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Tax Constitutional Questions in “Obamacare”: National Federation of Independent Business v. Sebelius in Light of Citizens United v. Federal Election Commission and Speiser v. Randall: Conditioning a Tax Benefit on the Nonexercise of a Constitutional Right

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Tax Constitutional Questions in “Obamacare”: *National Federation of Independent Business v. Sebelius* in Light of *Citizens United v. Federal Election Commission* and *Speiser v. Randall*: Conditioning a Tax Benefit on the Nonexercise of a Constitutional Right

JOHN R. DOROCAK*

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I. INTRODUCTION

The phrase “Tax Constitutional Questions” may seem to be an oxymoron or at least an interesting juxtaposition somewhat akin to the phrase “passive activity” derived from Section 469 of the Internal Revenue Code, which is familiar to tax practitioners, professors, and perhaps others.¹ It has been noted elsewhere that it is seemingly normal that tax professors (and tax practitioners) are somewhat isolated from such weighty issues as

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1. I.R.C. § 469 (2012).

constitutional questions.² Professor Erik Jensen has stated, “[T]hat issues of race, gender, and class have not been addressed very much by tax professors, who have instead ‘focused on more narrow and technical issues in business and financial taxation.’”³ Professor Jensen has also emphasized the “tax academy’s traditional insistence on connection with the real world of practice” and the often separation of tax and constitutional questions (“[b]ut raise one tax question with a con law person, and he’s gone . . .”).⁴

Despite what may be the tax bar’s seeming reluctance to engage in constitutional questions, those questions are nevertheless thrust upon tax practitioners and professors. Perhaps nowhere has the intersection of taxation and constitutional law been clearer than in the recent United States Supreme Court case on the Patient Protection and Affordable Care Act, *National Federation of Independent Business v. Sebelius* (hereinafter “*NFIB*”).⁵ In fact, Chief Justice Roberts’s five-four majority opinion upheld the so-called individual and employer mandate of the legislation, dubbed “Obamacare,” as a tax.⁶ Much has been and will undoubtedly be written about *NFIB*. The attempt here will be to determine whether or not some of the other recent tax constitutional cases, particularly *Citizens United v. Federal Election Commission*,⁷ which might be used in a tax setting, shed any light on the constitutional decision making in *NFIB*.⁸ Once again, this task is approached from the perspective of the tax professor and practitioner rather than those in the field of constitutional law. Indeed, in *Citizens United*, Justice Kennedy, writing for the majority, was relying heavily upon a tax constitutional case, despite not specifically citing to the case.⁹ In *Citizens United*, Justice Kennedy quotes Justice Scalia’s dissent in *Austin v. Michigan Chamber of Commerce* writing, “It is rudimentary that the State cannot exact as the price of these special advantages [of the corporate form] the forfeiture

2. John R. Dorocak, *Same-Sex Couples and the Tax Law: Tax Filing Status for Lesbians and Others*, 33 OHIO N.U. L. REV. 19, 20 at n.4 (2007) and accompanying text (citing Erik M. Jensen, *Critical Theory and The Loneliness of The Tax Prof*, 76 N.C. L. REV. 1753, 1766 & n.17 (1998)); see also John R. Dorocak, *The Income Tax Exclusion of the Housing Allowance for Ministers of the Gospel per I.R.C. Section 107: First Amendment Establishment of Religion or Free Exercise Thereof-Where Should the Warren Court Have Gone?*, 54 S.D. L. REV. 233, 236 at n.10 (2009); John R. Dorocak, *Recent Constitutional Questions in Taxation: Toward a Legislative Solution to Constitutional Problems of Same-Sex Couples and Ministers of the Gospel?*, 19 TEMP. POL. & CIV. RTS. L. REV. 223, 224 at n.2 (2009); John R. Dorocak & Lloyd E. Peake, *Political Activity of Tax-Exempt Churches, Particularly After Citizens United v. Federal Election Commission and California’s Proposition 8 Ban on Same-Sex Marriage: Render Unto Caesar What is Caesar*, 9 FIRST AMEND. L. REV. 448, 480 & n.152 (2010).

3. Jensen, *supra* note 2, at n.17 and accompanying text (citing Edward McCaffery, Statement at Taxation and the Family Conference at Lewis and Clark Northwestern School of Law (Oct. 6, 1995) (quoted in Rebecca S. Rudnick, *Taxation and the Family*, 69 TAX NOTES 421, 421 (1995))).

4. *Id.* at 1753, 1756.

5. 132 S. Ct. 2566 (2012) (hereinafter “*NFIB*”).

6. *Id.* at 2608.

7. 558 U.S. 310 (2010).

8. See generally Dorocak & Peake, *supra* note 2.

9. See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 905 (1990) (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting)).

of the First Amendment rights.”¹⁰ The tax constitutional case citation that Justice Kennedy omitted from Justice Scalia’s quote was *Speiser v. Randall*.¹¹

The inquiry here is whether or not *Speiser’s* prohibition of the nonexercise of a constitutional right as a condition for a tax benefit might also apply to, or at least inform, the constitutional decision making in *NFIB*. This article will first review the reasoning concerning the use of the taxing power to sustain legislation before the court in both the majority and dissenting opinions in *NFIB*. Second, this article will discuss the cases of *Speiser* and *Citizens United* within the context of tax constitutional cases. Third, this article will discuss whether *Speiser* and *Citizens United* might apply to or inform the decision making in *NFIB*. Fourth, this article will discuss similarities and differences in the use of *Speiser*, in context of matters to which *Citizens United* would apply in the tax area and the context of *NFIB*. Finally, the last section of this article will extend to the broader areas of constitutionalism in an effort to understand *NFIB* in the light of *Speiser*. That is, the constitution as a charter of negative or positive liberties will be discussed.

II. CONSTITUTIONAL POWER TO TAX IN NATIONAL FEDERATION OF INDEPENDENT BUSINESS

In *NFIB*, Chief Justice Roberts, writing for the five-four majority of the Court, upheld a provision of the Patient Protection and Affordable Care Act, the so-called individual mandate to purchase health insurance or to make a payment to the Internal Revenue Service (“IRS”), as an exercise of the taxing power to “lay and correct Taxes,” as established in Article 1, Section 8, Clause 1 of the U.S. Constitution.¹² In closing, the portion of the Court’s opinion upholding the individual mandate as a tax, Chief Justice Roberts’ states, “The Affordable Care Act’s requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or pass upon its wisdom or fairness.”¹³

Chief Justice Roberts’s first reason—that the individual mandate’s “shared responsibility payment” is a tax—is because “it looks like a tax” for multiple reasons.¹⁴ First, the payment is made to the Treasury by taxpayers

10. *Id.* at 905.

11. *Austin*, 494 U.S. at 680.

12. *NFIB*, 132 S. Ct. at 2600.

