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Richard A. Primus
University of Michigan Law School, raprimus@umich.edu

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HOW THE GUN-FREE SCHOOL ZONES ACT SAVED THE INDIVIDUAL MANDATE

*Richard Primus**†

INTRODUCTION

For all the drama surrounding the Commerce Clause challenge to the individual mandate provision of the Patient Protection and Affordable Care Act ("PPACA"),[1] the doctrinal question presented is simple. Under existing doctrine, the provision is as valid as can be. To be sure, the Supreme Court could alter existing doctrine, and many interesting things could be written about the dynamics that sometimes prompt judges to strike out in new directions under the pressures of cases like this one. But it is not my intention to pursue that possibility here. My own suspicion, for what it is worth, is that the Supreme Court will abide by its previously announced doctrines and uphold the individual mandate. So I mean to engage *U.S. Department of Health and Human Services v. Florida* as the easy case it is and to explore an underappreciated feature of how it came to be so easy.

My focus is the role of *United States v. Lopez*, in which the Supreme Court famously struck down the Gun-Free School Zones Act of 1990 as beyond Congress's power to enact under the Commerce Clause.[2] In the conventional telling, *Lopez* (along with its sidekick, *United States v. Morrison*[3]) is the source of the doctrinal threat to the PPACA's individual mandate. Before *Lopez*, the Supreme Court had settled into the practice of upholding pretty much anything that Congress claimed to be within its commerce power, largely on the strength of the econometrically undeniable proposition that every law that does anything (or at least every law that does anything to a lot of people) has effects on interstate commerce. But for *Lopez*, the conventional view therefore runs, we would live for practical purposes in a world of plenary federal power. Courts would not take Commerce Clause challenges seriously, and any attack on the PPACA would have to be mounted on other grounds.

I think this conventional telling may be backwards. That is, I think it nearer the truth to say that *Lopez* may be the PPACA's salvation—that without *Lopez*, the individual mandate would be considerably more precarious.

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* Professor of Law, University of Michigan Law School. Thanks to Jessica Morton and Samuel Rudman.

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1. Pub. Law No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. Law No. 111-152, 124 Stat. 1029 (2010).

2. 514 U.S. 549 (1995).

3. 529 U.S. 598 (2000).

I say this not because *Lopez* announced some rule that creates a safe harbor for the individual mandate. On its face, Commerce Clause doctrine was obviously more favorable to federal regulation on the day before *Lopez* was decided than on the day after. I say it instead for two other reasons, one practical and one discursive.

The practical reason is located in the common law dynamics of Supreme Court decisionmaking. *Lopez* announced limits on the commerce power, but it also forced the Court in later cases to articulate rules that would limit those limits. Without *Lopez* there would be no *Gonzales v. Raich*,[4] and it is *Raich* that makes upholding the individual mandate so blisteringly easy as a matter of doctrine.

Then there is the discursive reason. As a matter of the dynamics of American constitutional discourse, the Supreme Court feels pulled to show respect for the maxim that the federal government is one of limited and enumerated powers. But having demonstrated that respect in *Lopez* (and *Morrison*), it need not do so again and again and again: *Lopez* (and *Morrison*) may be enough to let the Court look itself in the eye as it recites the maxim, and that may be all that is necessary. On the other hand, if the modern Court had not yet demonstrated that it takes the enumerated powers maxim seriously, the urge to do so now might be irresistible.

In what follows, I will first explain why the individual mandate is within Congress's Article I power under existing doctrine. That will happen quickly. As I've said, the question is pretty easy, and there is no need to tarry over it. I will then move to something a bit more subtle: the idea that *Lopez* has made the world safe for the PPACA.

I.

Here, in four sentences that would be uncontroversial if health insurance reform were not a divisive political issue, is the explanation of why enacting the individual mandate is within Congress's power. (1) Congress has the power to regulate interstate commerce, including the power to regulate economic activities with substantial effects on interstate commerce.[5] (2) The health insurance market is either an interstate commercial market or, at the very least, a market with massive effects on interstate commerce. (3) When Congress uses its commerce power to regulate with a comprehensive legal scheme, it may under the Necessary and Proper Clause make rules for things that are themselves neither interstate nor commercial, if those rules are necessary for effecting the policy of the regulatory scheme overall.[6] (4) The PPACA regulates the health insurance market comprehensively, and the individual mandate is necessary for making that comprehensive regulatory scheme work.

