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'A Commandeering of the People'

One of America's leading libertarian legal scholars handicaps whether the Supreme Court will find ObamaCare's insurance mandate constitutional.

By JAMES TARANTO

Is ObamaCare constitutional? "If you ask any constitutional law professor whether Congress can do something, the answer is always yes," says Randy Barnett. But Mr. Barnett, who teaches legal theory at Georgetown, isn't just any law professor. A self-described "radical libertarian," he is the author of a 2004 book, "Restoring the Lost Constitution," that argues for a fundamentally new approach to jurisprudence.

Since the New Deal, Supreme Court justices have generally assumed a law is constitutional and overruled it only when it infringes on an individual right that is enumerated in the Constitution (free speech) or not (privacy). "If you're talking about the regulation of economic activity, the presumption of constitutionality is for all practical purposes irrebuttable," Mr. Barnett says.

Instead, Mr. Barnett would have the court adopt a "presumption of liberty," placing the burden on the government to show that a law has a clear basis in Congress's constitutional powers. "The easiest way to explain it is, it would basically apply to all liberty the same basic protection we now apply to speech," he says.

It's an attractive theory to those of us with libertarian sympathies—a group that seems to be growing in reaction to the Obama administration's unprecedented expansion of federal power. But Mr. Barnett, 58, readily admits there is virtually no chance the high court will embrace it during his lifetime. "On the Supreme Court now, probably only Clarence Thomas would be willing to question what the law professors call the post-New Deal settlement.'"

No one can accuse this theorist of being an ivory-tower intellectual lacking real-world experience. As a child, he was an avid fan of the 1960s TV series "The Defenders" and aspired to become a criminal lawyer. This he did, taking a job out of law school as a Chicago prosecutor. But he also had a scholarly side: "I realized that one day I would want to be a law professor, [a job] in which I could write about these things—not so much to tell people what I thought was just, but to figure out for myself what justice really is."

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"I became sort of pulled into the constitutional law world," he says, an area of study to which he was initially cool. "I was trained in law school to believe that all the good parts of the Constitution were gone. And if they're not going to respect the good parts, I'm not really all that concerned about the remaining parts."

One of those "good parts" is the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." In 1998, Judge Charles Breyer of

California's Northern District (younger brother of Justice Stephen Breyer) asked lawyers in a medical marijuana case to brief him on its Ninth Amendment implications. The defense lawyer, Robert Raich, came to Mr. Barnett, one of the few scholarly experts on the subject, for help.

In 2004, Mr. Barnett appeared for the first and only time before the Supreme Court, arguing the case of *Gonzales v. Raich* on behalf of Mr. Raich's then-wife, who had been busted by the Drug Enforcement Administration for growing marijuana for her personal medical consumption.

Zina Saunders

Randy Barnett

Did the federal government really have the power to do this? In *Wickard v. Filburn* (1942), the Supreme Court had held that it was constitutional to force a farmer to destroy "excess crops" rather than use them himself. But Mrs. Raich was not a commercial farmer. Nonetheless, in 2005, by a 6-3 vote, the court held that the federal government's authority under the Commerce Clause—which authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes"—"includes the power to prohibit the local cultivation and use of marijuana in compliance with California law."

Raich continued a jurisprudential trend, started during the New Deal and interrupted only by a couple of narrow decisions by the Rehnquist court, of construing Congress's power under the Commerce Clause very broadly. This is why ObamaCare proponents are so confident it will pass constitutional muster.

Mr. Barnett's own view of the Commerce Clause is extremely narrow. If he had his way, ObamaCare would be struck down on the ground that Congress has no authority to regulate the insurance business. When the Constitution was written, Mr. Barnett says, commerce was understood to mean "trade in things—goods. . . . The Commerce Clause was really put there, essentially, to create a free-trade zone for the United States," not to give Congress power over all economic activity. "Not only was insurance not thought to be a part of the original meaning; in fact, it was held by the Supreme Court for 100 years that it was not something within the commerce power to reach."

Today, however, Mr. Barnett acknowledges that is a losing argument. The court reversed itself in the 1944 case of *U.S. v. South-Eastern Underwriters,* holding that the Commerce Clause does authorize federal regulation of the insurance business.

So would "any constitutional law professor" be right to scoff at the case against ObamaCare? Not according to this law professor. "The challenges to ObamaCare are serious legal challenges within the existing doctrinal framework," Mr. Barnett says. "They are not an attempt to restore the lost Constitution."

That's why the "individual mandate"—the requirement that all Americans purchase medical insurance or pay a fine—has been the focus of the lawsuits by state attorneys general seeking to overturn ObamaCare. (Mr. Barnett wrote a friend-of-the-court brief with the Cato Institute, a libertarian think tank, in support of the Virginia attorney general's lawsuit.)

