

Presentation by Jack Painter
Panel Discussion - Constitutionality of the Individual Mandate
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What limits are there on the federal government's power to tell us what to do, and what is the source of those limits? We face that question because the individual mandate provision of the Patient Protection and Affordable Care Act requires most Americans to purchase health insurance from a private company starting in 2014 or pay a monetary penalty. Intuitively, most of us are uncomfortable with the idea the federal government can force us to purchase private products, but what, if anything, prevents that?

The source of the Congressional power in question – Article I, Section 8.

The starting point in the constitutional analysis is a principle on which everyone agrees. The federal government is one of enumerated, and therefore limited, powers, and it can exercise only the powers granted to it in the Constitution.

Article I, Section 8 of the U.S. Constitution grants the federal government two powers that are relevant here. The first is under what's called the Commerce Clause, which says Congress has the power to "regulate Commerce . . . among the several States." The second is under the Necessary and Proper Clause, which says Congress has the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers"

Expansion of Congressional power since the New Deal

Until 1937, the Supreme Court read these two clauses fairly narrowly and pretty much limited Congress's commerce power to the regulation of interstate commerce.

During the New Deal and after, the Court became more lenient. In a series of cases, it expanded Congress's commerce power. Along the way, it developed a doctrine called the "substantially affects" doctrine. Under that doctrine, Congress may regulate activity that is neither interstate nor commerce if it "substantially affects" interstate commerce. The Supreme Court has said that this doctrine does not apply to non-economic activity, such as possession of a gun near a school zone or violence against women.

The Obama administration's initial justification for the individual mandate – the "substantially affects" doctrine.

Initially, the Obama administration tried to justify the individual mandate based on the "substantially affects" doctrine.

But all the Supreme Court decisions applying this doctrine involve activity, such as controlling and using navigable waters, establishing wages and hours for employees, producing wheat for personal consumption, and turning away motel guests based on race. So the Obama administration has been forced to argue that a failure to act (a decision not to purchase health insurance) constitutes activity or, in the alternative, that Congress's commerce power reaches beyond activity to cover economic decisions.

Judge Kessler of the D.C District Court accepted this argument when she upheld the individual mandate on the grounds that Congress has the power to regulate what she called "mental activity."

The problem is that this argument doesn't have any logical limits. For example, a "decision" not to take a job or not to sell your house or not to buy a car would be "activity" that is economic in nature and could be subject to a government mandate.

Professor Bryant offers a variation on this argument. He says you can't divorce the inactivity of not purchasing health insurance from the activity of someday receiving free life saving emergency care. In other words, they are inextricably linked so the initial decision to self insure is really a form of activity.

As I'll explain in a minute, this isn't factually correct because the non-event of being uninsured doesn't inevitably lead to the event of receiving free emergency care. In any case, his argument isn't unique to healthcare. For example, you can't divorce the inactivity of not buying a car from the activity of someday taking subsidized public transportation. Does that mean the federal government can also mandate the purchase of cars?

Professor Bryant also argues that if a decision not to purchase health insurance is considered inactivity, Congress can regulate that decision because the current health care system is a threat to the U.S. economy. In other words, the reach of Congressional power expands as the seriousness of the problem increases. But if that's the principle, what are the limits on Congressional power?

The Obama administration's fallback position – Justice Scalia's "essential to a broader regulatory scheme" theory.

Because of these problems with its first argument, the Obama administration has shifted to a new theory that Congress may do anything essential to a broader scheme to regulate interstate commerce. Here, the broader regulatory scheme includes mandating that insurance companies cover people with pre-existing conditions. The government says that without the individual mandate, insurance companies won't be able to do that and stay in business because people will wait until they are sick to buy health insurance.

There are several problems with this argument.