13. *Id.*

14. *Id.* at 2594.

when they file their tax return and does not apply to individuals who do not pay federal income taxes because their income is below the filing threshold.¹⁵ Second, the amount to be paid is determined by factors such as income, number of dependents, and joint filing status.¹⁶ Third, the amount to be paid is enforced by the IRS in the same manner as taxes.¹⁷ Fourth, the payments produce revenue, estimated to be about \$4 billion by 2017.¹⁸

In addition, Chief Justice Roberts states that the Court has, in several previous cases, held that the label Congress uses, tax or penalty, does not control for constitutional purposes.¹⁹ Chief Justice Roberts cites *Bailey v. Drexel Furniture, License Tax Cases*, and *New York v. United States* to support the assertion that the Congressional label is not controlling for constitutional purposes.²⁰ He then applied the three-part reasoning used in *Drexel Furniture* to conclude that the fee in the case at hand was a tax. First, Chief Justice Roberts reasoned that the required payment would be far less than the price of insurance, and it would be a reasonable financial decision to make the payment unlike the “prohibitory” payment required in *Drexel Furniture*.²¹ Second, Chief Justice Roberts reasoned that the individual mandate had no scienter requirement, the requirement typical of punitive statutes requiring that the act be done knowingly.²² Third, the Chief Justice reasoned that the payment was collected by the IRS, the normal agency for collecting taxation, rather than another agency.²³

Further, Chief Justice Roberts compared the payments under the Affordable Care Act to the payment required in *New York*, in which a state responsible for providing for disposal of low-level radioactive waste was exposed to a surcharge if it shipped such waste to another state.²⁴ Chief Justice Roberts stated that the Court had interpreted the statute in *New York* as a tax imposing “a series of incentives” encouraging a statute to take responsibility for its nuclear waste.²⁵ Chief Justice Roberts stated that a “similar approach” would apply in *NFIB*.²⁶

Chief Justice Roberts indicated that there were three considerations limiting the extent of imposing a tax for “not doing something.”²⁷ First, he reasoned that Congress already had exercised its taxing power to encourage

15. *Id.*

16. *Id.*

17. *Id.*

18. *NFIB*, 132 S. Ct. at 2594.

19. *Id.*

20. *Id.* at 2595 (citing *New York v. United States*, 505 U.S. 144 (1992); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922); *License Tax Cases*, 72 U.S. 462 (1867)).

21. *Id.* at 2595–96.

22. *Id.* at 2596.

23. *Id.*

24. *NFIB*, 132 S. Ct. at 2597.

25. *Id.*

26. *Id.*

27. *Id.* at 2599.

activity such as purchasing homes and professional education so that upholding the mandate of the purchase of health insurance “does not recognize any new federal power.”²⁸ Second, the Chief Justice reasoned that the taxing power was limited in that a measure such as the shared responsibility payment must “pass muster as a tax under our narrower interpretation” and that there also was a “point at which an exaction becomes so punitive that the taxing power does not authorize it.”²⁹ Writing for the majority, the Chief Justice held that the shared responsibility payment met the three-part test of what was a tax under *Drexel Furniture*.³⁰ Third, the Chief Justice stated that the power to tax, although broader than the power to regulate commerce, “does not give Congress the same degree of control over individual behavior” because “Congress’s authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more.”³¹

The joint dissent, with whom Chief Justice Roberts agreed on the holding that the individual mandate could not be constitutionally sustained as an exercise of the commerce clause,³² would have also held that the individual mandate could not be constitutionally justified as an exercise of the taxing power.³³ In its analysis that the commerce clause could not be used to constitutionally justify the individual mandate, the joint dissent suggested that “there are many ways other than this unprecedented Individual Mandate by which the regulatory scheme’s goals of reducing insurance premiums and ensuring the profitability of insurers could be achieved.”³⁴ The dissent then advised that those who did not purchase the insurance could be surcharged when they entered the health care system or those individuals could be denied a full income tax credit given to others who purchased insurance.³⁵ The dissent stated that “[t]he issue is not whether Congress had the *power* to frame the minimum-coverage provision as a tax, but whether it *did* so.”³⁶

In a lengthy decision of the Court involving several opinions, the joint dissent devotes just a few pages to its reasoning that the individual mandate was not sustainable as an exercise of the taxing power.³⁷ The joint dissent states that Congress did not exercise the taxing power and the dissenters

28. *Id.*

29. *Id.*

30. *NFIB*, 132 S. Ct. at 2599.

31. *Id.* at 2600.

32. *Id.* at 2593.

33. *Id.* at 2655 (Scalia, J., Kennedy, J., Thomas, J., and Alito, J., dissenting).

34. *Id.* at 2647.

35. *Id.*

36. *NFIB*, 132 S. Ct. at 2651.

37. *Id.* at 2650–55.

refused to rewrite the statute to exercise that power.³⁸ The joint dissenters explained their reasoning as follows:

Our cases establish a clear line between a tax and a penalty In a few cases, this Court has held that a “tax” imposed upon private conduct was so onerous as to be in effect a penalty. But we have never held—*never*—that a penalty imposed for violation of the law was so trivial as to be in effect a tax.³⁹

The dissent found that the individual mandate in Section 5000A of the Internal Revenue Code imposed a penalty for failure to meet a requirement and that the congressional legislative findings with regard to the section “confirm that it sets forth a legal requirement and constitutes the assertion of regulatory power, not mere taxing power.”⁴⁰ In addition, the dissent stated, “We never have classified as a tax an exaction imposed for violation of the law, and so too, we never have classified as a tax an exaction described in the legislation itself as a penalty.”⁴¹ Further, the dissent pointed out that there were two classes of those exempt from Section 5000A: those exempt from the mandate because such persons were not “an applicable individual”—those with religious objections, not lawfully present in the U.S., or incarcerated—and those exempt from the payment liability—those who could not afford coverage, earned too little income, or members of an Indian tribe, who have short gaps in coverage, and who have suffered hardship in the judgment of the Secretary of Health and Human Services.⁴² The dissent stated that if the payment were a tax, there would be only one category of exemptions; *i.e.*, those exempt from the tax.⁴³

Additionally, the dissent also indicated that the Court had found the IRS could collect a penalty, but that, where other agencies were involved, this was “a feature that would be quite extraordinary for taxes.”⁴⁴ Finally, the dissent stated, “And the nail in the coffin is that the mandate and penalty are located in Title I of the Act, its operative core, rather than where a tax would be found – in Title IX, containing the Act’s ‘Revenue Provisions.’”⁴⁵ The dissent added:

38. *Id.* at 2651.

39. *Id.*

40. *Id.* at 2652.

41. *Id.* at 2653.

42. *NFIB*, 132 S. Ct. at 2653.

43. *Id.*

44. *Id.* at 2654.

45. *Id.* at 2655.

We have no doubt that Congress knew precisely what it was doing when it rejected an earlier version of this legislation that imposed a tax instead of a requirement-with-penalty Imposing a tax through judicial legislation inverts the constitutional scheme, and places the power to tax in the branch of government least accountable to the citizenry.⁴⁶

In closing, the dissent observed that “rewriting § 5000A as a tax in order to sustain its constitutionality would force us to confront a difficult constitutional question: whether this is a direct tax . . . [N]o federal court has accepted the implausible argument that § 5000A is an exercise of the taxing power.”⁴⁷

III. *SPEISER V. RANDALL* AND *CITIZENS UNITED V. FEC*: CONDITIONING A BENEFIT ON THE NONEXERCISE OF A CONSTITUTIONAL RIGHT

In *NFIB*, the five-four majority and the dissent reach opposite conclusions on the issue of whether the required payment of the individual mandate in the Patient Protection and Affordable Care Act is a constitutionally permissible tax.⁴⁸ In light of the division in the court, perhaps precedents of the Court other than those examined by the majority and the dissent might assist in resolving the constitutional question of whether the required payment is a constitutional exercise of the taxing power. The suggestion here is to look to a recent precedent of the Court, *Citizens United*, and related cases.⁴⁹ Although the much analyzed and often criticized doctrine of constitutional conditions might be said to be involved, the suggestion is to examine the recent case in possibly a new light.⁵⁰

In *Speiser*, Justice Brennan famously wrote, “[W]e hold that when the constitutional right to speak is sought to be deterred by a State’s general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition.”⁵¹ Justice Brennan added, “Similarly it does not follow that because only a tax liability is here involved, the ordinary tax assessment procedures are

46. *Id.*

47. *Id.*

48. *See NFIB*, 132 S. Ct. 2566.

