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## Turning Citizens into Subjects: Why the Health Insurance Mandate is Unconstitutional<sup>13</sup>

by Randy E. Barnett

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. I realize that writers make lots of factual claims that readers are wise to be skeptical about. I can prove, however, that an economic mandate like this one is unprecedented. If this mandate had ever happened before, everyone reading this passage would know all the contracts the federal government requires them to make, upon pain of a penalty enforced by the Internal Revenue Service (IRS). No reader, however, can recite any such mandate and neither could any reader's parents or grandparents because this has never been done before.

It is not as though the federal government never requires American citizens to do anything. They must register for the military (and serve if called), submit a tax form, fill out a census form, and serve on a jury. Additionally, they must join a posse organized by a United States Marshall. The existence and nature of these very few duties, however, 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 of the United States rejected the claim that the military draft violated the Thirteenth Amendment,<sup>14</sup> which bars "involuntary servitude."<sup>15</sup> At first glance, conscription surely looks like a form of involuntary servitude. The Supreme Court, however, said that it could not see how "the exaction by government from the citizen of the performance of *his supreme and noble duty of*

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13. These remarks were prepared as testimony before the Senate Judiciary Committee hearings held on February 2, 2011 and a hearing held by the House Judiciary Committee's Subcommittee on the Constitution on February 16, 2011. Together with the Cato Institute, the Author has submitted amicus briefs in support of the challenges to the Affordable Care Act in *Virginia v. Sebelius* in the United States District Court for the Eastern District of Virginia and in *Thomas More Law Center v. Obama* in both the United States District Court for the Eastern District of Michigan and the United States Court of Appeals for the Sixth Circuit.

14. U.S. CONST. amend. XIII.

15. *Id.*

contributing to the defense of the rights and honor of the nation . . . can be said to be the imposition of involuntary servitude.”<sup>16</sup>

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 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, the relationship of the people to the federal government would fundamentally change: they would no longer fairly be called “citizens;” instead, they would more accurately be described as “subjects.”

In Article III,<sup>17</sup> the United States Constitution distinguishes between citizens of the United States and subjects of foreign states.<sup>18</sup> What is the difference? In the United States, sovereignty rests with the citizenry. The government, including Congress, is not sovereign over the people but is the servant of the people. In *Yick Wo v. Hopkins*,<sup>19</sup> 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.”<sup>20</sup> If Congress can mandate that citizens do anything that is convenient to its regulation of the national economy, however, then that relationship is now reversed, and Congress has the prerogative powers of King George III.

In essence, the defenders of this health insurance mandate are making the following claim: because Congress has the power to draft citizens into the military—a power tantamount to enslaving one to fight and die—it has the power to make citizens do *anything less than this*, including mandating that they send their money to a private company

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16. Selective Draft Law Cases, 245 U.S. 366, 390 (1918) (emphasis added).

17. U.S. CONST. art. III.

18. Compare U.S. CONST. art. III, § 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.”).

19. 118 U.S. 356 (1886).

20. *Id.* at 370; see also *Chisolm v. Georgia*, 2 U.S. 419, 479 (1793) (Jay, J.) (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.”), superseded by constitutional amendment, U.S. CONST. amend. XI; *Chisholm*, 2 U.S. at 456 (Wilson, J.) (referring to the people as “a collection of original sovereigns”).

and do business with it for the rest of their lives. 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 the Constitution itself. Does the Constitution expressly give Congress a power to compel citizens to enter into contractual relations with private companies, or can this power be fairly implied? 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.<sup>21</sup> Furthermore, it has long been assumed that Congress can 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. For this constraint to operate, however, at a minimum Congress must expressly invoke its tax power so it can be held politically accountable.

This is why it is of utmost significance that when Congress enacted the Patient Protection and Affordable Care Act (PPACA),<sup>22</sup> Congress did not refer to the penalty imposed on those who fail to buy insurance as a tax.<sup>23</sup> Instead, Congress called it a "penalty" to enforce the insurance mandate.<sup>24</sup> Although the penalty was inserted into the Internal Revenue Code (I.R.C.),<sup>25</sup> Congress expressly severed the penalty from the normal enforcement mechanisms of the tax code.<sup>26</sup> The failure to pay the penalty "shall not be subject to any criminal prosecution or penalty with respect to such failure."<sup>27</sup> Furthermore, the IRS "shall not . . . 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" or impose a "levy on any such property with respect to such failure."<sup>28</sup> All of these restrictions undermine the claim that, because the penalty is inserted into the I.R.C., the penalty is a garden-variety tax.

