TURNING CITIZENS INTO SUBJECTS: WHY THE HEALTH INSURANCE MANDATE IS UNCONSTITUTIONAL

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In 2010 something happened in this country that has never happened before: Congress required that every person enter into a contractual relationship with a private company. Now, it is not as though the federal government never requires you to do anything. You must register for the military and serve if called, you must submit a tax form, fill out a census form, and serve on a jury. And you must join a posse organized by a U.S. Marshall. But the existence and nature of these very few duties illuminates the truly extraordinary and objectionable nature of the individual insurance mandate. Each of these duties is necessary for the operation of government itself; and each has traditionally been widely recognized as inherent in being a citizen of the United States.

Consider why, in 1918, the Supreme Court rejected the claim that the military draft violated the Thirteenth Amendment, which bars "involuntary servitude." At first glance, conscription surely looks like a form of involuntary servitude. But the Court said that it could not see how "the exaction by government from the citizen of the performance of *his supreme and noble duty* of contributing to the defense of the rights and honor of the nation . . . can be said to be the imposition of involuntary servitude. . . ."[1]

Keep that phrase, "supreme and noble duty" of citizenship, in mind. For this, and nothing less than this, is what is at stake in the fight

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[1] Selective Draft Law Cases, 245 U.S. 366, 390 (1918)

over the constitutionality of the individual insurance mandate. Is it part of the "supreme and noble duty" of citizenship to do whatever the Congress deems in its own discretion to be convenient to its regulation of interstate commerce? If this proposition is upheld, I submit, the relationship of the people to the federal government would fundamentally change: no longer would they fairly be called "citizens;" instead they would more accurately be described as "subjects."

In fact, in Article III, the Constitution distinguishes between citizens of the United States and "subjects" of foreign states.[2] What is the difference? In the United States, sovereignty rests with the citizenry. The government, including the Congress, is not sovereign over the people, but is the servant of the people. In the 1886 case of *Yick Wo v. Hopkins*, the Supreme Court reaffirmed that "in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts."[3] But if Congress can mandate you do anything that is "convenient" to its regulation of the national economy, then that relationship is now reversed, and Congress has the prerogative powers of King George III.

In essence, the defenders of this bill are making the following claim: because Congress has the power to draft you into the military — a power tantamount to enslaving you to fight and die — it has the power to make you do anything less than this, including mandating that you to send your money to a private company and do business with it for the rest of your life. This simply does not follow. The greater power does not include the lesser.

One way to justify so exceptional a power would be to find it in

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[2] *Compare* U.S. CONST. art. III, sec. 2 ("The judicial power shall extend . . . to controversies . . . between a state, or the citizens thereof, and foreign states, citizens or subjects.") *and* U.S. CONST. amend XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."), *with* U.S. CONST. amend. XIV, §1 ("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.").

[3] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (Matthews, J.). *See also* Chisolm v. Georgia, 2 U.S. 419, 479 (2 Dall.) (1793) (affirming "this great and glorious principle, that the people are the sovereign of this country," and "the people" consists of "fellow citizens and joint sovereigns.") (opinion of Jay, C.J.); *id*. at 356 (referring to the people as "a collection of original sovereigns.") (opinion of Wilson, J.).

the Constitution itself. Does the Constitution expressly give Congress a power to compel citizens to enter into contractual relations with private companies — or can it be fairly implied? Quite obviously, the answer is no.

True, the Constitution does give Congress the power to impose taxes on the people to compel them to give their money *to the government* for its support. And it has long been assumed that Congress can then appropriate funds to provide for the common defense and general welfare by making disbursements to private companies and individuals. Social Security and Medicare are examples of the exercise of such tax and spending powers.

Because the Supreme Court is highly deferential to Congress's use of its tax power, the primary constraint on the exercise of this power is political. That is, like the power to declare war or impose a military draft, legislators will be held politically accountable for their exercise of the great and dangerous power to tax. But for this constraint to operate, at a minimum Congress must expressly invoke this power so it can be held politically accountable for exercising its power to tax.

