**10 [SAMPLE]**

**Courting Public Opinion:**

**James Madison’s Strategy for Resisting Federal Usurpations**

**Lynn Uzzell**

On March 23, 2010, President Barack Obama signed into law the Patient Protection and Affordable Care Act (which would soon be dubbed “Obamacare” by friends and foes alike). The battle over the bill in Congress had been bitterly contested; the vote had split sharply down party lines; and the final passage of the law brought cheers of jubilation from some quarters and howls of protest from others. Opponents of the new law claimed among other things that it was an unconstitutional exercise of federal power. In particular, the “individual mandate”—which requires people to have health insurance or pay a penalty—was deemed to lie outside even the most expansive reading of the Commerce Clause found in Article I, section 8, of the Constitution. After opponents lost the fight in Congress, they did what aggrieved parties are wont to do. They called their lawyers.

Within moments of President Obama’s signing ceremony, attorneys general in numerous states began filing lawsuits.[[1]](#footnote-1) Proponents of the new law were at first confident and dismissive of any legal challenge. The question of constitutionality had first been broached while the bill was still under consideration. When a reporter asked Speaker of the House Nancy Pelosi what part of the Constitution authorized Congress to impose the individual mandate, she famously quipped, “Are you serious? Are you serious?”[[2]](#footnote-2) As it turns out, they were serious, and the legal challenge that they mounted was formidable. By the time that the case was argued before the Supreme Court, twenty-six states had joined the lawsuit and the legal winds were at their back. One appeals court decision had been in their favor; the administration’s counsel (according to some) had done a poor job of defending the law; and many of the questions coming from the bench had seemed sympathetic to the plaintiffs.

As the Supreme Court was poised to deliver its opinion, the pundits, prognosticators, and bookies began laying odds that substantial portions of the health care law would be overturned; the only question remaining seemed to be whether it would be overturned in its entirety or merely gutted beyond salvaging. Then, in a surprise twist, Chief Justice John Roberts led a 5-4 decision siding with the administration (though not with their arguments), ruling that the individual mandate was within the taxing powers of Congress. Once again, the cheers and howls were heard from their respective quarters, and President Obama went on national television to declare that “the highest court in the land has now spoken” and that “with today’s announcement, it’s time to move forward.”[[3]](#footnote-3) Opponents were left to lick their wounds and rejoin the battle on different fronts.

I do not propose to revisit the question of whether the Affordable Care Act was or was not constitutional, and I am even less interested in examining whether or not it is good policy. Rather, I wish to use this one example of a contretemps between state and federal authorities as a springboard to examine and evaluate the various possible *strategies* for resolving disagreements over the authoritative interpretation of American federalism. And in the interest of probing the depths of that perennially fascinating inquiry, “WWJD?”—“What Would ‘Jemmy’ Do?”—I explore how James Madison responded to similar perceived abuses of federal power and why he chose the avenues that he did. In this way, we may catch a glimpse of how the Father of the Constitution believed that a constitutional fracas should be resolved. And to the degree that his reasons are persuasive and his actions worthy of emulation, we may be armed with a guiding principle for how future battles over federalism should be waged.

There can be no question that Madison believed that the federal courts were a legitimate and even (in one sense) a final arbiter for determining the boundaries of federal authority. On that question he never wavered. When attempting to untie “the Gordian knot of the . . . collision between the federal and State powers,” the federal courts must have the last word, because all other roads would lead to anarchy and disunion.[[4]](#footnote-4) Toward the end of his life, he recalled that he had defended the supremacy of the federal courts when he wrote the *Federalist* essays, “and I have never ceased to think that this supremacy was a vital principle of the Constitution, as it is a prominent feature of its text.”[[5]](#footnote-5) But even if the Supreme Court would sometimes be called on as final arbiter of certain questions of federalism, it was clearly not the only arbiter, nor (and here is the nub) was it necessarily the best one. Both in theory and in practice, Madison preferred appealing to the people, either directly or through their representatives, rather than resorting to litigation. And that preference was not rooted in shortsighted considerations of achieving immediate political success for the question at hand; rather, it proceeded from his considered opinion of what was needed to make America’s experiment in republican government work.

1. . Sheryl Gay Stolberg and Robert Pear, “Obama Signs Healthcare Overhaul Bill, with a Flourish,” *New York Times*, March 23, 2010 (www.nytimes.com/2010/03/24/health/policy/24health.html?\_r=0). [↑](#footnote-ref-1)
2. . “Flashback: When Asked Where the Constitution Authorizes Congress to Order Americans to Buy Health Insurance, Pelosi Says: ‘Are You Serious?,’” December 13, 2010 (http://cnsnews.com/news/article/flashback-when-asked-where-constitution-authorizes-congress-order-americans-buy-health). [↑](#footnote-ref-2)
3. # . Bill Mears and Tom Cohen, “Emotions High after Supreme Court Upholds Health Care Law,” June 28, 2012 (www.cnn.com/2012/06/28/politics/supreme-court-health-ruling/index.html).

 [↑](#footnote-ref-3)
4. . Letter from James Madison to Spencer Roane, June 29, 1821, in *The Mind of the Founder: Sources of the Political Thought of James Madison*, rev. ed., edited by Marvin Meyers (University Press of New England, 1973, 1981), p. 367. [↑](#footnote-ref-4)
5. . Letter from James Madison to Nicholas P. Trist, December, 1831, in *Letters and Other Writings of James Madison,* published by Order of Congress, 4 vols. (Philadelphia: J. B. Lippincott & Co, 1865), cited in theAmerican Reference Library(Orem, Utah: Western Standard Publishing Company, 1998), IV: 211. [↑](#footnote-ref-5)