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21. U.S. CONST. art. I, § 8, cl. 1.

22. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of Titles 26 and 42 U.S.C.).

23. See *id.* § 1501, 124 Stat. at 244-45.

24. See *id.*

25. 26 U.S.C. §§ 1-9834 (2006 & Supp. 2009).

26. See I.R.C. § 5000A(a)-(c) (West Supp. 2010).

27. I.R.C. § 5000A(g)(2)(A) (West Supp. 2010).

28. I.R.C. § 5000A(g)(2)(B)(i), (g)(2)(B)(ii) (West Supp. 2010).

Nor is this merely a matter of form. As Justice Souter explained in a 1996 case, “if the concept of penalty means anything, it means *punishment for an unlawful act or omission*.”<sup>29</sup> By contrast, Justice Souter described “a tax [as] a pecuniary burden laid upon individuals or property *for the purpose of supporting the Government*.”<sup>30</sup> When Congress identified all the revenue-raising provisions of the PPACA for the vital purpose of scoring the Act’s costs, however, Congress failed to include *any* revenues to be collected under the penalty.<sup>31</sup>

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.<sup>32</sup> Congress expressly justified the mandate, under the Commerce Clause,<sup>33</sup> as an exercise of its regulatory powers.<sup>34</sup> 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. Thus, the unprecedented assertion of a power to impose economic mandates on the citizenry must rise or fall on whether the mandate is within the power of Congress, under the Commerce Clause, “[t]o regulate Commerce . . . among the several States,”<sup>35</sup> or whether, under the Necessary and Proper Clause,<sup>36</sup> the mandate is both “necessary and proper for carrying into Execution” its commerce power.<sup>37</sup>

The government is not claiming that the individual mandate is justified by the original meaning of either the Commerce Clause or the Necessary and Proper Clause. Instead, the government and most law professors who support the mandate have rested their arguments exclusively on the decisions of the Supreme Court.<sup>38</sup> So what does existing Supreme Court doctrine say about the scope of the Commerce Clause and the Necessary and Proper Clause?

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29. *United States v. Reorganized CF & I Fabricators, Inc.*, 518 U.S. 213, 224 (1996) (emphases added).

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

31. *See* §§ 9000-9023, 124 Stat. at 847-83.

32. *See id.* § 1501, 124 Stat. at 242-44.

33. U.S. CONST. art I, § 8, cl. 3.

34. § 1501, 124 Stat. at 243.

35. U.S. CONST. art I, § 8, cl. 3.

36. U.S. CONST. art I, § 8, cl. 18.

37. *Id.*

38. *See, e.g.,* Renée M. Landers, “*Tomorrow’ May Finally Have Arrived—The Patient Protection and Affordable Care Act: A Necessary First Step Toward Health Care Equity in the United States*,” 6 J. HEALTH & BIOMEDICAL L. 65, 76-77 (2010).

Of course, given that economic mandates have never before been imposed on the American people by Congress, there cannot possibly be any Supreme Court case expressly upholding such a power. During the New Deal, however, 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.<sup>39</sup> In 1995, in *United States v. Lopez*,<sup>40</sup> the Supreme Court limited the reach of this power to the regulation of economic, rather than noneconomic, activity.<sup>41</sup> Barring Congress from regulating noneconomic intrastate activity keeps Congress 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 of necessity or utility” of a measure.<sup>42</sup> The existing Commerce Clause and Necessary and Proper Clause doctrines, therefore, allow Congress to go this far *and no further*.

The individual health insurance mandate, however, is not regulating any economic activity. The mandate 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—the mandate 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*<sup>43</sup>) to grow wheat or Angel Raich (of *Gonzales v. Raich*<sup>44</sup>) to grow marijuana.

The distinction between acting and not acting is pervasive in all areas of law. Individuals are liable for their actions; however, absent some preexisting duty, they cannot be penalized for inaction. Thus, in defending the mandate, the government has been forced to offer a number of shifting arguments for why—despite appearances—insurance mandates are actually regulations of activity. The statute itself speaks

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39. See, e.g., *United States v. Darby*, 312 U.S. 100, 118-19 (1941) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)) (relying on the Necessary and Proper Clause case of *McCulloch v. Maryland* to justify reaching intrastate activities that affect interstate commerce).

40. 514 U.S. 549 (1995).

41. *Id.* at 567-68; see also *United States v. Morrison*, 529 U.S. 598, 611 (2000).

