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The Constitution & Healthcare Reform

The U.S. government is using the Commerce and Supremacy Clauses as its constitutional basis for passing its healthcare reform bill, but it misrepresents the Constitution.

On March 23, 2010, Attorneys General from 18 states sued the federal government, accusing it of committing "an unprecedented encroachment on the liberty of individuals living in the Plaintiffs' respective states, by mandating that all citizens and legal residents of the United States have qualifying healthcare coverage or pay a tax penalty."

In the 22-page complaint, the plaintiffs aver that in passing and signing the Patient Protection and Affordable Care Act into law, specifically the individual mandate that every American purchase a health insurance policy, Congress and the executive branch exceeded their constitutional authority. The complaint specifically cites Article I and the 10th Amendment of the U.S. Constitution in support of the states' case.

Curiously, defendants in the suit and their supporters point to the Constitution for support of their position. Specifically, these parties have identified the Commerce Clause and the Supremacy Clause as the two pillars upon which President Obama and his congressional lictors are "authorized" to build this temple of tyranny known as ObamaCare.

Commerce Clause

The first pretext relied upon by the national government in defense of its enactment of the ObamaCare scheme is the power granted to it by the Constitution to regulate commerce among the states.

Section 1, Article 8 of the Constitution grants Congress the authority to "regulate commerce with foreign nations, and among the several states." The fact that Congress passed and President Obama signed the Patient Protection and Affordable Care Act into law demonstrates that neither the legislative nor executive branch of the national government is bothered by constitutional restrictions on their power. As a matter of fact, it is imprecise to say that the Constitution restricts the power of the national government. The truth is that the Constitution empowers the national government with very specific, limited and enumerated powers, leaving all others to the "states, respectively, or to the people."

For nearly 80 years, the federal government has used the Commerce Clause as a cloak of constitutionality with which to shroud its unlawful expansionism. But in recent years, the Supreme Court has heard challenges to Congress' view of the unlimited scope of this authority, and exercising its proper role as a check on the other branches of the government, the Court has imposed limits on Congress' preposterous enlargement of this very limited power.

One of the chief cases wherein the Court sought to mark the metes and bounds of congressional authority to regulate commerce was the case of *United States v. Alfonso Lopez, Jr.* In the *Lopez* case, Lopez was convicted of having violated the federal Gun-free School Zone Act of 1990 for having brought

a handgun and cartridges to school. In this act, Congress outlawed the possession of firearms within a "school zone" and based this law on its power to regulate commerce. According to the Attorney General, this law was a reasonable exercise of the powers granted by the Commerce Clause, in that carrying a firearm near a school might lead to commission of a violent crime, which in turn would adversely affect the overall economic condition of the states and effectively impede the free flow of commerce nationwide.

Unimpressed with the legal tenability of this tenuous link between commerce and the activity for which he was convicted, Lopez's attorneys appealed his conviction asserting that the act was unconstitutional, as Congress exceeded its constitutional authority in exercising such regulation over schools.

Remarkably, the Fifth Circuit Court of Appeals overturned the conviction, whereupon the government petitioned the Supreme Court for review and the Court accepted. In a 5-4 decision, the Court affirmed the decision of the Court of Appeals and held that:

> To uphold the Government's contentions here, we have to pile inference upon inference in a manner that would bid fair to convert congression-al authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

This decision represented the first time since the Great Depression and the resulting slate of socialist programs foisted on the nation by FDR that the Court attempted to clamp constitutional shackles on the ever-overreaching arm of federal authority to "regulate commerce."

Another important decision attempting to effect a restriction on the flexibility of the Commerce Clause was *United States v. Antonio Morrison, et al*. The issue in this case was the constitutionality of the Violence Against Women Act of 1994. The matter involved a young woman at Virginia Tech University who accused Antonio Morrison of rape. The state grand jury failed to indict Morrison, and the accuser then brought federal charges against Morrison under the Violence Against Women Act.

This law, as the Gun-free School Zone Act, was promulgated under the ostensible authority of the Commerce Clause. The Congress excused the federal assumption of state police power on the grounds that a gender that lived in fear of crime could not be productive and thus commerce nationwide would be negatively affected.

