PLF Liberty Blog

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D.C. Obamacare appeal—semantics, implied powers, and why even Hamilton's on our side

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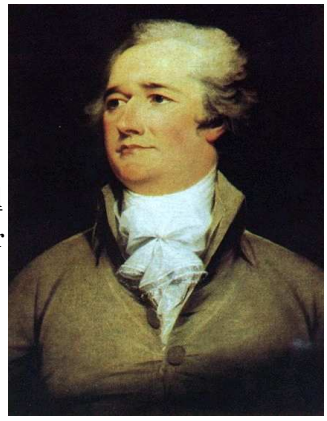

Today, Pacific Legal Foundation, along with six other pro-freedom groups, filed this brief in the D.C. Circuit Court of Appeals opposing the constitutionality of the Individual Mandate. (It's the third friend of the court brief we've filed in this litigation, after the Fourth and Eleventh Circuit cases that we blogged about here and here.) This is the case in which the trial court upheld the Individual Mandate, ruling that the federal government can control whatever "mental activity" has an ultimate economic effect—and can force people to act, not merely regulate their voluntary acts, because the difference between activity and inactivity is only "semantics."

Our brief focuses on the Constitution's Necessary and Proper Clause. That's the part of the Constitution that allows Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers"—those "foregoing powers" being the ones listed in Article I section 8 or other places in the Constitution.

The Necessary and Proper Clause has been a source of controversy since the Constitution was first written. Antifederalists called it the "sweeping clause" or "the elastic clause," and warned that it would allow Congress basically unlimited power. "Brutus," among the Constitution's most eloquent critics, worried that the clause was "very comprehensive," and

> meant...that the legislature of the United States are vested with the great and uncontroulable powers.... [T]hey may so exercise this power as entirely to annihilate all the state governments, and reduce this country to one single government. And if they may do it, it is pretty certain they will; for it will be found that the power retained by individual states, small as it is, will be a clog upon the wheels of the government of the United States; the latter therefore will be naturally inclined to remove it out of the way. Besides, it is a truth confirmed by the unerring experience of ages, that every man, and every body of men, invested with power, are ever disposed to increase it, and to acquire a superiority over every thing that stands in their way. This disposition, which is implanted in human nature, will operate in the federal legislature to lessen and ultimately to subvert the state authority, and having such advantages, will most certainly succeed, if the federal government succeeds at all.

But the Federalists countered that the federal government gave Congress only limited, enumerated powers, and that the Necessary and Proper Clause only gave it a limited flexibility as to the means of effectuating the powers listed. It would *not* allow the federal government to go beyond its limited authority. In *Federalist* 33, Alexander Hamilton provided two examples of laws that would not be authorized by the Necessary and Proper Clause:

> Suppose, by some forced constructions of its authority (which, indeed, cannot easily be imagined), the Federal legislature should attempt to vary the law of descent in any State, would it not be evident that, in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the State? Suppose, again, that upon the

> pretense of an interference with its revenues, it should undertake to abrogate a land tax imposed by the authority of a State; would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to this species of tax, which its Constitution plainly supposes to exist in the State governments?

In other words, Hamilton—who became the intellectual forefather of the implied powers doctrine that the Supreme Court adopted in *McCulloch*—found it *difficult to imagine* that the federal government would try to change or override state laws governing wills and inheritance. Any attempt to do so would be unconstitutional and would infringe on state authority. The federal government has no power to govern inheritance (even though inheritance has, through the action of supply and demand, some ultimate effect on the economy!) and therefore cannot attempt to do so under the Necessary and Proper Clause. Note that Hamilton regards it as a mere "pretense" for the federal government to excuse the expansion of its authority on the grounds that states "interfere" with federal power. Is it not equally a "pretense" to use aggregate economic effects of "mental activity" as a basis for allowing Washington bureaucrats to control that "mental activity," and to displace state autonomy on that pretext?

> If there ever should be a doubt on this head, [Hamilton continues] the credit of it will be entirely due to those reasoners who, in the imprudent zeal of their animosity to the plan of the convention, have labored to envelop it in a cloud calculated to obscure the plainest and simplest truths.

In other words, the only people who would fret about federal abuse of the Necessary and Proper Clause are those "imprudent" people who are just trying to obscure things.

Lawyers have a principle called *contra proferentem*, which says that a contract or other document written entirely by one party should be interpreted against that party—so that the person can't write something that's confusing and then benefit from that confusion. It's the same principle that applies when one person cuts the cake and the other person chooses which piece to eat. When we read the Constitution, we should employ the same *contra proferentem* principle. That's why we should pay attention to the Anti-federalists' concerns, and construe the Constitution in a way that minimizes their concerns.

If Hamilton, of all people, defended the Constitution by arguing that the Necessary and Proper Clause should not be subjected to "forced constructions" (or "enveloped in a cloud calculated to obscure the plainest and simplest truths"), then we should avoid reading that Clause expansively. It's time courts stopped allowing such doctrines as the "substantial effects" test or the "aggregation principle"—or the idea that the difference between activity and inactivity is a "semantic game"—to expand federal power in ways that even Alexander Hamilton regarded as unreasonable and unconstitutional.

Update: More at Cato's blog.

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