42. Alexander Hamilton, *Opinion of Alexander Hamilton, on the Constitutionality of a National Bank*, 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).

43. 317 U.S. 111 (1942).

44. 545 U.S. 1 (2005).

of regulating “decisions” as though a decision is an action.<sup>45</sup> Expanding the meaning of “activity” to include decisions not to act, however, erases the distinction between acting and not acting. This expansion would convert all decisions not to sell one’s house or car into economic activity that could be regulated or mandated if Congress deemed the expansion 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.<sup>46</sup> While the government could try to condition the activity of delivering health care on patients having previously purchased insurance, the PPACA did not do this.<sup>47</sup> 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: Congress may do anything that it deems to be “necessary to a broader scheme” of regulating interstate commerce—in this case, the regulation of the insurance companies under the commerce power.

Yet 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*<sup>48</sup>—a lawsuit this Author brought on behalf of Angel Raich and argued in the Supreme Court.<sup>49</sup> Justice Scalia’s theory, in turn, rests on a single sentence of dictum in *Lopez*.<sup>50</sup>

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, the Supreme Court will need to limit this doctrine, to avoid an unlimited power in Congress. If that day comes, the Supreme Court need only look back to see that every exercise

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45. See § 1501(a)(2)(A), 124 Stat. at 243 (“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.”).

46. See § 1501(a), 124 Stat. at 242-44.

47. See Pub. L. No. 111-148, 124 Stat. 119.

48. 545 U.S. 1 (2005).

49. See *id.* 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.”).

50. See 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”).

of the Commerce Clause and the Necessary and Proper Clause has involved the regulation of voluntary activity.<sup>51</sup> 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, Congress would now have the general police power the Supreme Court has always denied it possessed. All Congress needs to do is adopt a broad regulatory scheme that will not work the way Congress likes unless Congress can mandate any form of desired private conduct.

What limiting principle is offered by the government to this new claim of federal power under the Necessary and Proper Clause? The government's only response, to date, is that health care is somehow different than other types of goods and services. This argument takes a number of different forms, but most commonly it is claimed that because everyone will one day need health care and may not be able to afford it when that day arrives, and because emergency rooms are obligated by law to provide care regardless of ability to pay, it is necessary to require that all persons purchase health insurance today to avoid shifting costs to others.

There are many serious factual problems with this analysis, but even if we assume it is entirely accurate, the government has not identified any *constitutional* principle to differentiate health care—or health insurance—from any other activity that Congress may want to mandate or conscript the American people to perform in the future. Without more, a factual distinction is not a constitutional principle. If the Supreme Court upholds the power to impose insurance mandates on the people, in the future the Supreme Court will never evaluate the next use of economic mandates to see if that circumstance is similar to or different from health care.

For nearly two hundred years, the Supreme Court has avoided making any such factual distinctions in favor of deferring to Congress's assessment of the facts. Lacking any limiting *constitutional* principle, once the power to conscript Americans to enter into contractual relations with private companies is accepted, it will be accepted for any circumstances that Congress deems convenient to its regulation of the national

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51. See, e.g., *Morrison*, 529 U.S. 598; *Lopez*, 514 U.S. 549.



economy. This would fundamentally reverse the relationship of American citizens to the federal government. Americans would no longer be citizens in the fullest sense of the word; they would be subjects.

Thus, whenever defenders of the insurance mandate say “health care is different,” this question should be asked: “What *constitutional* limitation are you proposing for this power?” If their only reply is the protection of liberty in the Due Process Clause,<sup>52</sup> then they have now avoided the question by changing the subject. They are actually claiming that the commerce power is limited only by guaranteed rights—the very same rights that limit the state’s plenary police power. This answer is like saying, “Well, the First Amendment<sup>53</sup> is a limit on the commerce power.”

Any answer based on due process or liberty is actually a refusal to provide any limit to Congress’s enumerated powers. Since a state’s police power is also limited by the Due Process Clause of the Fourteenth Amendment,<sup>54</sup> in reality, defenders of the mandate are claiming that the powers of Congress *are just as broad as the police power of the states*. That is, if the only limit on Congress’s power is the same as the limit on state power, then the two powers have the same scope. This, however, is a proposition that has always been rejected by the Supreme Court. As Chief Justice Rehnquist wrote in *Lopez*, “We start with first principles. The Constitution creates a Federal Government of enumerated powers.”<sup>55</sup> Chief Justice Rehnquist then quoted James Madison: “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”<sup>56</sup>

In addition, law professors know, even if the American people do not, that under current constitutional doctrine the Due Process Clause is not construed to be an open-ended protection of liberty. Instead, the Supreme Court now construes the Due Process Clause to protect only a very few specifically defined rights, none of which would apply to the right to refrain from doing business with private companies.<sup>57</sup> Therefore, when defenders of the mandate give this answer, what they are really

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52. U.S. CONST. amend. V.