- The Supreme Court has never adopted this doctrine. It is based on a statement by Justice Scalia in his concurring opinion in *Gonzales v. Raich*, where he said “Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.” (This theory creates a basis to regulate purely local activity, including non-economic activity, that does not “substantially affect” interstate commerce.) Justice Scalia based that statement on *dicta* – meaning a comment not essential to the decision – in *United States v. Lopez*, where Justice Rehnquist said the Gun Free School Zone Act was not an essential part of a larger regulatory scheme and implied that if it had been, the decision in *Lopez* would have been different.
- There is nothing in Justice Scalia’s concurring opinion that supports extending his proposed doctrine to inactivity.
- Doing so would permit Congress to mandate any form of private conduct. All Congress would have to do is first adopt a permitted regulatory scheme that won’t work without a mandate and then impose the mandate. For example, Congress could require all private colleges to give free tuition to needy in-state students and then mandate that all students attend a private college within their state to help pay for that.

The Obama administration’s answer – “Healthcare is different.”

The proponents of the individual mandate argue that applying the “substantially affects” doctrine or Justice Scalia’s proposed “essential to a broader scheme” theory won’t result in inappropriate government mandates in other areas. Why? Because a decision to self-insure has a unique affect on interstate commerce. In other words, healthcare is different.

But is that true? As Judge Vinson noted in his decision in the recent Florida District Court case, “the mere status of being without health insurance, in and of itself, has absolutely no impact whatsoever on interstate commerce . . . at least not any more so than the status of being without any particular good or service.”

The government responds that everyone will eventually need health care, and because emergency rooms must provide emergency medical care without first inquiring about ability to pay, a decision not to purchase health insurance is necessarily a choice to take a free ride on the healthcare system.

But that is clearly false. Millions of people who do not have health insurance today, including a lot of young adults, will acquire it in the future before they incur emergency medical expenses they cannot afford. And those who remain uninsured at the time they

receive emergency medical care will still be legally obligated to pay their bill and won't necessarily fail to do so. As a result, the most that can be said is that some but not all who fail to purchase health insurance will eventually get a free ride. (According to authoritative studies, the uninsured pay about a third of the aggregate cost of their care out of pocket, and the remaining uncompensated cost is shifted largely to government and has a negligible effect on private health insurance premiums.)

So the principle being asserted by the government is that people shouldn't be allowed to fail to act if in the aggregate that shifts costs to others. Well, if that's the principle, what about the failure to go to the doctor for preventive care or checkups? Doesn't that ultimately increase healthcare costs and result in additional cost shifting? If so, does Congress have the power to force people to see their doctors?

Those who say "healthcare is different" also argue that a decision not to purchase health insurance limits the size of the pool of insured individuals and – assuming those not insured are young and healthy – drives up premium costs. But that applies to all forms of insurance, not just health insurance. And that argument also establishes the principle that people shouldn't be allowed to shift costs to others and again raises the specter of forced doctor visits.

There's one other problem. The argument that healthcare is different is not a constitutional principle. In the future, courts will never examine the factual differences between programs to see if economic mandates are appropriate. Mandates will be constitutional if Congress deems them to be necessary.

The government's theory would give Congress virtually unlimited power to impose mandates on private conduct.

Let's assume, however, that Professor Bryant is correct, and Congress has the power to impose the individual mandate. I'd like to know exactly what limits apply to Congress's power to mandate private conduct.

Can the federal government force us to buy foods *it* believes are healthful or join a health club in an effort to reduce healthcare costs and cost-shifting? In recent Senate testimony, Former Solicitor General and Harvard law professor, Charles Fried, defended the constitutionality of the individual mandate and argued that Congress has the power to force people to buy broccoli.

What about going one step further to tell us we must eat broccoli or exercise?

The answers provided by those who say the individual mandate is constitutional are not very comforting. Erwin Chemerinsky, the Dean of the California Irving School of Law, says, "what people choose to eat well might be regarded as a personal liberty" and thus beyond Congressional control. Professor Bryant stated in his recent *Enquirer* column

that forcing people to exercise “might unconstitutionally infringe upon individual liberty.”

From what I can determine, their theory is that those actions by the federal government would intrude on personal autonomy and therefore would not be a permissible regulation of commerce. I’d like to know why government mandates concerning personal decisions like whether to go to a doctor and how to pay for it don’t also intrude on personal autonomy.