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4. 545 U.S. 1 (2004).
5. *Lopez*, 514 U.S. at 559.
6. *See Raich,* 545 U.S. at 17–18; *id.* at 34–35 (Scalia, J., concurring).

That's pretty much it. If there are remaining niceties, they have been thoroughly addressed in opinions by Judges Lawrence Silberman and Jeffrey Sutton.[7] To be sure, the individual mandate is enormously controversial as a political matter, and we have all observed that certain kinds of political controversy get articulated in the language of constitutional objection. Indeed, such objections are sometimes felt powerfully enough among the decisionmaking class as to prompt a change in constitutional doctrine. This is a basic dynamic of living constitutionalism. But if the question before us is how settled constitutional law bears on the individual mandate, we need say no more. As John Marshall almost put the point, whether the PPACA's individual mandate provision is within Congress's commerce power "is a question deeply interesting to the United States," but it is "not of an intricacy proportioned to its interest."[8]

II.

What is intricate as well as interesting, I think, is the set of forces that have made this much-anticipated decision so doctrinally easy. My focus is on the role of *Lopez*—a decision that I see as a critical step toward upholding the individual mandate. That may seem unorthodox, given that *Lopez* represents the contemporary Court's commitment to putting limits on the commerce power. But fans of the individual mandate are deeply fortunate that *Lopez* was decided as it was. As noted above, there are two reasons why, one rooted in the common law process of Supreme Court decisionmaking and one located in the dynamics of American constitutional discourse.

A. *Common Law Process*

Lopez imposed limits on the commerce power for the first time in decades. But *Lopez* did not undo all of the ways in which the world changed during those decades, and the Court has not been so impractical or so ideologically blinkered as to think that it can fully turn back the clock. Instead, the Court has recognized that we live now under conditions of pervasive federal regulation, much of which it would be foolish to eliminate. Once *Lopez* was on the books, therefore, its holding forced the Court to engage seriously with the question of how constitutional law could impose a limit on the commerce power while still permitting the elaborate edifice of federal law that keeps modern America running. That engagement took the form of normal common law development: here a case limiting a principle that should not be too far extended, there a case refining a rule that was stated too crudely before.

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7. *See* Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011); Thomas More Law Ctr. v. Obama, 651 F.3d 529, 549–66 (6th Cir. 2011) (Sutton, J., concurring in part).

8. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

The high moment of this process to date has been *Gonzales v. Raich*, in which the Court upheld a provision of the federal Controlled Substances Act as applied to an individual citizen growing marijuana for his own noncommercial use. Justice Antonin Scalia's opinion in *Raich* stands as one of the most cogent expositions of the commerce power ever written. With its clear-sighted view of the difference (and interaction) between the Commerce Clause and the Necessary and Proper Clause, Justice Scalia's opinion credibly explains both the impermissibility of far-flung, scattershot federal laws like the Gun-Free School Zones Act and the validity of the comprehensive federal regulatory schemes on which the modern American economy now depends. The Commerce Clause itself, the opinion teaches, reaches only interstate commerce, defined in terms of the three categories—channels, instrumentalities, and substantial effects—that *Lopez* deems regulable.[9] But when Congress enacts a regulatory scheme whose object lies within those categories, its chosen implementation may also reach beyond those categories. If need be, it may reach into space that is neither interstate nor commercial, so long as the implementing regulation is an integral part of the overall scheme authorized by the commerce power.

It is *Raich*, therefore, that makes upholding the individual mandate so straightforward. In my earlier four-sentence explanation of the validity of the individual mandate, sentence (3) and perhaps also sentence (4) owe not just their authority but also their crisp formulation to *Raich*, and in particular to Justice Scalia's analysis in that case. Without *Raich*, the Supreme Court would approach the PPACA and individual mandate without the benefit of a prominent, well-articulated, ready-to-hand framework explaining that otherwise *ultra vires* congressional action can be unproblematically within Congress's power if it is an integral part of a larger legal scheme regulating interstate commerce.

To be sure, there is no conceptual reason why that framework had to be articulated in *Raich* rather than awaiting articulation in *Department of Health and Human Services*. Either set of facts would make it appropriate for the deciding Court to explain that a challenged provision that by itself might not regulate interstate commerce is valid if part of a larger system that *does* regulate interstate commerce. But as observers of common law development know, not every case is an equally likely occasion for every possible doctrinal development. Principles are refined when refinement is needed, and whether a refinement is needed is something that the particular court applying the doctrine decides. When faced with the alternative of undermining congressional drug policy and permitting Angel Raich to grow his marijuana, the Rehnquist Court was moved to refine its doctrine and allow federal law to stand. It is far less clear that the Roberts Court would feel the need to refine doctrine in order to sustain the individual mandate.