This is why it is of utmost significance that, when it enacted the Affordable Care Act, Congress did not refer to the penalty imposed on those who fail to buy insurance as a tax. Instead it called it a "penalty" to enforce the insurance mandate. Although the penalty was inserted into the Internal Revenue Code, Congress then expressly severed the penalty from the normal enforcement mechanisms of the tax code. The failure to pay the penalty "shall not be subject to any criminal prosecution or penalty with respect to such failure."[4] Nor shall the IRS "file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section,"[5] or impose a "levy on any such property with respect to such failure."[6] All of these restrictions undermine the claim that, because the penalty is inserted into the Internal Revenue Code, it is a garden-variety tax.

Nor is this merely a matter of form. As Justice Souter explained

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[4]I.R.C. §5000A(g)(2)(A) (West 2010).

[5]I.R.C. §5000A(g)(2)(B)(i) (West 2010).

[6]I.R.C. §5000A(g)(2)(B)(ii) (West 2010).

in a 1996 case, "if the concept of penalty means anything, it means *punishment for an* unlawful act or *omission*. . . ."[7] By contrast, he described a tax as "a pecuniary burden laid upon individuals or property *for the purpose of supporting the Government*."[8] But when Congress identified all the revenue raising provisions of the Affordable Care Act for the vital purpose of scoring its costs, it failed to include *any* revenues to be collected under the penalty.[9]

Rather than tax everyone to provide a direct subsidy to private insurance companies to compensate them for the cost of the new regulations being imposed upon them, Congress decided to compel the people to pay insurance companies directly. And it expressly justified the mandate as an exercise of its regulatory powers under the Commerce Clause. But if the mandate to buy insurance is unconstitutional because it exceeds the commerce power, then there is nothing for the penalty to enforce, regardless of whether it is deemed to be a tax.

So the unprecedented assertion of a power to impose economic mandates on the citizenry must rise and fall on whether the mandate is within the power of Congress under the Commerce Clause "to regulate . . . commerce among the several states,"[10] or whether, under the Necessary and Proper Clause, the mandate is both "necessary and proper for carrying into Execution"[11] its commerce power.

No one claims that the individual mandate is justified by the original meaning of either the Commerce Clause or Necessary and Proper Clause. Instead, the government and those law professors who support the mandate have rested their arguments exclusively on the decisions of the Supreme Court. So what does existing Supreme Court doctrine say about the scope of the Commerce and Necessary and Proper clauses?

Of course, given that economic mandates have never before been

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[7] United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 224 (1996) (emphases added).

[8] *Id*. (quoting New Jersey v. Anderson, 203 U. S. 483, 492 [1906]) (emphasis added).

[9] *See* Pub. L. No. 111-148, §§ 9000 et seq., 124 Stat. 119 (2010).

[10] U.S. CONST. art I., § 8, cl. 3.

[11] U.S. CONST. art I., § 8, cl. 18.

imposed on the American people by Congress, there cannot possibly be any Supreme Court case expressly upholding such a power. But during the New Deal, the Supreme Court used the Necessary and Proper Clause to allow Congress to go beyond the regulation of interstate commerce itself to reach wholly intrastate activities that substantially affect interstate commerce.[12] Then in 1995, in the case of *United States v. Lopez*, it limited the reach of this power to the regulation of economic, rather than noneconomic activity.[13]

Barring Congress from regulating noneconomic intrastate activity keeps it from reaching activity that has only a remote connection to interstate commerce, without requiring courts to assess what Alexander Hamilton referred to as the "more or less necessity or utility"[14] of a measure. Existing Commerce Clause and Necessary and Proper Clause doctrine, therefore, allows Congress to go this far, *and no farther*.

But the individual mandate is not regulating any economic activity. It is quite literally regulating *inactivity*. Rather than regulating or prohibiting economic activity in which a citizen voluntarily *chooses* to engage — such as growing wheat, operating a hotel or restaurant, or growing marijuana — it is commanding that a citizen *must* engage in economic activity. It is as though the federal government had mandated Roscoe Filburn (of *Wickard v. Filburn*[15]) to grow wheat, or mandated Angel Raich (of *Gonzales v. Raich*[16]) to grow marijuana.