And what if the Obama Administration’s argument that healthcare is different isn’t really a constitutional principle? Can Congress force people to buy other products?

Dean Chemerinsky, an advocate of the constitutionality of the individual mandate, admits as much when he says that “Congress could use its commerce power to require people to buy cars.”

So the Administration can’t seem to convincingly identify a limiting principle that protects us against inappropriate government control over our lives. (This is true even though the Supreme Court has said the “substantially affects” doctrine doesn’t apply to intrastate non-economic activity.)

Let me ask this. How many of you in this room are comfortable with the idea that the federal government might be able to force you to buy broccoli, join a health club, or buy a car?

Well, it appears Professor Bryant has some more explaining to do.

As part of that discussion, we should address some questions that go beyond the current debate.

First, if the federal government can force you to buy a product, can it also force you to sell one? Does this apply to services as well?

Second, how far can the government go in imposing penalties for non-compliance? Keep in mind that under the Patient Protection and Affordable Care Act as originally proposed, people who refused to purchase health insurance or pay a penalty faced jail time. Congress changed that only after reporters questioned President Obama about it.

Finally, if the government has the power to force people to enter the stream of commerce, why hasn’t it ever used that power in the last 230 years? Why has it instead chosen to create incentives for people to buy and sell goods and services instead of just ordering them to do that?

Application of the Necessary and Proper Clause.

Both of the Administration's legal theories appear to be based on the Necessary and Proper Clause. Justice Scalia's "essential to a broader scheme" theory is explicitly based on the "necessary" part of the Necessary and Proper Clause. And the key Supreme Court decisions developing the "substantially affects" doctrine appear to be as well. For example, *United States v. Darby* says Congress must use "appropriate means" to achieve a legitimate end and cites the Necessary and Proper Clause case of *McCulloch v. Maryland* as authority for the "substantially affects" doctrine. (Subsequent cases, such as *Wickard v. Filburn*, *Heart of Atlanta Motel v. United States* and *Katzenbach v. McClung*, also seem to be based on the Necessary and Proper Clause.)

The Necessary and Proper Clause has two parts. Legislation based on the Necessary and Proper Clause must not only meet the "necessary" test, but it must also meet the "proper" test.

In *McCulloch v. Maryland*, Chief Justice John Marshall said the proper test is not met unless the means chosen by Congress to exercise its commerce power are consistent with "the letter and spirit of the Constitution."

So the question is whether economic mandates like the individual mandate pass that test. In addressing that, I'd like to offer three observations.

First observation – The individual mandate is unprecedented, and government mandates like it are vastly more intrusive than mere prohibitions.

My first observation is that the individual mandate is unprecedented, and government mandates like it are vastly more intrusive than mere prohibitions.

Professor Bryant rightly points out that being unprecedented doesn't automatically mean something is unconstitutional. It can just mean the issue has never come up before.

But the individual mandate is unprecedented in a different sense that has constitutional significance.

To understand this, it helps to categorize government coercion, whether state or federal, into three categories: prohibitions of chosen activity, regulations of chosen activity, and mandates.

- A prohibition of chosen activity occurs when the government says "You can't do X." This happens, for example, when the law says you can't steal from your neighbor.

- A regulation of chosen activity occurs when the government says “If you choose to do X, you must do X in a certain manner.” For example, if you choose to build a house, you must comply with building codes. Or the government says “If you choose to do X, you must do Y as well.” For example, if you choose to drive a car on public roads, you must purchase auto insurance. (Regulations of chosen activity have a corollary prohibition of chosen activity. For example, you are prohibited from building a house that doesn’t comply with building codes or driving a car on public roads without having auto insurance.)
- A mandate occurs when the government says flat out “You must do X”, and the coercion has nothing to do with chosen activity. It applies merely because you reside in this country or are a citizen.

The individual mandate falls into this third category of coercion. The federal government coerces you to act in specific ways (purchase health insurance) merely because you are a citizen. You cannot make a choice to forego certain activities and avoid the government coercion.