Such a mandate is unprecedented: "This is the first time in American history that Congress has claimed to use its power over interstate commerce to mandate, or require, that every person enter into a commercial relationship with a private company," Mr. Barnett notes. "As a judicial matter, it's also unprecedented. There's never been a court case which said Congress can do this." That doesn't establish that Congress *can't* do it, but the high court could reach that conclusion without undoing existing law.

Last weekend the New York Times reported that administration officials were preparing to argue in court that the individual mandate—or, more precisely, the penalty for failing to comply with it—is an excise tax. This is an awkward political position, since the president himself insisted in an interview with ABC's George Stephanopoulos last September that it was nothing of the sort.

It's an awkward legal argument, too, since there is no language in the ObamaCare law to support it: "The bill doesn't say excise tax," Mr. Barnett says. "The bill does have excise taxes in it. Tanning salons are subject to an excise tax. Medical devices are subject to an excise tax. . . . This bill has an entire section . . . in which they're trying to identify all the revenue-raising aspects of the bill for purposes of scoring its costs. They failed to include the penalty. . . . They didn't even think of it as a source of revenue."

Mr. Barnett speculates that this shoddy legislative work resulted from the political timing—from the way in which Democrats pushed ObamaCare through over public opposition. He and others first made the argument that the individual mandate was unprecedented in December, the same month the Senate approved ObamaCare on a 60-40 party-line vote.

"Then Scott Brown gets elected, and there's no option to pass a new bill that highlights the tax power. They're stuck with the December Senate bill that highlights the Commerce Clause power. So what do they do? The day the House votes the Senate bill up, the Joint Committee on Taxation staff issues a report describing the individual mandate as an excise tax. . . . So now, the tax-power question is: If Congress *could* have enacted it as an excise tax, is that going to satisfy the court?"

The premise of that question can't be taken for granted either: "Never has the tax power been used to mandate that everybody engage in an activity with a private company either. Just because you switch the claim of what you're doing, doesn't make it any less unprecedented."

Mr. Barnett doesn't think the justices will buy the tax-power argument. If they did, "from then on in, Congress could prohibit or mandate anything, as long as they limit themselves to a fine. Anything. It would be unlimited power in Congress."

Instead, he thinks, the argument will be over the Necessary and Proper Clause, which authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The strongest argument for ObamaCare's constitutionality, in Mr. Barnett's view, begins with the premise—true as a matter of settled law—that Congress has the power to regulate insurance. Among the regulations Congress has seen fit to enact is one barring insurance companies from refusing coverage to people with pre-existing conditions. This regulation cannot work without keeping healthy people in the insurance pool.

"It's necessary under the loose, anything-goes criteria of necessary" that the court typically uses in deference

to Congress, Mr. Barnett says. "But it's also necessary under a tighter 'Is it really necessary?' [standard], and the answer is, 'Yeah.' And did Congress really do it for that reason? The answer is again, 'Yeah.' So it kind of satisfies even the kind of scrutiny I would like to see attached to it."

But is it proper? Again, because such an individual mandate is unprecedented, no case law exists that speaks directly to the question. Mr. Barnett's counter-argument necessarily ventures into uncharted legal territory.

He notes that twice in the 1990s, the high court struck down federal mandates against state governments—one requiring legislatures to pass laws dealing with the transport of nuclear waste, and one mandating that police conduct background checks on gun buyers—saying they amounted to unconstitutional "commandeering" under the 10th Amendment. That amendment is usually thought of as protecting states' rights, but note the final four words: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

"What is the individual mandate?" Mr. Barnett says. "I'll tell you what the individual mandate, in reality, is. It is a commandeering of the people. . . . Now, is there a rule of law preventing that? No. Why isn't there a rule of law preventing that? Because it's never been done before. What's bothering people about the mandate? This fact. It's intuitive to them. People don't even know how to explain it, but there's something different about this, because it's a commandeering of the people as a whole. . . . We commandeer people to serve in the military, to serve on juries, and to file a return and pay their taxes. That's all we commandeer the people to do. This is a new kind of commandeering, and it's offensive to a lot of people."

Will this argument prevail? "If I want to bet actual money, I'll always bet the court upholds anything Congress does," Mr. Barnett says.

Therein lies the danger of constitutional litigation: If you lose, it is a lasting defeat for the principle on behalf of which you are arguing—something Mr. Barnett knows all too well from his experience in the *Raich* case. "My opening line in the Supreme Court . . . was: If this court upholds this extension of federal power, *Gonzales v. Raich* will replace *Wickard v. Filburn* as the outermost extension of federal power ever recognized by this court," he says. "That's kind of what happened, and I'm responsible for that. You know how badly that makes me feel?"

I console him by pointing out that if the court upholds ObamaCare, he will no longer have that unwanted distinction. He responds by laughing, heartily if somewhat ruefully.

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