49. *See, e.g.*, *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (1990).

50. *See, e.g.*, Richard A. Epstein *Judicial Engagement With the Affordable Care Act: Why Rational Basis Analysis Falls Short*, 19 GEO. MASON L. REV. 931, 933–34 (2012) (lamenting the decline of the doctrine of unconstitutional conditions); Note, *What The Unconstitutional Conditions Doctrine Can Teach Us About ERISA Preemption: Is It Possible to Consistently Identify “Coercive” Pay-or-Play Schemes?*, 109 COLUM. L. REV. 1482 (2009) (citing much of the existing scholarship).

51. *Speiser v. Randall*, 357 U.S. 513, 528–29 (1958).

adequate when applied to penalized speech.”⁵² In *Speiser*, the taxpayer was required to take a loyalty oath to obtain a property tax exemption available to veterans.

Justice Scalia, when utilizing *Speiser* in his dissent in *Austin*, stated perhaps more directly, “It is rudimentary that the State cannot exact the price of those special advantages the forfeiture of First Amendment rights.”⁵³ Justice Scalia had “[t]axbreaks” listed among the “all sorts of special advantages that the State need not confer.”⁵⁴ Scalia’s dissent in *Austin* became the basis of the majority opinion in *Citizens United*, in which Justice Kennedy, writing for the majority, overruled *Austin* and adopted, by citation and quotation, Scalia’s dissenting language in *Austin*, although not Scalia’s citation to *Speiser*.⁵⁵

Plainly, *Speiser* and *Citizens United* involved the First Amendment right of free speech and it was in that context that the Justices of the Supreme Court stated that a tax benefit could not be conditioned upon the non-exercise of a constitutional right. But perhaps that principal has a broader application. In *Regan v. Taxation With Representation of Washington*,⁵⁶ Justice Blackmun, in the concurring opinion joined by Justices Brennan and Marshall, placed *Speiser* in a wider context:

If viewed in isolation, the lobbying restriction contained in § 501(c)(3) violates the principal, reaffirmed today, “that the government may not deny a benefit to a person because he exercises a constitutional right.” Section 501(c)(3) does not merely deny a subsidy for lobbying activities; it deprives an otherwise eligible organization of its tax-exempt status . . . for all its activities[.]⁵⁷

The majority opinion in *Regan*, perhaps more forcefully than in *Speiser*, stated that “TWR is certainly correct when it states that we have held that the government may not deny a benefit to a person because he exercises a constitutional right.”⁵⁸

52. *Id.* at 525.

53. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting) (citing *Speiser v. Randall*, 357 U.S. 513 (1958)).

54. *Id.*

55. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 905 (2010); Dorocak & Peake, *supra* note 2, 469 at n.102 and accompanying text.

56. 461 U.S. 540, 552 (1997).

57. *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 552 (1997) (citing *Speiser*, 357 U.S. at 518–519) (citations omitted); Dorocak & Peake, *supra* note 2, at n.41 and accompanying text. Justice Brennan appears to be stating the difference in The Constitutional Conditions doctrine of denying a subsidy versus imposing a penalty. See Note, *supra* note 50, at 1511.

58. *Regan*, 461 U.S. at 545.

The *Regan* majority cited yet another case, *Perry v. Sindermann*, in which Justice Steward was likely even more direct in stating the principle.

For at least a quarter-century, this Court has made clear that even though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to “produce a result which [it] could not command directly.” *Speiser v. Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.⁵⁹

IV. DO SPEISER AND CITIZENS UNITED AID IN UNDERSTANDING NATIONAL FEDERATION OF INDEPENDENT BUSINESS?

A. *Liberty as the Non-Exercised or Burdened Constitutional Right*

Thus the Supreme Court has acknowledged, apparently frequently, that a benefit, including a tax benefit, may not be conditioned on the non-exercise of a constitutional right, or, in other words, that the constitutional right may not be burdened. Applying this reasoning in *NFIB* would likely immediately raise the question of what constitutional right was burdened or not exercised in order to obtain the tax benefit of not being forced to make the required payment of the individual mandate. Perhaps the constitutional right, which is not exercised or is burdened, might be found in an examination of the key difference between the majority opinion and the dissent, at least in terms of examples about taxes.

Chief Justice Roberts, in the majority opinion, cites the following example:

Suppose Congress enacted a statute providing that every taxpayer who owns a house without energy efficient

59. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

windows must pay \$50 to the IRS. The amount due is adjusted based on factors such as taxable income and joint filing status, and is paid along with the taxpayer's income tax return. Those whose income is below the filing threshold need not pay. The required payment is not called a "tax," a "penalty," or anything else. No one would doubt that this law imposed a tax, and was within Congress' power to tax.⁶⁰

On the other hand, the dissenters clearly did not believe Chief Justice Roberts' example was a tax. The dissenters' examples differed:

With the present statute, by contrast, there are many ways other than this unprecedented Individual Mandate by which the regulatory scheme's goals of reducing insurance premiums and ensuring the profitability of insurers could be achieved. For instance, those who did not purchase insurance could be subjected to a surcharge when they do enter the health insurance system. Or they could be denied a full income tax credit given to those who do purchase the insurance.⁶¹

Clearly the dissent's two examples highlight the dissenters' refusal to extend the commerce clause to inactivity and the taxing power to a penalty.

The dissent, in its examples, was concerned about the extent of federal government power and the protection of individual constitutional rights.

The Government was invited, at oral argument, to suggest what federal controls over private conduct (other than those explicitly prohibited by the Bill of Rights or other constitutional controls) could *not* be justified as necessary and proper for carrying out of a general regulatory scheme. It was unable to name any [T]he proposition that the Federal Government cannot do everything is a fundament precept.⁶²

Thus, given these tax examples of the majority opinion and the dissent, and the dissent's reference to private conduct, the question of what constitutional rights are not exercised to avoid the required payment under the individual mandate is again raised. Or, in other words, what constitutional right is burdened by that payment?

60. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2597–98 (2012).

61. *Id.* at 2647.

62. *Id.* (citation omitted).

The first answer that may occur to outsiders—such as tax practitioners, tax professors, possibly constitution scholars, those on the court, those in academia and others—is that liberty is what is protected. However, protecting liberty under current constitutional jurisprudence may not be such an easy matter. In criticizing the current jurisprudence, which protects liberty under the due process clause, Professor Randy Barnett has said the following:

There are two different formulations of what makes a liberty fundamental, and sometimes courts run them both together: those rights that are “implicit in the concept of ordered liberty” and those rights that are “deeply rooted in the nation’s tradition and history.”

. . . .

The fact that courts can come out any way they want, depending on which of the accurate characterizations of the liberty they choose shows that there is something seriously wrong with current doctrine.⁶³

This difficulty in protecting liberty apparently exists despite the statement in the Preamble to the Constitution that it was drafted to “secure the Blessing of Liberty to ourselves and our Posterity . . .”⁶⁴ and the famous wording of the Declaration of Independence, “[T]hat all men . . . are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty and the pursuit of happiness . . .”⁶⁵

Without using the term “liberty” itself, Justice Scalia still wrote forcefully for the dissent in *NFIB* as follows:

What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, is that there are structural limits upon federal power—upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States. Whatever may be

63. Randy E. Barnett, *Access to Justice: The Social Responsibility of Lawyers: The Presumption of Liberty and the Public Interest: Medical Marijuana and Fundamental Rights*, 22 WASH. U. J. L. & POL’Y. 29, 41, 43 (2006) [hereinafter *The Presumption of Liberty*].