Until now, the only time the federal government has imposed such a flat out mandate is in the case of military conscription, jury service and census participation. Unlike the individual mandate, those mandates are all contemplated by relatively explicit language of the Constitution. (Military conscription is based on the power to declare war and raise armies found in Article 1, Section 8, Clauses 11 and 12; jury service is contemplated by the Sixth Amendment, which mandates a right to trial by jury in criminal trials; and the census is specifically called for in Article I, Section 2, Clause 3.) Those mandates are also all essential to the very existence of the federal government and therefore considered fundamental duties of citizenship. No one seriously argues that the private purchase of health insurance is essential to the very existence of the federal government and therefore is a fundamental duty of citizenship.

In other words, the individual mandate doesn’t just apply an existing Congressional power in a new way. It asserts for the first time that the federal government has the power to impose mandates that aren’t essential to the very existence of the government.

And this new claim of power is particularly dangerous to liberty because mandates like the individual mandate are vastly more intrusive than mere prohibitions of chosen activity. Professor Randy Barnett of the Georgetown University Law Center illustrates this point as follows:

- Imagine I tell you 100 things you may not do tomorrow. For example, you may not run on a treadmill, eat broccoli, buy a car, and 97 other things. While your liberty would be restricted, there would still be an infinite number of things you could do.

- Now suppose I tell you 100 things you must do tomorrow. You must run on a treadmill, eat broccoli, buy a car, and 97 other things. These 100 mandates could potentially occupy all your time and consume all your financial resources.

Some people try to counter the claim that the individual mandate is unprecedented by citing various kinds of government coercion in addition to the flat out mandates I just mentioned relating to military conscription, jury service, and census participation. You should pay close attention, though, to the examples they give. They all involve the regulation of chosen activity (and related prohibitions of chosen activity). In other words, the government says, "If you choose to do X, you must do X in a certain way or must also do Y." (For example, if you choose to open a restaurant, you must offer services to all people regardless of their race; if you choose to build a factory, you must install certain pollution control devices.) None of these is a flat out mandate like the individual mandate.

Others argue that the power to mandate private purchases is really no different or more intrusive than the power to impose taxes. Both are claims on the fruits of your labor and therefore infringe on liberty. In one case, the government forces you to give money to the government. In the other, it forces you to give money to a private business. Either way, you are out-of-pocket the money.

But that argument ignores the differences between the two:

- We justify the infringement on liberty caused by taxation on the theory that taxes are essential to the very existence of government and, therefore, the payment of taxes is a fundamental duty of citizenship. That justification doesn't apply to the individual mandate.
- And the framers of the Constitution clearly recognized this unique justification for taxation. Article I, Section 8 of the Constitution and the Sixteenth Amendment explicitly give Congress the power to impose taxes. If the Constitution were as explicit about Congress's power to mandate private purchases, we wouldn't be debating the issue today.
- In any event, the fact that we gave the federal government the power to impose taxes doesn't in itself mean we gave it carte blanche to mandate the purchase of products or the payment of money to others. In fact, the history of the taxing power illustrates that one government power doesn't automatically beget another. Even though the original Constitution explicitly permitted various forms of taxation, a constitutional amendment was still necessary for the government to tax income from dividends, interest and rents.

There's one other important distinction worth noting. To one degree or another, there is an element of choice in taxation that often makes it a regulation of chosen activity

rather than a flat out mandate. You have a choice whether to purchase and continue to own real property and therefore pay real estate taxes. You have a choice whether to invest in tax exempt bonds and avoid taxes on investment income. You also have a choice to invest in capital assets, such as stocks, and hold them until death to avoid any capital gains tax. And you have a choice whether to spend your savings and avoid some or all of the estate tax. Admittedly, these choices have practical limitations, but they are still choices. In contrast, the individual mandate doesn't involve any chosen activity. It applies merely because you exist.

Second observation – The lack of a limiting principle puts the burden of protecting liberty almost entirely on individual liberty rights, and that has serious implications.