The distinction between acting and not acting is pervasive in all areas of law. We are liable for our actions but, absent some preexisting duty, we cannot be penalized for inaction. So in defending the mandate, the government has been forced to offer a number of shifting arguments

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[12] *See e.g.* United States v. Darby, 312 U.S. 100, 118 (1941) (relying on the Necessary and Proper case of *McCulloch v. Maryland* to justify reaching intrastate activities that affect interstate commerce).

[13] *See* United States v. Lopez, 514 U.S. 549 (1995). *See also* United States v. Morrison, 529 U.S. 598 (2000).

[14] Alexander Hamilton, *Opinion on the Constitutionality of a National Bank* (Feb. 23, 1791), in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 95, 98 (M. St. Clair Clarke & D. A. Hall eds., Augustus M. Kelley Publishers 1967) (1832).

[15] *See* Wickard v. Filburn , 317 U.S. 111 (1942)

[16] *See* Gonzales v. Raich, 545 U.S. 1 (2005)

for why, despite the appearances, insurance mandates are actually regulations of activity.

The statute itself speaks of regulating "decisions"[17] as though a decision is an action. But expanding the meaning of "activity" to include "decisions" not to act erases the distinction between acting and not acting. It would convert all of your "decisions" not to sell your houses or cars into economic activity that could be "regulated" or mandated if Congress deems it convenient to its regulation of interstate commerce.

The government also claims that it is regulating the activity of obtaining health care, which it says everyone eventually will seek. While the government could try to condition the activity of delivering health care on patients having previously purchased insurance, in the Affordable Care Act it did not do this. The fact that most Americans will seek health care at some point or another does not convert their failure to obtain insurance from inactivity to activity and so does not convert the mandate to buy insurance into a regulation of activity.

For this reason, the government primarily relies, not on the claim that "decisions" are activities or that Congress is regulating the activity of seeking health care, but on a proposition that has yet to be accepted by a majority of the Supreme Court: that Congress may do anything that it deems to be "necessary to a broader scheme" regulating interstate commerce — in this case the regulation of the insurance companies under the commerce power.

But there is no such existing doctrine. The government's theory is based on a concurring opinion by Justice Antonin Scalia in the 2005 medical marijuana case of *Gonzales v. Raich* — a lawsuit I brought on behalf of Angel Raich and argued in the Supreme Court.[18] Justice

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[17] *See* PATIENT PROTECTION AND AFFORDABLE CARE ACT, Pub. L. No. 111-148, § 1501(a)(2)(A), 124 STAT. 119 (2010) ("The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.").

[18] *See Raich*, 545 U.S. at 37 (Scalia, J. concurring) ("Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.")

Scalia's theory, in turn, rests on a single sentence of dictum in *Lopez*.[19]

Whenever a majority of the Supreme Court eventually decides to allow Congress to regulate noneconomic activity because doing so is essential to a broader regulatory scheme, it will need to limit this doctrine, lest it lead to an unlimited power in Congress. If that day comes, the Court need only look back to see that every exercise of the Commerce and Necessary and Proper clauses has involved the regulation of voluntary activity. Barring Congress from reaching inactivity prevents it from exercising powers that are even more remote to the regulation of interstate commerce than is the regulation of noneconomic activity.

Look at what is happening here. Congress exercises its commerce power to impose mandates on insurance companies, and then claims these insurance mandates will not have their desired effects unless it can impose mandates on the people — which would be unconstitutional if imposed on their own. By this reasoning, the Congress would now have the general police power the Supreme Court has always denied it possessed. All Congress need do is adopt a broad regulatory scheme that won't work the way Congress likes unless it can mandate any form of private conduct it wishes.