So: Without *Raich*, the Court would lack a framework that cogently explains why permitting the individual mandate to stand does not mean permitting Congress to do anything it likes. And *Raich* as we know it came

9. *Raich,* 545 U.S. at 34–35 (Scalia, J., concurring).

into being because of *Lopez* (and *Morrison*). Without *Lopez* (and *Morrison*), the justices would not have needed to articulate any complex or refined theory in order to uphold a portion of the Controlled Substances Act.

To be sure, it is also true that without *Lopez* (and *Morrison*) the Court could not strike down the individual mandate on the authority of *Lopez* (or *Morrison*). But the problem that sank the Gun-Free School Zones Act in *Lopez* would still be deployed against the individual mandate, even if *Lopez* had never been decided. The party challenging the statute would contend that to permit this federal law is to say that the Commerce Clause authorizes anything, and that just cannot be. Without *Raich*, the justices might not have already formulated (and committed to writing) the insight that permitting a rule as part of a general regulatory scheme is not the same as permitting any rule at all. Unless the justices were willing to work to find that answer with the PPACA before them, the individual mandate would fall. And it is not clear that the Roberts Court would see the incipient death of the individual mandate as a sign that something was going wrong, such that doctrinal refinement would be necessary to set things right.

B. *The Dynamics of Constitutional Discourse*

As part of their socialization into the world of American constitutional law, lawyers learn the maxim that the federal government is one of limited and enumerated powers. For a long portion of the twentieth century, expert observers could be forgiven for wondering whether that maxim had remaining force. But the maxim never disappeared: it was never consigned to the dustbin of constitutional expressions. It stayed around, repeated from teacher to student as a living idea. Even most supporters of strong federal power were loath to jettison the enumerated powers maxim as a matter of principle. At no point in our post-1937 history does one find judges or law professors routinely or ordinarily contending that the federal government has plenary power. To be sure, many people felt that the federal government had something close to plenary power in practice, such that the maxim that the federal government is one of limited and enumerated powers was essentially a nostrum devoid of meaningful present content. But for a great many well-socialized American lawyers—perhaps enough to claim the mainstream of constitutional discourse—the phrase "our federal government is one of limited and enumerated powers" was always one that induced head-nodding, at least as a matter of principle.

To utter this maxim is to engage in a profession of faith. For many American lawyers, declaring that the federal government is one of limited and enumerated powers is a way of showing fidelity to the Founders' design, to American tradition, to the structure of the document, and perhaps to their own experience of induction into the discipline of constitutional law. To disavow the maxim officially would be to break faith along all of these dimensions. Constitutional law has tolerated tremendous expansions of federal power in practice, as the logic of modern life has directed. But it has proved easier to tolerate those expansions while continuing to pay homage

to the maxim than to repudiate the maxim openly. A piece of our identity is invested in the maxim: articulating it reminds us of a part of who we are, or of a story in which we locate ourselves.

Lopez was decided as it was partly because a majority of the Court felt that it could not uphold the Gun-Free School Zones Act and still utter the maxim. At oral argument in the case, the Solicitor General of the United States was asked to identify a law that the federal government could not make if the statute at issue were upheld. He could not provide an example.[10] In the absence of such an example, and once the question had been asked, those justices most concerned with limiting federal power (or keeping faith with certain inherited maxims) could surely have felt that upholding the Gun-Free School Zones Act would have made the hallowed phrase unsayable. Seen in this light, the Court's decision in *Lopez* was partly a compulsory demonstration of *bona fides*. If you really believe in this maxim, the contention ran—and of course you do—then there can be no justification for your upholding the statute. Or put the other way, if you uphold the statute, you will be forever estopped from claiming that you honor this traditional maxim. You will be, to that extent, a heretic. And if you are supposed to be the guardian of the principles at whose articulation well-socialized constitutional lawyers nod their heads, a heretic is an uncomfortable thing to be.

That said, the maxim does not demand that the Supreme Court constantly strike down federal laws. It demands only evidence that it is taken seriously. *Lopez* and *Morrison* insulate the Court against charges of heresy on the point—not perfectly, but considerably more than would be the case had those decisions not been rendered. In later cases, the Court can uphold far-reaching exercises of the commerce power without laying itself as open to the claim that it has let the maxim come to nothing.[11] When it upholds other federal statutes, the Court can identify concrete examples of laws that are beyond the commerce power, laws with respect to which it has exercised its solemn duty to police the boundaries of federal legislative power.[12] So when it upholds other laws as within the commerce power, it can adduce evidence that it has not left the maxim empty.