My second observation is that the Obama Administration's broad view of the commerce power puts the burden of protecting liberty almost entirely on the concept of individual liberty rights, and that has serious implications for federalism and the protection of liberty.

It's hard to read the Federalist Papers or the Constitution without concluding that the vision of our founding fathers was a sea of individual liberty rights with islands of government power. We've debated for over 200 years about how many islands of government power exist and how big those islands are. As the islands of government power have grown, we've evolved in the opposite direction towards a sea of government power with islands of individual liberty rights.

If I am correct in assessing Professor Bryant's vision of the commerce power, Professor Bryant is asking us to fully accept the idea of a sea of government power with islands of individual liberty rights.

So what's wrong with that?

Well, let's look at what the islands of liberty rights are. They fall into three categories. First, relatively minor limits on federal power to regulate intrastate non-economic activity under the "substantially affects" doctrine, like those recognized in *United States v. Lopez* (Congress cannot prohibit guns near schools.) and *United States v. Morrison*. (Congress cannot regulate gender-motivated violence.) Second, the rights enumerated in the Bill of Rights. And third, so-called "unenumerated rights" that the Supreme Court has read into the Constitution through the Fourteenth Amendment under a doctrine called "substantive due process."

Because the limitations on regulating intrastate non-economic activity have limited application, the islands of liberty rights really consist of the second and third categories - the Bill of Rights and unenumerated rights.

That means the limits on federal and state power are effectively the same, and as a result the federal government has virtually the same powers as the states. That is inconsistent with the idea stated by Madison in Federalist No. 45 that the powers of the federal government are “few and defined”, unlike the powers of the states, which are “numerous and indefinite.” (The Supreme Court reaffirmed this famous statement by Madison as recently as *United States v. Lopez*.) It is also inconsistent with the plain meaning of the Ninth and Tenth Amendments.

It also means our liberty is at risk since existing individual liberty rights don’t provide much protection from the possible intrusions on personal autonomy mentioned above. The Bill of Rights enumerates specific rights, like freedom of speech, but it isn’t well suited to protect us against the types of personal mandates we’re discussing, presumably because the framers of the Constitution never envisioned them. That means we have to rely on the so-called “unenumerated rights” that have been recognized by the Supreme Court under the doctrine called “substantive due process.” But those “unenumerated rights” are fairly narrow. One line of cases recognizes a right to privacy and protects only “fundamental” rights, like the right to abortion. Another line of cases, based on *Lawrence v. Texas*, recognizes a right to liberty itself but at best protects only conduct that is not harmful to others, such as certain private sexual conduct. Based on this Supreme Court precedent, there is a real risk the courts will conclude that our failure to eat broccoli or exercise indirectly harms others by raising healthcare costs and is therefore not a protected right. I believe that’s why Dean Chemerinsky and Professor Bryant hedged on whether the federal government could impose those mandates.

Third observation - Ultimately, the types of mandates at issue are inconsistent with the fundamental idea that underlies the theory of rights in the Declaration of Independence.

My final observation is that Professor Bryant’s vision of government is at odds with the concept of self-ownership that underlies the theory of natural rights in the Declaration of Independence - the idea that we own ourselves and, therefore, have the right to be left alone as long as we honor the equal right of others to be left alone.

Professor Bryant suggested in his *Enquirer* article that the idea of a right to be left alone supports the individual mandate. After all, he argues, people who fail to purchase health care insurance are imposing higher costs on others and violating their right to be left alone.

But since when do higher costs for things I choose to purchase violate my right to be left alone? And if that does violate some right I have, why is the solution to impose economic mandates that further intrude on my personal autonomy?

And Professor Bryant seems to assume that the Patient Protection and Affordable Care Act eliminates subsidies to people who currently don’t purchase health insurance. In

fact, it just changes how subsidies get paid and apparently expands the number of people eligible for subsidies. Currently, uninsured consumers receive subsidies (largely from taxpayers) but only *if* they don't pay their hospital bill. Under the Patient Protection and Affordable Care Act, people who meet certain tests and are below 400% of the poverty level receive subsidies (entirely from taxpayers) to purchase health insurance.

