The idea that we can default on our debt is not only reckless; it’s probably unconstitutional.

Editors have argued that Obama’s health care act takes government power to unprecedented—and unconstitutional—levels. They contend that the government can’t compel us to do things, or buy things, simply because we are here. In his ruling declaring the Affordable Care Act unconstitutional, Florida federal District Judge Roger Vinson argued, “Never before has Congress required that everyone buy a product from a private company (essentially for life) just for being alive and residing in the United States.”

Well, maybe. The government does require us to pay taxes, serve on juries, register for the draft. The government also compels us to buy car insurance (if we want to legally drive our car), which is a product from a private company. George Washington once signed a bill asking Americans to buy a musket and ammunition. There’s nothing in the Constitution that restricts the government from asking us to do something or buy something or pay a tax—even if we don’t like it.

No one really disputes Congress’s power to regulate interstate commerce, and it’s silly to argue that health care—which accounts for 17% of the U.S. economy—doesn’t involve interstate commerce. Your doctor’s stethoscope was made in one state and was shipped to and sold in another. What conservatives mostly argue is that the individual mandate in the bill is unconstitutional and that the government can’t regulate something you don’t do. Supporters of Obamacare note that it’s not a mandate but, in effect, a tax, imposed on people who do not buy health care.

III. OBAMACARE

‘The Congress shall have power ... To regulate Commerce with foreign Nations, and among the several States.’

Article I, Section 8, Clause 3

unconstitutional about Congress’s trying to impose cuts in the federal budget to decrease the size of the debt or to bargain for cuts in order to vote to raise the ceiling. But if in the end Congress seems intent on allowing the U.S. to default on its debt, the President can assert that that is unconstitutional and take extraordinary measures to avoid it. He can use his Executive power to order the Treasury to produce binding debt instruments that cover all of the U.S.’s obligations around the world. He can sell assets, furlough workers, freeze checks—heck, he could lease Yellowstone Park. And it would all be constitutional.

The GOP may currently oppose raising the debt limit, but Congress has routinely done so, 75 times since 1962.
Tea Party supporters take the constitutionality of Obama's Affordable Care Act to the streets as the House deliberates.

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insurance. And that it’s not universal; people who are on Medicare and Medicaid, for example, don’t need that coverage.

One would like to think that the decision to buy health insurance—or not—is a private one. If you’re young and healthy, you might just say, I’d rather spend my money on something else. That’s your right—and it may well be a rational decision. But it’s hard to argue that not buying health insurance has no interstate economic consequences. Opponents say Congress can regulate commercial activity only, and not buying health insurance is not an activity—it’s doing nothing.

But what happens when that healthy, young uninsured woman goes skiing and tears her anterior cruciate ligament and has to have emergency surgery? She can’t afford to pay the full fee, and the hospital absorbs much of the cost. That’s basically a tax on everyone who does have health insurance, and it ultimately raises the cost of hospital care and insurance premiums. I devoutly believe in Justice Louis Brandeis’ famous dissent in the 1918 wiretapping case of Olmstead v. United States, in which he wrote that the Constitution conferred on all of us “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.” Amen. But doing nothing can be a private decision with public consequences. Some argue that the Affordable Care Act is cynical. As a University of Pennsylvania Law Review article contended, “Making healthy young adults pay billions of dollars in premiums into the national health-care market is the only way to fund universal coverage without raising substantial new taxes.” But cynicism—or pragmatism—is not proscribed by the Constitution. The Affordable Care Act may be bad legislation, as some contend, but that doesn’t mean it’s unconstitutional. There’s no law against bad laws. The remedy for bad laws is elections.

IV. IMMIGRATION

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” 14th Amendment, 1868

All around the world, there are basically three ways of acquiring citizenship: by birth, by blood or by naturalization. All of them depend on the circumstances of one’s birth. The principle of jus soli (right of the soil) means that if you’re born within the borders of a country, you’re automatically
a citizen. Jus sanguinis (right of blood) means that if your parents are citizens of a country, you too are a citizen, no matter where you were born. And naturalization is the process by which a noncitizen becomes a citizen through residency, a test or an oath—or some combination of the three.

The U.S. is one of the last nations—and by far the largest—to follow the principle of jus soli, better known as birthright citizenship. The 14th Amendment, ratified in 1868, basically holds that if you’re physically born in the U.S. or a U.S. territory, you’re a citizen. Full stop. Of the world’s advanced economies, only the U.S. and Canada offer birthright citizenship. No European nation does so. Nor does China or Japan. We are in part a jus sanguinis nation as well in that children of American citizens who are born outside the U.S. can become citizens. But in the latter case, it’s not so simple. For example, an out-of-wedlock child born to an unemployed illegal-immigrant mother in Paris, Texas, is a citizen when he breathes his first breath, whereas a child born to an American mother and father working for IBM in Paris, France, must apply for a certificate of citizenship and file months or years of paperwork with the State Department to show evidence that the child qualifies for American citizenship. Last year nearly 620,000 immigrants went through the naturalization process in the U.S., which on top of the paperwork includes tests in English and civics that many jus soli citizens might not be able to pass.