Now imagine the counterfactual world in which the Gun-Free School Zones Act had not come before the Supreme Court. The Court's case law would not include *Lopez*'s demonstration of fidelity. For simplicity's sake, assume also that there was no *Morrison*. To those justices for whom it matters, the anxiety that the enumerated powers maxim has been abandoned would be more potent than it is today, and the payoff for holding some law to be beyond the commerce power would be commensurately greater. So if the PPACA and its individual mandate were to come before a Court that had

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10. Oral Argument at 4:52, United States v. Lopez, 514 U.S. 549 (1995) (No. 93-1260), *available at* http://www.oyez.org/cases/1990-1999/1994/1994_93_1260#argument.

11. *E.g.*, United States v. Comstock, 130 S. Ct. 1949 (2010).

12. *See e.g.*, *id.* at 1963 (citing *Lopez*, 516 U.S. at 567); *Raich*, 514 U.S. at 23 (citing *Morrison*, 529 U.S. 598; *Lopez*, 514 U.S. 549).

not yet stood up for the maxim, several justices might experience a deeply powerful pull toward demonstrating fidelity to the maxim, especially in light of the public salience of the decision. With no *Raich* framework on the books, the doctrinal path to that demonstration of fidelity would be easier than the one that now exists. And one need not be a crude attitudinalist to think that this Court would need less than overwhelmingly favorable conditions to be convinced to rule against the PPACA.

CONCLUSION

My argument has been both anticipatory and speculative. If the Court strikes down the individual mandate, my thoughts here may come to seem quaint or benighted or naïve. And even if the Court upholds the mandate, as I expect it to do, I will not be able to prove what would have happened in a world without the Gun-Free School Zones Act. Not knowing the contents of other people's minds, I can make no conclusive statements about the extent to which the dynamics I have described operate, consciously or unconsciously, within the decisionmaking process of any given justice. This is particularly true of my claims about the role of the enumerated powers maxim in American constitutional discourse. Nonetheless, the thought experiment I have rehearsed has value in thinking about the dynamics of American constitutional law. Among other things, it makes the point that the alternative to the world of *Lopez* is probably not a world where the federal judiciary merrily dispensed with any impulse to honor the idea of limited federal power. It is more likely a world where that impulse had not yet been given expression and force in a modern Supreme Court decision. Discourses evolve, and sometimes hallowed maxims disappear. But while they live, they can be mobilized. And sometimes they lie about like loaded weapons.

Lopez dissipated our constitutional culture's discursive pressure to vindicate the enumerated powers maxim. Not entirely, of course—some people who recognize that the individual mandate is within the commerce power under present doctrine continue to worry that the Court is not giving the enumerated powers maxim its full due.[13] But one or two examples of taking the maxim seriously do infinitely more to allay that worry than zero examples would. Just as importantly, *Lopez* set in motion a process of common-law refinement that by 2006 produced an articulate framework for upholding pervasive federal regulation. Forced to live in the modern world, *Lopez* begot *Raich*, and *Raich* makes upholding the individual mandate easy. Stated differently, *Raich* requires the Court to work hard to explain why the mandate is unconstitutional, whereas before *Raich* greater effort would have been required to show that the mandate was valid. And the burden of cognitive effort can matter a great deal, especially when combined with a Court's inclination to go one way or another in the first place.

In his dissent in *Lopez*, Justice David Souter wrote that it would be a mistake to think of the decision rendered that day as a minor development in

13. *See e.g.*, *Thomas More*, 651 F.3d at 549–66 (Sutton, J., concurring in part).

the law. It is sometimes the case, he wrote, that one does not realize how important a decision will become until years later, when one sees the course on which that decision set the law. At a certain level of generality, Justice Souter's observation is surely correct. But Justice Souter's point was that *Lopez* could be the beginning of a large rollback of the commerce power, one that could imperil the world of federal regulation in which his generation had always lived. So far, that has not come to pass. Instead, one of the most consequential effects of *Lopez* may be the development of a more stable rubric for upholding comprehensive federal regulation—a rubric that has more or less by accident taken shape just in time to preserve one of the most ambitious federal laws in American history.