In any event, the point is that if the government can force us to pay money to a private company for the rest of our lives, and by logical extension, force us to buy a car or join a health club and perhaps force us to eat broccoli or exercise, we have strayed far from the vision of liberty at the heart of our system of government.

This is true even if states can use their police powers to impose economic mandates (such as mandates to purchase health insurance), since there are practical limits on their use of those powers that don't apply at the federal level, including the ability of people to move elsewhere to avoid mandates.

Does the individual mandate pass the "proper" test in light of the above analysis?

My analysis of the individual mandate can be summed up as follows:

- The government's argument in support of the individual mandate advances a theory of government power that has no effective limiting principle.
- If accepted, it would give Congress virtually unlimited power to impose mandates on private conduct.
- Mandates like the individual mandate are unprecedented and are vastly more intrusive than mere prohibitions.
- The Obama Administration's broad view of the commerce power would effectively eliminate the distinction between federal and state power that is fundamental to the structure of the Constitution.
- It would also lead to improper infringements on liberty because the Bill of Rights and the so-called unenumerated rights currently recognized by the Supreme Court have limited application.
- Ultimately, the types of mandates at issue are inconsistent with the idea of self ownership that underlies the theory of natural rights in the Declaration of Independence.

Given these conclusions, is the individual mandate "proper" under the Necessary and Proper Clause? Specifically, is it consistent with the letter and spirit of the Constitution?

The Supreme Court has never applied the "proper" test to economic mandates because they have never existed before, so there is no clear precedent.

Possible Application of the Tenth Amendment

The Tenth Amendment may play a role in the Court's application of the "proper" test to the individual mandate. It says, "The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people."

In the 1990's, the Supreme Court held that certain federal mandates on the states are not "proper" under the Necessary and Proper Clause (such as requiring local sheriffs to conduct background checks on gun buyers and requiring states to take radioactive waste) because they constitute an unconstitutional "commandeering" of the state legislatures in violation of state sovereignty (independent authority) under the Tenth Amendment.

An unanswered question is whether the Tenth Amendment protects not just state sovereignty but also the popular sovereignty of the people, and the recent decision in *Bond v. United States* (2011) suggests the answer is yes. That case addressed a woman's standing (or legal right) to challenge a federal criminal statute enforcing a chemical weapons treaty. In recognizing such standing, all nine Justices agreed that states are not the sole intended beneficiaries of federalism (reserved powers) under the Tenth Amendment, and Justice Kennedy stated that "federalism protects the liberty of the individual from arbitrary power."

If the Tenth Amendment recognizes the popular sovereignty of the people, presumably individuals, like states, cannot be commandeered to carry out federal regulatory programs, and the question is whether the individual mandate is unconstitutional as an improper commandeering of the people.

Professor Randy Barnett of the Georgetown University Law Center makes a strong argument that the individual mandate constitutes an unconstitutional commandeering of the people and is, therefore, not "proper," and I find it persuasive. See Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 *New York University Journal of Law & Liberty*, 581 (2011).

More recently, Professor Elizabeth Price Foley has argued that the individual mandate abandons the long-standing legal principle that legally binding contracts require mutual assent and cannot be coerced. She argues this crosses a line the federal government has never crossed and effectively tramples on "The powers . . . reserved . . . to the people" under the Tenth Amendment.

Professor Barnett points out in his law review article that extending the anti-commandeering doctrine to the people may be novel, but the individual mandate is itself novel, just as certain federal mandates on the states were novel before they were struck down. He also argues that a decision by the Court to draw a distinction between activity and inactivity and refuse to extend the commerce power to inactivity will not

overturn any Supreme Court precedent (it will just mean that existing precedent isn't extended to inactivity) and will affect only this one law.

The Administration's response to concerns about individual liberty.