It was the 14th Amendment—one of the post-Civil War Reconstruction amendments—that made it crystal clear that anyone born in the U.S. was a citizen. It was passed for a very specific reason: to establish that former slaves were indeed citizens and entitled to all the rights of citizenship, including voting. For African Americans, this was a new birth of freedom. The 14th Amendment was a reaction to the infamous Dred Scott decision of 1857, which asserted that African Americans were “beings of inferior order” who “had no rights which the white man was bound to respect.” That ruling declared that African Americans could never become U.S. citizens and were therefore not entitled to any constitutional protections. The 14th Amendment reversed that. In drafting the 14th Amendment, Congress was definitely not thinking about illegal immigration. At the time, the country needed a lot more immigrants, legal or otherwise. Congress was thinking more practically. It wanted to emancipate blacks and allow them to vote so that white Southern Democrats would not try to reverse the gains of the Civil War. It was also a direct response to the Black Codes passed by Southern states that sought to put freed slaves into something like the condition they were in before the war.

Some opponents of birthright citizenship argue that illegal immigrants are not under U.S. jurisdiction and therefore their children should not automatically become citizens, but this argument doesn’t hold up under scrutiny. Senator Lindsey Graham of South Carolina has suggested he might offer an amendment to overturn the principle of birthright citizenship. I’ve always thought it odd that a nation united not by blood or religion or ethnic identity but by certain extraordinary ideas is a nation where citizenship is conferred on the basis of where you were physically born. It’s equally strange to me that a nation that was forged through immigration—and is still formed by immigration—is also a nation that makes it constitutionally impossible for someone who was not physically born here to run for President. (Yes, the framers had their reasons for that, but those reasons have long since vanished.)

Critics of birthright citizenship argue that people come here to give birth—and some do—and that the U.S. has a rash of anchor babies who then get all kinds of rights for their families. But the law says the parents of such a child must wait till she is 21 for her to be allowed to sponsor them to live and work legally in the U.S., and research shows that the vast majority of children of illegal immigrants are born years after the mother and father have arrived in the U.S.

But even so, it’s a problem. There are liberals and conservatives alike who oppose changing birthright citizenship. It’s seen as a core American value. It is important to African Americans as well as Hispanic Americans. But it is an outdated law. However, changing the birthright-citizenship law would not end immigration or even slow it. Most illegal immigrants are economic immigrants.

Arizona and now Georgia have passed laws designed to decrease illegal immigration by making it a crime for illegal immigrants not to carry documentation and by giving the police broad powers to detain anyone suspected of being in the country illegally without such documents. A federal district court struck down certain provisions in the Arizona bill.

There may well be parts of these bills that are unconstitutional, but it’s unclear what the rights of illegal immigrants are as opposed to those of citizens. The U.S. needs to take a carrot-and-stick approach to illegal immigration. Many progressives and business leaders agree that we need to make legal immigration easier, grant legal status to undocumented young people who enter college or join the military, and staple a green card to every engineering degree earned by a foreign-born national. That’s the carrot. The stick is that we need better workplace enforcement, a reasonable standard for policing and more secure borders. We need to make legal immigration easier, faster and cheaper so that illegal immigration becomes harder and less desirable.
In 1898 the case of Wong Kim Ark, a man born in California to noncitizen Chinese immigrants who was denied re-entry into the U.S., made its way to the Supreme Court. The court ruled that the 14th Amendment indeed made him a citizen.

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There is an old Latin phrase, *inter arma enim silent leges*, which roughly translates as “in time of war, the Constitution is silent.” But it’s not just in times of war that the Constitution is silent. The Constitution is silent much of the time. And that’s a good thing. Two hundred twenty-three years after it was written, the Constitution is more a guardrail for our society than a traffic cop. The Constitution works so well precisely because it is so opaque, so general, so open to various interpretations. Originalists contend that the Constitution has a clear, fixed meaning. But the framers argued vehemently about its meaning. For them, it was a set of principles, not a code of laws. A code of laws says you have to stop at the red light; a constitution has broad principles that are unchanging but that must accommodate each new generation and circumstance.

We can put ourselves on the back about the past 223 years, but we cannot let the Constitution become an obstacle to the U.S.’s moving into the future with a sensible health care system, a globalized economy, an evolving sense of civil and political rights. The Constitution, as Martin Luther King Jr. said in his great speech on the Mall, is a promissory note. That note had not been fulfilled for African Americans. But I would say the Constitution remains a promissory note, one in which “We the People” in each generation try to create that more perfect union.

A constitution in and of itself guarantees nothing. Bolshevik Russia had a constitution, as did Nazi Germany. Cuba and Libya have constitutions. A constitution must embody something that is in the hearts of the people. In the midst of World War II, the great judge Learned Hand gave a speech in New York City’s Central Park that came to be known as “The Spirit of Liberty.” It was a dark time, with freedom and liberty under threat in Europe. Hand noted that we are Americans by choice, not birth. That we are Americans precisely because we seek liberty and freedom—not only freedom from oppression but freedom of speech and belief and action. “What does the world mean when we say that first of all we seek liberty?” he asked. “I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are bare bones; believe me, these are bare bones. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can ever do much to help it.”

The Constitution does not protect our spirit of liberty; our spirit of liberty protects the Constitution. The Constitution serves the nation; the nation does not serve the Constitution.

That’s what the framers would say.

—WITH REPORTING BY ANDRÉA FORD