But the individual mandate not only exceeds existing Supreme Court doctrine governing what is "necessary" under the Necessary and Proper Clause. That clause also requires that a law be "proper." Economic mandates, however, are an improper means to the regulation of interstate commerce. In 1997, the Supreme Court struck down a mandate that local sheriffs run background checks on purchasers of firearms as part of a broader scheme regulating the sale of guns that Congress enacted using its commerce power. In *Printz v. United States*,[20] the Court held that this mandate on state executives unconstitutionality violated the sovereignty of state governments and the Tenth Amendment.

Writing for the Court, Justice Scalia rejected the government's

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[19] *See Lopez*, 514 U.S. at 561 (noting that the Gun Free School Zone Act was not "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.").

[20] Printz v. United States, 521 U.S. 898 (1996).

contention that, because the background checks were "necessary" to the operation of the regulatory scheme, they were justified under the Necessary and Proper Clause. After memorably calling the Necessary and Proper Clause "the last, best hope of those who defend ultra vires congressional action,"[21] Justice Scalia concluded that "When a 'Law . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in" the Tenth Amendment and other constitutional provisions, "it is not a 'Law . . . proper for carrying into Execution the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] act of usurpation' which 'deserves to be treated as such.'"[22]

Just as commandeering state governments is an unconstitutional infringement of state sovereignty, commandeering the people violates the even more fundamental principle of *popular* sovereignty. After all, the Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, *or to the people*."[23]

Should the Supreme Court decide that Congress may not commandeer the people in this way, such a doctrine would only affect one law: the Affordable Care Act of 2010. Because Congress has never done anything like this before, the Court need strike down no previous mandate. This makes a challenge to the insurance mandate more likely to succeed. But if it strikes down the individual insurance mandate, the Court may also have to strike down the mandates imposed on insurance companies. For the Affordable Care Act does not include the normal severability clause that would let the remainder stand if any part is invalidated. And the very reasons why the government argues that the individual mandate is "essential" to implement the insurance regulations, are why it is not severable.

Although the bulk of my remarks today concerned decisions of the Supreme Court, many of the Court's doctrines concerning the regulatory and taxing powers are not actually opinions about what the

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[21] *Id.* at 923.

[22] *Id.* at 923–24. (citations omitted).

[23] U.S. CONST. Amend X.

Constitution requires, but when the Court will defer to Congress's judgment of the scope of its own powers and when it will intervene. Each Senator and Representative takes his or her own oath to uphold the Constitution, and each must reach his or her own judgment about the scope of Congressional powers.

After the Supreme Court upheld the constitutionality of the second national bank in *McCulloch v. Maryland* by invoking the Necessary and Proper Clause, President Andrew Jackson vetoed its renewal. Jackson interpreted *McCulloch* as deferring to the judgment of the legislature as to the bank's necessity and propriety. Because he viewed the veto power as legislative in nature, and because he viewed the bank as both unnecessary and improper, he concluded that the bank was unconstitutional. "If our power over means is so absolute that the Supreme Court will not call in question the constitutionality of an act of Congress the subject of which "is not prohibited, and is really calculated to effect any of the objects intrusted to the Government," . . . it becomes us to proceed in our legislation with the utmost caution."[24]

In short, just because *the Supreme Court* defers to you, does not mean *the Constitution* lets you do anything you like. Regardless of how the Supreme Court may eventually rule, each of you must decide for yourself whether the mandate is truly necessary to provide, for example, for portability of insurance if one changes jobs or moves to another state. If not, then restricting the liberties of the American people in this way is unnecessary. Each of you must also decide if allowing Congress to regulate inactivity by mandating that Americans enter into contractual relations with a private company for the rest of their lives would be to treat them as subjects, rather than citizens. If so, then commandeering the people in this manner is improper.

If you conclude that the mandate is either unnecessary or improper then, like President Jackson, you are obligated to conclude that it is unconstitutional, and to support its repeal.

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[24] Andrew Jackson, *Veto Message* (July 10, 1832), as it appears in RANDY E. BARNETT, CONSTITUTIONAL LAW: CASES IN CONTEXT 141 (2008)