Supporters of the individual mandate say disallowing the individual mandate would not protect individual liberty because Congress can achieve similar policy goals (making people pay at least something towards their health care costs) by other means. For example, it could impose taxes under its taxing power and provide health care under its spending power (as with Medicare and Medicaid). But the fact that Congress can use the taxing power to tax people who choose to enter the stream of commerce (for example, Medicare and Medicaid taxes) doesn't mean it can use the commerce power to force them to enter the stream of commerce (the individual mandate). And the individual mandate is arguably a greater threat to liberty than taxes because it is politically easier for Congress to impose targeted economic mandates than broad-based tax increases, as evidenced by the choices made by Congress in adopting the Patient Protection and Affordable Care Act.

Others point out that Congress could achieve exactly the same thing as the individual mandate (give us a choice between owning health insurance and paying a penalty) by taxing each citizen a certain amount each year and rebating the tax to those who purchase health insurance. The premise of this argument seems to be that if one enumerated power permits a particular form of government coercion, there is really no principled basis to say other enumerated powers don't allow the same thing. But that's like saying that because the taxing power allows the government to impose a particular tax, all the other enumerated powers allow the imposition of that tax as well. That seems inconsistent with the idea of enumerated powers because it automatically expands each beyond its stated scope. In any event, it is arguably easier from a political standpoint for the government to impose economic mandates through the commerce power than to use the taxing power to accomplish the same thing, and if that is true, an expansive commerce power is more likely to be abused and therefore is more of a threat to individual liberty.

To illustrate, assume that the government had included in the Patient Protection and Affordable Care Act an annual tax on every American of \$700 (roughly the amount of the individual mandate penalty) and had said people could get that back each year upon the purchase of health insurance. Such a tax would be imposed on everyone up front (unlike the individual mandate, which really only affects those without health insurance) and would apply regardless of economic activity (unlike most other taxes). Those features seem to make the use of the taxing power to impose the individual mandate less politically attractive than the use of the commerce power. (It should also be noted that the tax would have to be several thousand dollars per person to make it sufficiently expensive to induce people to purchase health insurance.) And even if there were sufficient political support to use the taxing power to implement the individual

mandate, the comparative difficulties of using the taxing power to impose mandates would seem to grow if the federal government tried to implement other mandates using that power (e.g., a doctor visit tax, a broccoli purchase tax, a health club membership tax, a car purchase tax).

When cornered in the debate, supporters of the individual mandate argue that we can rely on the political system to protect us against intrusive mandates. After all, what prevents the federal government from raising the minimum wage to \$100 an hour? There are two problems with this argument. First, the minimum wage (like other examples typically given) is a regulation of chosen activity and not a mandate. It requires employers to pay a minimum hourly rate if they choose to hire someone but doesn't mandate hiring (buying a service). More importantly, the theory of our system of government is that there are certain things the government cannot do to us even by majority vote, such as forcing us to sell our services to others (a form of servitude). The question remains whether forcing people to purchase goods or services is also impermissible.

Conclusion

Ultimately, the Administration faces a dilemma in presenting its case to the Supreme Court. The legal theories it uses under the Necessary and Proper Clause require the Court to accept limits on federal power that are inconsistent with the letter and spirit of the Constitution. It's hard to see how the individual mandate can be "proper" under those circumstances.

As Judge Vinson said in his opinion, "It is difficult to imagine that a nation which began, at least in part, as a result of opposition to a British mandate giving the East India Company a monopoly and imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place."

I urge you to keep an open mind as you reflect on these issues. When there is broad public opposition to a law because people think it improperly intrudes on their lives, it is incumbent on our elected representatives and those of us in the legal profession to pay attention. The legitimacy of our system of laws depends on the consent of the governed. If we lose that, we put our legal system at risk.

Given the importance of this issue, vigorous debate is critical. I'd like to thank Professor Bryant and Dean Bilionis for giving me a chance to participate in this discussion and be part of that debate.

Jack Painter lives in Cincinnati, Ohio and is a corporate attorney. He founded Liberty Alliance Cincinnati and is on the board of the Ohio Liberty Council. He can be reached at jack.painter@ohiolibertycouncil.org.