64. U.S. CONST. Pmb1.

65. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct and to compel the States to function as administrators of federal programs.⁶⁶

However, whether the formulation is that the federal government has limited powers, or that individuals have liberty, is this argument not the same? Professor Barnett counseled that the limited powers argument could more easily find a receptive audience, particularly on the Court, stating. “I think there may be five votes for the proposition that economic mandates are simply not within the limited and enumerated powers of Congress.”⁶⁷

B. *Supreme Court Precedents on Liberty—Griswold v. Connecticut, Eisenstadt v. Baird, Roe v. Wade, Lawrence v. Texas*

Likely, anyone even slightly familiar with the Supreme Court’s protection of liberty under the due process clause would turn to cases such as *Griswold v. Connecticut*,⁶⁸ *Eisenstadt v. Baird*,⁶⁹ *Roe v. Wade*,⁷⁰ and *Lawrence v. Texas*,⁷¹ as does Professor Barnett.

While there is no need to memorize the lost Ninth Amendment, law students really should memorize Footnote Four [United States v. Carolene Products] because, to some degree, this Footnote became the sole constitutional protection of liberty. In the body of the opinion in Carolene Products, the court adopts a “presumption of constitutionality” that attaches to any legislation—especially that which purports to regulate the economy. Footnote Four then qualifies the text by asserting that there is a narrower scope for the operation of the presumption of constitutionality when the laws affect the rights or specific prohibitions of the Constitution—including portions of the Bill of Rights.

....

66. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2643 (2012).

67. Brad Joondeph et al., *Our Pending National Debate: Is Health Care Reform Constitutional?*, 62 *MERCER L. REV.* 605, 617 (2011).

68. 381 U.S. 479 (1965); see John R. Dorocak, *Same-Sex Couples and the Tax Law: Tax Filing Status for Lesbians and Others*, 33 *OHIO N. UNIV. L. REV.* 19, 29–31 (2007).

69. 405 U.S. 438 (1972).

70. 410 U.S. 438 (1973).

71. 539 U.S. 558 (2003).

In the 1960s, when an unenumerated “right of privacy,” which is not an “express prohibition” in the Constitution, was protected by the Court in *Griswold v. Connecticut*, all hell broke loose, even among those progressives who rejected the legal prohibition of contraceptives.⁷²

There is certainly language suggesting constitutional protection of liberty in *Griswold v. Connecticut*,⁷³ the case where the Supreme Court invalidated a Connecticut statute criminalizing use and distribution of contraceptives as unconstitutional for violating a fundamental privacy right. In *Griswold*, the nine justices unanimously joined in Justice Douglas’s opinion of the Court. Chief Justice Burger and Justice Brennan also joined in Justice Goldberg’s concurring opinion, which stated that:

The protection guaranteed by the (Fourth and Fifth) amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.⁷⁴

Justice Goldberg quoted the Ninth Amendment⁷⁵ in his opinion, clearly believing that it applied in *Griswold*. He also quoted the Tenth Amendment,⁷⁶ James Madison,⁷⁷ Alexander Hamilton,⁷⁸ Justice Story,⁷⁹ and *Bates v. Little Rock*:

In a long series of cases this Court has held that where fundamental liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose.

72. *Presumption of Liberty*, *supra* note 63, at 40.

73. 381 U.S. 479.

74. *Id.* at 494 (Goldberg, J., concurring) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (Brandeis, J., dissenting)).

75. *Id.* at 488.

76. *Id.* at 489 n.4.

77. *Id.* at 489–90.

78. *Id.* at 489 n.4.

79. *Griswold*, 381 U.S. at 490 (quoting COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 626–27 (5th ed. 1891)).

“Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.”⁸⁰

The Ninth Amendment provides, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁸¹ The Tenth Amendment provides, “[t]he 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.”⁸² Justice Goldberg concluded, “[the] statements of Madison and Story make clear that the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.”⁸³ Justice Goldberg was aware that “[t]his [Ninth] Amendment has been referred to as ‘The Forgotten Ninth Amendment,’ in a book with that title by Bennett B. Patterson (1955).”⁸⁴ Long after *Griswold*, Professor Barnett also admitted that he had made a cottage industry out of his attention to clauses seemingly lost from constitution, such as the Ninth Amendment.⁸⁵

Lawrence v. Texas,⁸⁶ finding a Texas statute criminalizing same sex sodomy unconstitutional, also offers some promising generalities about protected liberties.⁸⁷ In *Lawrence*, the Court noted that “[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so

80. *Id.* at 497 (quoting *Bates v. Little Rock*, 361 U.S. 516, 524 (1960) (Goldberg, J., concurring)).

81. U.S. CONST. amend. IX.

82. U.S. CONST. amend. X.

83. *Griswold*, 381 U.S. at 490 (Goldberg, J., concurring).

84. *Id.* at 492 n.6.

85. *Presumption of Liberty*, *supra* note 63, at 31. Professor Barnett writes:

[S]ince 1988 I have been writing and thinking about the Ninth Amendment to the Constitution, which says “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” I have to tell you what it says because I have a suspicion that it may not be strongly emphasized in your constitutional law classes. If you did not study the Ninth Amendment it is because the Supreme Court has basically ignored it for most of its history, along with a number of other clauses I discuss in my book, *Restoring the Lost Constitution*. The term “lost constitution” in the title of my book refers to these clauses, like the Ninth Amendment, that are read out of the Constitution and just aren’t there anymore as a practical matter. No lawyer could litigate on the basis of the Ninth Amendment or using the Privileges or Immunities Clause of the Fourteenth Amendment. These clauses are effectively redacted from the text. Still, I started writing about the Ninth Amendment because it always seemed like an interesting clause, and one that appealed to me ever since I was a law student. I figured, “Well, now I had tenure,” so I should be able to write about any clause that was still literally in the Constitution, even if it was considered to be beyond the pale by scholars.

Id. (footnotes omitted).

86. 539 U.S. 558 (2003) (holding unconstitutional a Texas statute that criminalized sodomy between same-sex couples).

87. *Id.* at 578–79.

fundamentally affecting a person as the decision whether to bear or beget a child.”⁸⁸ In addition, the *Lawrence* Court quoted from *Planned Parenthood of Southeastern Pennsylvania v. Casey* that “[o]ur obligation is to define the liberty of all, not to mandate our own moral code.”⁸⁹ The *Lawrence* Court went on to explain that “[t]he *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”⁹⁰ In further explanation, the *Lawrence* Court quoted the *Casey* Court once again:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.⁹¹

The *Casey* Court, which revisited *Roe v. Wade* some 20 years after its decision that certain restrictions on abortion were unconstitutional, held that the requirement that a woman notify her husband before an abortion was similarly unconstitutional and further stated:

It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty. Thus, while some people might disagree about whether or not the flag should be saluted, or disagree about the proposition that it may not be defiled, we have ruled that a State may not compel or enforce one view or the other.⁹²

What might be said about all of these Supreme Court quotes about liberty, in the context of the decision to uphold the individual mandate of Obamacare, may best be captured by that which comedian Woody Allen is

88. *Id.* at 565 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

89. *Id.* at 571 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

90. *Id.* at 573–74 (quoting *Casey*, 505 U.S. at 851).