53. U.S. CONST. amend. I.

54. U.S. CONST. amend. XIV.

55. 514 U.S. at 552.

56. *Id.* (internal quotation marks omitted).

57. See generally Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479 (2008) (explaining how the Supreme Court avoids recognizing rights as “fundamental” so as to avoid protecting liberty under the Due Process Clause).

saying is that the enumerated powers scheme in Article I of the Constitution<sup>58</sup> provides no constraint whatsoever on the powers of Congress.

Because this theory of Congress's implied power would lead to a general federal police power, it would, in the words of Chief Justice Marshall in *McCulloch v. Maryland*,<sup>59</sup> not "consist with the letter and spirit of the constitution," and would therefore be improper.<sup>60</sup> In *Florida ex rel. Bondi v. United States Department of Health & Human Services*,<sup>61</sup> Judge Vinson held that "the individual mandate falls outside the boundary of Congress' Commerce Clause authority and cannot be reconciled with a limited government of enumerated powers. By definition, it cannot be 'proper.'"<sup>62</sup> In other words, because the rationale offered to justify the mandate would lead to a general federal police power, such a law cannot be a proper exercise of congressional power.

This is but one reason why the insurance mandate, however necessary it might be, is 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.<sup>63</sup> In *Printz v. United States*,<sup>64</sup> the Supreme Court held that this mandate on state executives unconstitutionally violated the Tenth Amendment<sup>65</sup> and the sovereignty of state governments.<sup>66</sup>

Writing for the Supreme Court, Justice Scalia rejected the government's contention that because the background checks were necessary to the operation of the regulatory scheme they were justified under the Necessary and Proper Clause.<sup>67</sup> After memorably calling the Necessary and Proper Clause "the last, best hope of those who defend ultra vires congressional action,"<sup>68</sup> Justice Scalia concluded, "When a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected" in the Tenth Amendment and other constitu-

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58. U.S. CONST. art. I.

59. 17 U.S. (4 Wheat) 316 (1819).

60. *Id.* at 421.

61. No. 3:10-cv-91-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011).

62. *Id.* at \*33.

63. *Printz v. United States*, 521 U.S. 898 (1997).

64. 521 U.S. 898 (1997).

65. U.S. CONST. amend. X.

66. *Printz*, 521 U.S. at 935.

67. *Id.* at 923.

68. *Id.*

tional provisions, "it is not a 'La[w] . . . proper for carrying into Execution the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'"<sup>69</sup>

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 states, "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.*"<sup>70</sup>

Should the Supreme Court decide that Congress may not commandeer the people in this way, such a doctrine would only affect one law: the PPACA. Because Congress has never done anything like this before, the Supreme Court does not need to strike down any previous mandate. This makes a challenge to the insurance mandate more likely to succeed. If the Supreme Court strikes down the individual insurance mandate, however, the Supreme Court may also have to strike down the mandates imposed on insurance companies because the PPACA does not include the normal severability clause that would let the remainder stand if any part is invalidated. The very reasons why the government argues that the individual mandate is essential to implement the insurance regulations are why the mandate is not severable. Judge Vinson ruled as such in Florida.<sup>71</sup>

I am now increasingly coming to believe that if the administration fears that the legal challenge to the mandate might succeed, the administration will agree to its repeal and replacement before the constitutional challenge to the mandate reaches the Supreme Court. If the challenges do reach the Supreme Court during its next term, however, as now seems likely, I think there may well be five votes for the proposition that economic mandates are simply not within the limited and enumerated powers of Congress. The American people are not subjects who must perform any action that Congress deems convenient to its regulation of interstate commerce. They are citizens whose powers are as much reserved by the "letter and spirit" of the enumerated powers scheme as are the states. As you watch these lawsuits develop, you should remember that hanging in the balance is nothing less than the ultimate sovereignty of the American people.

*(continued on next page)*

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69. *Id.* at 923–24 (alterations in original).

70. U.S. CONST. amend. X (emphasis added).

71. *Bondi*, 2011 WL 285683, at \*39.