. See A. Christopher Bryant, *Constitutional Forbearance*, 46 U. RICH. L. REV. 695, 698-703 (2012).

183. Seven of the eight Democratic appointees to rule on the merits of the Commerce Clause issue voted to uphold the ACA; ten of the twelve Republican appointees rejected the claim that the Commerce Clause authorized the Act.

184. See Richard A. Posner, *In Defense of Looseness*, THE NEW REPUBLIC, Aug. 27, 2008, at 33 (describing and criticizing a perspective that would conclude that because “[l]iberal judges have used loose construction to expand constitutional prohibitions beyond any reasonable construal of original meaning” that “now it is the conservatives’ turn”).

185. *Id.*

186. See Bryant, *supra* note 182, at 702-03.

187. Cf. Pushaw, *supra* note 111, at 586 (noting that “liberal Democrats who had applauded the Court for inventing new political rights under the Equal Protection Clause lambasted the *Bush v. Gore* majority for doing exactly the same thing”).

either case, we will no doubt in due course learn to love the ACA decision.