91. *Id.* at 574 (quoting *Casey*, 505 U.S. at 851).

92. *Casey*, 505 U.S. at 851 (internal citations omitted).

reported to have said about baseball: “it doesn’t have to mean anything, it’s just very beautiful”⁹³ Quoting Mr. Allen may seem a bit harsh, but the majority opinion in *NFIB* does not seem to recognize a constitutional liberty interest either to be left alone or to make private personal decisions freely. The language of the Supreme Court in decisions past raises an important question. Why should decisions regarding contraception, appropriate types of sexual conduct, private schooling, and saluting or defiling the flag enjoy more protection than a decision about whether or not to purchase health insurance? After all, such a decision is both economic and deeply personal, affecting one’s right to conduct his or her own life and possibly its ending.

C. *Constitutional Decision Making: Presumption of Liberty Versus Presumption of Constitutionality*

Professor Barnett has indicated that the Supreme Court’s formulation requiring the finding of a fundamental right, implicit in ordered liberty or in the history and traditions of the nation, can offer limited protection of liberty. This is particularly true when the presumption is that federal or state legislation is constitutional, as opposed to the presumption of liberty on behalf of citizens.⁹⁴ Professor Barnett explained the current state of constitutional law after *Carolene Products*, the presumption of constitutionality of legislation, *Griswold*, and the unenumerated right of privacy as follows:

So the burden is now on the claimant litigating a Due Process Clause challenge to say that an unenumerated liberty is not just a mere “liberty interest,” which gets no judicial protection, but is one of these heightened “fundamental rights” that is either deeply rooted in the nation’s tradition and history or is implicit in the concept of ordered liberty [B]ut see *Lawrence v. Texas*, in which the Court did protect liberty without finding, as a threshold matter, that the liberty in question was deeply rooted in the nation’s tradition and history.⁹⁵

Professor Barnett does have a suggestion:

My proposal is that all liberties should be treated equally. Under my proposal, the government would have the burden to

93. Mr. Allen’s actual quote was, “I love baseball, you know it doesn’t have to mean anything, it’s just very beautiful to watch.” See PETER H. GORDON, *DIAMONDS ARE FOREVER: ARTISTS AND WRITERS ON BASEBALL* (Chronicle Books 1987) (citing the ZELIG (ORION PICTURES 1983)).

94. See generally *Presumption of Liberty*, *supra* note 63 (discussing the presumption of liberty versus the presumption of constitutionality); see also Epstein, *supra* note 50, at 931.

95. *Presumption of Liberty*, *supra* note 63, at 41.

justify its restrictions on liberty, whether exercising its police power at the state level, or its enumerated powers at the federal level. Whatever power is being exercised, the government may justly (1) regulate the rightful exercise of liberty or (2) prohibit wrongful acts, but they may not (3) prohibit rightful exercise of liberty.⁹⁶

Professor Barnett refers to the police power of the states in conjunction with the enumerated powers of the federal government. Many may well regard the federal government's requirement that individuals purchase health insurance, or pay a "tax," as akin to the states' power to require motorcycle riders to wear a helmet.⁹⁷ Of course, the federal government is supposed to be one of limited and enumerated powers, so much so that Professor Barnett thought that argument would prevail in *NFIB*: "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."⁹⁸ And, of course, Justice Scalia emphasized that "there are structural limits upon federal power" and that the Constitution "enumerates not federally soluble *problems*, but federally available *powers*."⁹⁹

Professor Barnett is concerned about the apparent lack of protection for liberty under current constitutional doctrine: "Distinguishing 'fundamental rights' from mere 'liberty interests' and protecting only the former is bad for liberty, bad for the public interest, and something that courts are not particularly qualified or authorized to do."¹⁰⁰ Professor Barnett has apparently been alternately hopeful and not so hopeful about protection for liberty becoming greater.

For the Constitution says this: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." And the Footnote Four formulation, even if expanded to include those unenumerated rights that courts deem to be "fundamental," is a direct violation of this expressed conjunction of the Constitution itself. Or so those academics with tenure may contend. Perhaps someday,

96. *Id.* at 43.

97. *See, e.g.,* *City of Bremerton v. Spears*, 134 Wn.2d 141 (1998) (considering the constitutionality of a mandatory helmet law).

98. Joondeph, *supra* note 68, at 617 (article of Professor Randy Barnett).

99. *NFIB*, 132 S. Ct. at 2643, 2650.

100. *Presumption of Liberty*, *supra* note 63, at 44.

Article III judges with lifetime tenure will agree. Such a change of heart would be, I maintain, in the public interest.¹⁰¹

Perhaps Article III judges searching for a way to afford additional protection to liberty might utilize cases such as *Speiser* and *Citizens United* as suggested above. Indeed, the formulation in those cases is that a benefit may not be conditioned on the nonexercise of a constitutional right.¹⁰² Applying that type of reasoning to Obamacare as addressed in *NFIB*, the Court could find that the benefit of not having to pay the tax of the individual mandate might well be conditioned upon the nonexercise of a constitutional right. The constitutional right not exercised would be an unenumerated liberty right in the Constitution to be left alone, as suggested in *Griswold*, and/or to make decisions about one's personal affairs, as suggested in *Casey*.¹⁰³

Of course, in *Speiser* and *Citizens United*, the constitutional right that was not exercised or burdened was free speech under the First Amendment. Professor Barnett also utilizes the First Amendment cases, although admittedly reaching them by a different route.

Consider how we now approach the liberties protected by the First Amendment—the rights of freedom of speech, press, and assembly. When it comes to these liberties we allow them to be reasonably regulated by so-called time, place, and manner regulations Therefore, the reasonable regulation of these liberties is constitutionally permissible, provided that the government is not improperly placing an undue burden on the exercise of liberty or discriminating against one viewpoint in favor of another.

. . . .

Just as the government now prohibits wrongful speech and regulates rightful speech, I propose simply that we take that same approach across the board with all liberties. No longer would we protect only those liberties that are somehow “fundamental.”¹⁰⁴

Professor Barnett's language of “not improperly placing undue burden on the exercise of liberty” may remind one of the “undue burden” language used in

101. *Id.* at 44–45 (footnote omitted).

102. *See supra* notes 48–59 and accompanying text.

103. *See supra* notes 60–92 and accompanying text.

104. *Presumption of Liberty*, *supra* note 63, at 44.

Casey, when the Supreme Court revisited *Roe v. Wade* some twenty years later.

In fact, there are pending challenges to Obamacare based on arguments under current constitutional interpretations. Such challenges would be that fundamental rights have suffered an undue burden so that the government must show a compelling interest for the legislation (as stated in Justice Goldberg’s concurring opinion in *Griswold*).¹⁰⁵ For example, *Liberty University v. Geithner*¹⁰⁶ has made an argument that the fundamental right of freedom of religion under the First Amendment is burdened by Obamacare.

Professor Barnett has also attempted to use what he calls “anti-commandeering” to similarly preserve liberty.¹⁰⁷ Professor Barnett has reasoned to the anti-commandeering principle from Justice Scalia’s opinion in *Printz v. United States*.¹⁰⁸ “In *Printz v. United States*, the Supreme Court held that this mandate [requiring local sheriffs to run background checks on the purchasers of firearms] on state executives unconstitutionally violated the Tenth Amendment and the sovereignty of state governments.”¹⁰⁹ Professor Barnett also compared that commandeering of the state governments to the commandeering of individuals. “Just as commandeering state governments is an unconstitutional infringement of state sovereignty, commandeering the people violates the even more fundamental principle of popular sovereignty.”¹¹⁰

Finally, Professor Barnett closes his anti-commandeering argument by stating that to allow such commandeering would turn citizens into subjects.