Remarkably, the Court ruled in favor of Morrison and held that violent crimes such as those addressed by the Violence Against Women Act had at best an attenuated effect on interstate commerce, certainly not a substantial one.

While these crucial Supreme Court decisions demonstrate that body's willingness to impose restrictions on Congress' authority to relate every aspect of human life to commerce and then regulate it based on that relationship, the newly enacted healthcare law is distinct from these cases in a very signal way.

Noticeably, neither *Lopez* nor *Morrison* dealt with a law mandating compulsory purchase of a commodity. Not only does ObamaCare require every individual to buy a health insurance policy or be punished, but it also makes compliance with that mandate a condition of legal residency in the United States.

While the Constitution explicitly authorizes Congress to regulate commerce and the Supreme Court has validated the exercise thereof in a string of decisions, there is no precedent in our over 200 years of constitutional jurisprudence for the ability of Congress to force citizens to buy something regardless of their own preference.

This latest expression of the legislative madness denigrates the very principle of personal liberty that is at the core of our constitutional Republic. If Congress is permitted to envelop the iron fist of absolutism within the velvet glove of the Commerce Clause, then there is nothing that will not fall within that purview.

Supremacy Clause

The states joining in the suit charge the federal government with attempting to impose a top-down form of federalism that is inimical to the structure established by the Constitution wherein the sovereignty of the several states is protected and held inviolable. In writing in defense of the proposed Constitution, James Madison expressed his opinion of the relationship between national and state governments intended by the Constitution he helped write: "Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a *federal*, and not a *national* constitution." Madison and the Founders adamantly denied the claim that the Constitution in any way reduced the scope of state authority or the sovereignty of the people.

The so-called Supremacy Clause of Article VI reads, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

While at first blush the Supremacy Clause argument may seem persuasive, there is a significant flaw in it. Consideration of the application of the Supremacy Clause in the debate is only appropriate where there is a legitimate federal statute contending with an equally legitimate state law. This is not the situation with regard to the Patient Protection and Affordable Care Act.

That is to say, a constitutionally sound act of Congress is one that comports in every way with the scope of enumerated powers set forth in the Constitution, specifically in Article I. If an act of Congress exceeds its constitutional mandate, then it is per se unconstitutional and cannot be defended by reference to the Supremacy Clause. The key to the conundrum is the phrase "made in pursuance thereof." If the law is not made in pursuance of constitutional authority, then the very language of the Supremacy Clause expels the law from its protection.

Even a cursory reading of the Constitution reveals that there is no authority therein for Congress to legislate with regard to national healthcare. To merit the support of the Supremacy Clause, a law would have to at least meet the threshold requirement of "pursuance thereof." ObamaCare inarguably does not qualify.

This argument is buttressed by the principles behind the precedents of our Founders. At the Constitutional Convention of 1787 in Philadelphia, the Virginia Plan proposed by that state's delegation initially endowed the national government with the ability "to negative all laws passed by the several states contravening, in the opinion of the national legislature, the Articles of Union." When challenged as to the breadth of the scope of this power, Governor Edmund Randolph responded that his proposal

never intended to give unrestricted power to the national legislature. In fact, he expressly opposed any such interpretation of the clause in question.

When the matter of the national government's ability to veto state legislation was put to a vote, seven of the assembled states voted against it. With that vote, the federal government was denied the right to exercise an unqualified negative of state laws, and its will would only be supreme within the universe of its specifically enumerated powers, but in all other matters, the states retained their sovereignty.

As delegates gathered throughout the country to deliberate on the ratification of the proposed Constitution, the Supremacy Clause had attracted the attention of friend and foe alike. Those opposed to the new document asserted that the federal government created by the Constitution swallowed up the state governments and rendered them mere minions of an all-powerful national magistracy.