The anti-commandeering principle precisely identifies why the individual mandate has so riled the American people. Ordinarily, persons are responsible for their failure to act—or omissions—when they have a preexisting duty to act. A mandate to act, therefore, presupposes the existence of a duty. But unlike the type of preexisting fundamental duties that have

105. See *supra* notes 72–80 and accompanying text.

106. See 753 F. Supp. 2d 611 (W.D. Va. 2010), *vacated*, No. 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011); see also Mark Sherman, *Supreme Court Orders Federal Appeals Court to Consider Health Care Challenge*, HUFFINGTON POST (Nov. 26, 2012, 1:04 PM), http://www.huffingtonpost.com/2012/11/26/supreme-court-health-care_n_2191463.html (discussing *Liberty*).

107. See generally Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581 (2010) [hereinafter *Commandeering the People*] (arguing that the anti-commandeering doctrine ought to extend not only to states but also to individuals); see also Joondeph, *supra* note 68, at 617.

108. See 521 U.S. 898, 904–05 (1997) (commandeering of local law enforcement officers); see also *New York v. United States*, 505 U.S. 144, 161 (1992) (commandeering of state legislature).

109. Joondeph, *supra* note 68, at 616 (article of Professor Randy Barnett) (footnotes omitted).

110. *Id.* at 617.

traditionally been recognized, such as the duties to defend one's country and provide the revenue needed to maintain its governance, there is no fundamental duty of citizenship to enter into contracts with private parties when Congress deems it convenient to the regulation of interstate commerce. Upholding such mandates would truly turn citizens into subjects.¹¹¹

One may wonder why it has come to this seemingly difficult task to protect liberty in a society whose foundational documents, the Declaration of Independence and the Constitution, found liberty to be so essential.¹¹² After all, at the risk of seeming facetious, noted American patriot Patrick Henry did not proclaim, "Give me health insurance or give me death!"¹¹³

The next section of this paper considers the current dilemma of protecting liberty by seeking to understand, at least to some degree, the constitutional philosophy of the president whose name is immortalized in Obamacare, the term utilized to refer to the law under scrutiny in *NFIB*.

V. THE CONSTITUTION AS A CHARTER OF NEGATIVE LIBERTIES

Perhaps it would be instructive in seeking to further the protection of liberty under constitutional doctrine to examine at least two currently prevalent doctrines of constitutionalism. It is likely that many Americans first heard of negative constitutionalism and the U.S. Constitution described as a "charter of negative liberties" when a 2001 radio interview with Barack Obama was unearthed during the 2008 presidential campaign. Back on January 18, 2001, State Senator Barack Obama appeared on WBEZ-FM's show "Odyssey" to discuss the topic "The Courts and Civil Rights." When State Senator Obama described the U.S. Constitution as a "charter of negative liberties," he was criticizing the Warren Court, usually regarded as quite liberal, for not being radical enough.

He stated:

But . . . the Supreme Court never ventured into the issues of redistribution of wealth and sort of more basic issues of political and economic justice in this society. And to that extent, as

111. *Commandeering the People*, *supra* note 107, at 637.

112. *See supra* notes 64–65 and accompanying text.

113. *See* WILLIAM WIRT, SKETCHES OF THE LIFE AND CHARACTER OF PATRICK HENRY 94 (1817) (quoting Patrick Henry, Speech at the House of Burgesses at St. John's Church in Richmond, Virginia (Mar. 23, 1775) (transcript available at http://en.wikiquote.org/wiki/Patrick_Henry)). The crowd, by Wirt's account, jumped up and shouted "To Arms! To Arms!" in response to Patrick Henry's famous line, "Give me liberty, or give me death!" The author of this article was reminded of the unwavering belief in liberty of many of the Founders while in a weekend Revolutionary War re-enactment with his then ten-year-old son at a school outing at Riley's Farm in Oak Glen, California. The family patriarch delivered Henry's speech. Visit Riley's Farm online at www.rileysfarm.com.

radical as I think people tried to characterize the Warren Court, it wasn't that radical. It didn't break free from the essential constraints that were placed by the founding fathers in the Constitution, at least as it's been interpreted, and [the] Warren Court interpreted in the same way that, generally, the Constitution is a charter of negative liberties, says what the states can't do to you, says what the federal government can't do to you, but it doesn't say what the federal government or the state government must do on your behalf. And that hasn't shifted.¹¹⁴

Justice Elena Kagan, one of President Barack Obama's appointments to the Supreme Court, wrote perhaps more directly than President Obama, as a Supreme Court law clerk for Justice Thurgood Marshall in 1987 on the theories of negative and positive constitutionalism: "I only worry that a majority of this court will agree with [Seventh Circuit] Judge Posner and that 'the Constitution is a charter of negative rather than positive liberties' and will thereby preclude the approach of the Third and Fourth circuits."¹¹⁵

Justice Kagan wrote her memo to Justice Marshall in *DeShaney v. Winnebago County*,¹¹⁶ a case that may be an example of the old legal saying that hard cases make bad law. In that case:

The court's 6-3 ruling immunized state welfare officials who over the course of a year failed to act when repeatedly alerted to an alcoholic father's violent abuse of his four-year-old son. The continued beatings ultimately put the boy in a coma, destroyed half his brain and left him institutionalized for life, court records say.¹¹⁷

Judge Richard Posner of the Seventh Circuit had held that state officials had no duty to protect the son, Joshua DeShaney, and U.S. Supreme Court Chief Justice William Rehnquist, writing for the majority, said the Due Process Clause of the Fourteenth Amendment was intended "to protect the people from the State, not to ensure that the State protected them from each other."¹¹⁸

114. Jake Tapper, *McCain to Attack Obama for Public Radio Comments from 2001*, ABC NEWS (Oct. 27, 2008, 10:16 AM), <http://abcnews.go.com/blogs/politics/2008/10/McCain-to-attac/>.

115. Jess Bravin, *Kagan Backed Broad Interpretation of 14th Amendment*, WALL ST. J. (May 16, 2010, 9:44 PM), <http://online.wsj.com/article/SB10001424052748703745904575248620872377444.html>.

116. 489 U.S. 189 (1989).

117. Bravin, *supra* note 115.

118. *DeShaney*, 489 U.S. at 196.

A recent Wall Street Journal article reporting on *DeShaney* and Kagan, however, has cited a discussion of legal scholars concerning the revitalization of the Privileges or Immunities Clause of the Fourteenth Amendment:

Some liberals have argued that it would be wiser to ground claims like *DeShaney*'s in another 14th Amendment clause, which bars states from abridging "the privileges or immunities of citizens of the United States." Since the late 19th century, the Supreme Court has given little significance to the Privileges or Immunities Clause. But scholars across the political spectrum believe that reading is mistaken, and say its diminished status has resulted in limiting rights the framers intended citizens to exercise.¹¹⁹

The article further quotes David Gans of the liberal Constitution Accountability Center as stating that the "right of protection" that the court rejected in *DeShaney* was "unquestionably one of the Privileges or Immunities that the framers of the [Fourteenth] Amendment considered a fundamental right of all citizens."¹²⁰ Professor Randy Barnett, presumably on the end of the political spectrum opposite Gans, would likely also argue for using the Privileges or Immunities Clause to protect liberty.¹²¹

Thus, the *DeShaney* case has legal scholars, probably at the outer edges of each end of the political spectrum, reaching for protection of the plaintiff but in potentially different ways, unless the two sides converge on the Privileges or Immunities Clause. Certainly, President Obama's criticism of reading the U.S. Constitution as a charter of negative liberties is likely far removed from the views of James Madison, Justice Scalia, Justice Goldberg, and Professor Barnett concerning the federal government as a government of enumerated powers.¹²² Even a positive constitutionalist like Sotirios A. Barber, in a response to Randy E. Barnett, has identified James Madison as likely espousing negative constitutionalism.¹²³ Presumably, President Obama's constitutional view would be closer to Justice Kagan's.

Given that President Obama gave the nation the individual mandate through medical legislation dubbed "Obamacare," it might be instructive to inquire into his own constitutional theories that might underlie such legislation. In fact, President Obama had spent twelve years at the University of Chicago Law School as a lecturer teaching three classes in constitutional law which included due process and equal protection, voting

119. Bravin, *supra* note 115.

120. *Id.*

121. *See supra* note 85 and accompanying text.

122. *See supra* notes 64–80 and accompanying text.

123. Sotirios A. Barber, *Fallacies of Negative Constitutionalism*, 75 *FORDHAM L. REV.* 651, 666 (2006).

rights, and racism and the law.¹²⁴ But, as has been observed of President Obama, “his views [could not] be gleaned from scholarship; Mr. Obama has never published any.”¹²⁵ On the other hand, President Obama did use a fellowship that the same law school gave him to write *Dreams from My Father*.¹²⁶ Again, perhaps, examination of that record might help to illuminate President Obama’s constitutional theories and explain the country’s journey to the point where defense of liberties seems to have become more and more difficult.

Dinesh D’Souza¹²⁷ has apparently attempted just that task in recent Forbes Magazine article *How Obama Thinks*,¹²⁸ a feature film called *2016: Obama’s America*,¹²⁹ and a book titled *The Roots of Obama’s Rage*.¹³⁰ Although Mr. D’Souza, an academic, has reached out to and through the popular media, his may be one of the only attempts to date to understand the political, and thus constitutional, philosophy that President Obama apparently received from his father.

Mr. D’Souza’s thesis is that President Obama’s worldview is one that is foreign to most Americans.¹³¹ “To most Americans,” he states, “anti-colonialism is an unfamiliar idea, so let me explain it.”¹³² Both Justice Scalia dissenting in *NFIB* and a Wall Street Journal article commenting on that case utilized the often cited American historical narrative framework that this country was born out of an anti-tax revolution.¹³³ Justice Scalia wrote:

Taxes have never been popular, see, *e.g.*, Stamp Act of 1765, and in part for that reason, the Constitution requires tax increases to originate in the House of Representatives We have no doubt that Congress knew precisely what it was doing when it

124. Jodi Kantor, *Teaching Law, Testing Ideas, Obama Stood Slightly Apart*, N.Y. TIMES, July 30, 2008, at A1.

125. *Id.*

126. *Id.*

127. Dinesh D’Souza is President of King’s College and a Fellow at times at the Hoover Institute at Stanford University and the American Enterprise Institute.

128. Dinesh D’Souza, *How Obama Thinks*, FORBES MAG. (Sept. 9, 2010, 5:40 PM), <http://www.forbes.com/forbes/2010/0927/politics-socialism-capitalism-private-enterprises-obama-business-problem.html> [hereinafter *How Obama Thinks*].

129. 2016: OBAMA’S AMERICA (OAF LLC 2012).

130. DINESH D’SOUZA, *THE ROOTS OF OBAMA’S RAGE* (2010).

131. *How Obama Thinks*, *supra* note 128.

132. *Id.* A native of Mumbai, India, D’Souza knows a great deal about anticolonialism. He states, “I am part of the first Indian generation to be born after my country’s independence from the British. Anticolonialism was the rallying cry of Third World politics for much of the second half of the 20th century.” *Id.*

133. See Joe Rago, *A Vast New Taxing Power*, WALL ST. J. (July 2, 2012, 8:12 PM), <http://online.wsj.com/articles/SB10001424052702303561504577496603068605864.html> [hereinafter *Vast New Taxing Power*].

rejected an earlier version of this legislation that imposed a tax instead of a requirement-with-penalty Imposing a tax through judicial legislation inverts the constitutional scheme, and places the power to tax in the branch of government least accountable to the citizenry.¹³⁴

Similarly, the Wall Street Journal, commenting upon the opinion, wrote as follows:

America has its origins in a rebellion against arbitrary and pernicious taxation and the Framers wanted to make it extremely difficult to impose or raise direct taxes. These can easily morph into plenary police powers, the regulation of private behavior and conduct that the Constitution vests in the states. For this reason, while the taxing power in addition to raising revenue can achieve regulatory results, *those regulatory results must be constitutional themselves.*¹³⁵

Apparently, Mr. D’Souza believes that President Obama’s formative experience regarding governmental power was quite different. Mr. D’Souza points out that President Obama spent his first seventeen years off the American mainland, in Hawaii, Indonesia, and Pakistan (with visits to Africa), that he has denied that he believes in American exceptionalism, and that he wrote the aforementioned book, *Dreams from My Father*.¹³⁶

Of President Obama’s father, Barack Obama, Sr., Mr. D’Souza writes:

He was a Luo tribesman who grew up in Kenya and studied at Harvard. He was a polygamist He was also a regular drunk driver . . . causing his own legs to be amputated due to injury In 1982 he got drunk at a bar in Nairobi and drove into a tree, killing himself.¹³⁷

However, Mr. D’Souza also says, “Obama Sr. was an economist, and in 1965 he published an important article in the *East Africa Journal* called ‘Problems Facing Our Socialism.’”¹³⁸ Mr. D’Souza explains, “Obama Sr. wasn’t a doctrinaire socialist; rather, he saw state appropriation of wealth as a

134. *NFIB*, 132 S. Ct. at 2655 (Scalia, J., dissenting).

135. *Vast New Taxing Power*, *supra* note 133.

136. *How Obama Thinks*, *supra* note 128 (information derived from BARACK OBAMA, *DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE* (2d ed. 2004)).

137. *Id.*

138. *Id.*

necessary means to achieve the anticolonial objective of taking resources away from the foreign looters and restoring them to the people of Africa.”¹³⁹

On taxes, the subject of this paper, Mr. D’Souza wrote the following of President Obama’s father:

The senior Obama proposed that the state confiscate private land and raise taxes with no upper limit. In fact, he insisted that “theoretically, there is nothing that can stop the government from taxing 100% of income so long as the people get benefits from the government commensurate with their income which is taxed.”¹⁴⁰

Mr. D’Souza continues in his analysis of Mr. Obama’s political and cultural background:

Today’s neocolonial leader is not Europe but America. As the late Palestinian scholar Edward Said—who was one of Obama’s teachers at Columbia University—wrote in *Culture and Imperialism*, “The United States has replaced the earlier great empires and is the dominant outside force.”

....

It may seem incredible to suggest that the anticolonial ideology of Barack Obama Sr. is espoused by his son, the President of the United States.

....

Colonialism today is a dead issue. No one cares about it except the man in the White House. He is the last anticolonial. Emerging market economies such as China, India, Chile and Indonesia have solved the problem of backwardness
 . . . [O]ur President is trapped in his father’s time machine
 The invisible father provides inspiration and the son dutifully gets the job done. America today is governed by a ghost.¹⁴¹

139. *Id.*

140. *Id.* (quoting Barak H. Obama, *Problems Facing Our Socialism*, E. AFR. J. 26, 31 (July 1965)).