It is the retort of the advocates of the new charter that reveals the true and proper reading of the provision in question. William Davie, a delegate to the Constitutional Convention from North Carolina and supporter of the fruit of that body, allayed the fears of the so-called anti-federalists by declaring, "This Constitution … can be supreme only in cases consistent with the powers specially granted, and not in usurpations." Again, the standard for the subordination of state law to federal law is reiterated: The contending federal law must be within the enumerated, specifically granted powers allotted to the federal government in the Constitution itself. The ObamaCare revolution unquestionably fails to meet even the threshold requirements for Supremacy Clause validation, as there exists nowhere in the Constitution authorization for federal control of this aspect of human life.

Nullification

While the effort of the states' Attorneys General to fight the federal government in court is noble and worth the struggle, it is not the only option available to proponents of the right of states to govern themselves. Perhaps the most effective weapon in the war against the national legislature's plan to exercise unchecked and absolute dominion over the states and the people is the nullification of unconstitutional federal legislation by the governments of the states.

Simply stated, nullification is the principle that each state retains the right to nullify, or invalidate, any federal law that a state deems unconstitutional. Nullification is founded on the assertion that the sovereign states formed the union, and as creators of the compact, they hold ultimate authority as to the limits of the power of the central government to enact laws that are applicable to the states and the citizens thereof.

As cited above, James Madison is clear as to his opinion on the relative positions of the states and national government created by the Constitution. The states, he assured readers, are sovereign and they retain that sovereignty under the provisions of the national constitution. No clause or phrase of the Constitution may be accurately interpreted to enshrine the national government in a superior position to that of the state governments. In *The Federalist*, No. 46, Madison reasoned that "the federal and state governments are in fact but different agents and trustees of the people, instituted with different powers and designated for different purposes." He notes in the same paper that "the ultimate authority, wherever the derivative may be found, resides in the people alone." There is no more fixed expression of the intent of our Founders as to the locus of ultimate sovereignty in the United States.

Apart from his designation as the "Father of the Constitution," Madison may also rightly be called the "Father of Nullification." Madison and Thomas Jefferson united in their opposition to the expansion of the federal government's powers and gave expression to their stance in the Kentucky and Virginia

Resolutions of 1798. The impetus for the drafting of these resolutions was the passage by the national government of the Alien and Sedition Acts. The unvarnished aim of these laws was to squash political dissension and silence foes of the administration then in power.

In the resolutions they penned and offered to the legislatures of Kentucky and Virginia, Madison and Jefferson insisted that American jurisprudence and principles of good government preserved to the states the constitutional and natural-law right to firmly resist federal encroachments into the realms of their own sovereignty, and further to void any acts of the national government they deemed unconstitutional. Additionally, those state legislatures were justified in refusing to implement any congressional mandate not made in pursuance of the specifically enumerated powers granted Congress by the Constitution of the United States.

Both the Kentucky and Virginia legislatures passed the resolutions. Although other state governments did not follow suit at that time, there were soon other state legislatures expressing their official disdain of the unlawful encroachment of the federal government into the sovereign territory of the states.

In Massachusetts, for example, while the legislature did not pass the resolution, the highest court of that state, in invalidating the Embargo Act of 1807, expressed effectively the spirit of nullification:

> A power to regulate commerce is abused, when employed to destroy it; and a manifest and voluntary abuse of power sanctions the right of resistance, as much as a direct and palpable usurpation. The sovereignty reserved to the states, was reserved to protect the citizens from acts of violence by the United States, as well as for purposes of domestic regulation. We spurn the idea that the free, sovereign and independent State of Massachusetts is reduced to a mere municipal corporation, without power to protect its people, and to defend them from oppression, from whatever quarter it comes. Whenever the national compact is violated, and the citizens of this State are oppressed by cruel and unauthorized laws, this Legislature is bound to interpose its power, and wrest from the oppressor its victim.

Happily, there are currently at least 30 states whose legislatures have declared their intent to resist the mandates forced upon them by the various ObamaCare provisions. To aid that worthy effort, The John Birch Society has crafted a model nullification statute to be offered to like-minded constitutionalists in the various statehouses. (A PDF of the model nullification statute may be downloaded at the "Freedom Campaign Downloads" page of JBS.org.)

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