141. *Id.*

Even allowing for some political hyperbole in Mr. D'Souza's assessment, he does offer several examples of the President's "anticolonial ideology." Specifically, Mr. D'Souza cites the President's: (1) support for oil drilling off the coast of Brazil but not in America; (2) reduction of America's carbon consumption; subsidizing energy production in the developing world; (3) refusal to nationalize investment banks and the health sector but instead bringing them under the government's leash (primarily by refusing bail out paybacks to financial institutions and by imposing Obamacare); (4) having the rich pay close to fifty percent or more of their income in overall taxes; (5) failing to object to Britain's release of Lockerbie bomber Abdel Baset al-Megrahi to his home country; and (6) NASA's role as a public relations program outreach to Muslim countries.¹⁴² Of all the analysis, Mr. D'Souza's observations about President Obama's relation to the health industry may be most informative and apropos to this analysis:

For Obama, health insurance companies on their own are oppressive racketeers, but once they submitted to federal oversight he was happy to do business with them. He even promised them expanded business as a result of his law forcing every American to buy health insurance.¹⁴³

This statement may well explain the President's political outlook on the constitutionality of the individual mandate. Mr. D'Souza's explanation of President Obama as an antineocolonialist appears to be in accord with the President's own criticism of the constitution as a charter of negative liberties. Certainly, a neocolonialist view would appear more in accord with the positive constitutionalism expressed by President Obama (and Justice Kagan).

VI. CONCLUSION

Whether or not Mr. D'Souza is correct about the source of President Obama's outlook on constitutional government in the United States, it seems clear that the view of President Obama, his former solicitor general, and now Supreme Court appointee, Elena Kagan, is quite different from that of James Madison, Justice Scalia, Justice Goldberg, academicians like Professor Barnett, and even the Warren Court. Sadly to this author and likely to the traditional American narrative, though, this view may not be so different from that of the American people. Presently, the re-election of President Obama continues the implementation of the individual mandate and may

142. *How Obama Thinks*, *supra* note 128.

143. *Id.*

signify that a majority of the American people, at least in some states and cities, prefer the offer of security to liberty. Founding father Benjamin Franklin has been credited with the quote, “They who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety.”¹⁴⁴ Similarly, to paraphrase former British Prime Minister Margaret Thatcher, described as a “soul mate” of President Ronald Reagan¹⁴⁵ and credited with musings that socialism is great until you run out of other people’s money,¹⁴⁶ the end of the United States could well be when we run out of liberty. Some have likely said of President Reagan that his mantra was lower taxes, less government, more personal freedom.¹⁴⁷ Recent constitutional tax cases such as *NFIB* and events like the re-election of

144. BENJAMIN FRANKLIN, MEMOIRS OF THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN 270 (1818).

145. See, e.g., *Archived Papers Reveal Thatcher Secrets*, BBC NEWS (Mar. 17, 2012, 1:06 AM), <http://www.bbc.co.uk/news/uk-17369334>.

146. Todd Ganos, *Why Socialism Doesn’t Work*, FORBES MAG. (Feb. 17, 2012, 9:40 AM), <http://www.forbes.com/sites/toddganos/2012/02/17/why-socialism-doesnt-work/>.

147. See, e.g., www.pbs.org/wgbh/americanexperience/features/general-article/Reagan-domestic/?flavor=mobile

President Obama certainly depart from Reagan's formula. To value liberty, likely a different course must be taken from the present one.¹⁴⁸

148. President Reagan gave hope to the then-younger generation—the “Baby Boomers”—that they could enjoy the same prosperity and freedom of their parents despite what has often been called the “economic malaise” of the Carter years. See Neil Munro, *Obama Echoes Carter's 'Malaise': U.S. Has 'Gotten a Little Soft'*, DAILY CALLER (Sept. 30, 2011), <http://news.yahoo.com/obama-echoes-carter-malaise-u-gotten-little-soft-135010839.html> (comparing a controversial Obama speech with Carter's “malaise speech”). For example, among his many quotable phrases, Reagan spoke of America as the “shining city on the hill” and his re-election slogan was “It's Morning Again in America.” See Ronald Reagan, Remarks Accepting the Presidential Nomination at the Republican National Convention (Aug. 23, 1984) (transcript available in the University of Texas archives) (“shining city on the hill”); *Top 10 Campaign Ads*, TIME MAG. (Sept. 22, 2008), http://www.time.com/time/specials/packages/article/0,28804,1842516_1842514_1842575,00.html (“It's Morning Again in America”); see also Philip Klein, *Reagan's 'Morning in America' vs. Obama's America*, WASH. EXAM'R (Oct. 19, 2012, 12:32 PM), <http://washingtonexaminer.com/reagans-morning-in-america-vs.-obamas-america/article/2511223>. President Obama campaigned famously in his first presidential campaign on the slogan of “Hope and Change.” But see Chad Stafko, *How's That Hope and Change Working Out for Obama Supporters?*, AM. THINKER (June 14, 2011), http://www.americanthinker.com/2011/06/how_s_that_hope_and_change_working_out_for_obama_supporters.html (discussing Obama's failure to live up to that slogan); Jim Kuhnenn, *Obama 2012 Reelection Campaign: 'Hope' and 'Change' Aren't Enough to Inspire Voters*, HUFFINGTON POST (June 15, 2011, 3:52 PM), http://www.huffingtonpost.com/2011/06/15/obama-2012-election-campaign_n_877258.html. Of his second campaign, President Obama said “[i]t's still about hope. It's still about change.” See *Obama: 2012 Campaign Still About 'Hope' and 'Change'*, FOX NEWS (May 6, 2012), <http://www.foxnews.com/politics/2012/05/06/obama-2012-campaign-still-about-hope-and-change/>. Apparently, the generation now younger than the “baby boomers” is embracing a different kind of hope. See *Exit Polls Anatomise Obama Win*, BBC NEWS (Nov. 7, 2012, 2:20 PM), <http://www.bbc.co.uk/news/world-us-canada-20240375>. “Millennials”—those born after 1980—were the only generation to indicate by more than 50% that “Government should do more to solve problems” in a survey by Pew Research Center. PEW RESEARCH CENTER, MILLENNIALS PORTRAIT OF GENERATION NEXT 63 (2010), <http://pewsocialtrends.org/files/2010/10/millennials-confident-connected-open-to-change.pdf>. Similarly, the Millennials indicate at barely 40% that “[w]hen Something Is Run by the Government, It Is Usually Inefficient and Wasteful” while the other generations surveyed (“Silent,” “Baby Boomer,” and “Generation X”) agree with the statement (62%, 66%, 55%). *Id.* at 71. The generations are categorized by Pew Research Center as Silent (born 1928–1945), Baby Boomer (born 1946–1964), Generation X (born 1965–1980), and Greatest Generation (born before 1928). *Id.* at 4. Concerning the “Greatest Generation,” the Pew Research Report states as follows: “*The Greatest Generation* (those born before 1928) saved the world when it was young, in the memorable phrase of Ronald Reagan. It's the generation that fought and won World War II.” *Id.* at 4. “We do not have enough respondents ages 83 and older in our 2010 survey to permit an analysis of the Greatest Generation Throughout much of this report, we have grouped these older respondents in with the Silent generation. However, Chapter 8 on politics and Chapter 9 on religion each draw on long-term trend data from other sources, permitting us in some instances in those chapters to present findings about the Greatest Generation.” *Id.* at n.4.