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Challenges to ObamaCare Likely Headed to Supreme Court

In Federalist #84, Alexander Hamilton asked, "For why declare that things shall not be done, which there is no power to do?" To Hamilton (and his co-authors, John Jay and James Madison) such a question made sense. How could the national government exercise authority not granted to it by the newly proposed Constitution? It could not, they insisted.

Hamilton, Madison, and Jay never met the justices of the modern Supreme Court. These bench-bound legislators have for years, brick by brick, removed the walls around the innumerable panoply of natural rights once held unalienable. Surrounding the pile of rubble where our liberties once stood, the Supreme Court has found penumbras and emanations wherein colonies of unconstitutional expansions of limited and delegated powers take root. The Commerce Clause, the General Welfare Clause, and the Necessary and Proper Clauses have all grown into massive weeds, choking the life from the Constitution.

It isn't that the Founders ignored the potential for such usurpations. In fact, some of the men who helped form our government were adamant that the Constitution contains auxiliary precautions against this tendency toward totalitarianism that tainted all governments of antiquity. Many members of this bloc, known to history as Anti-Federalists, were influential and their assent was key to the ratification of the Constitution by the state conventions. As a result of the pressure exerted by these opinion molders, the First Congress appended the Bill of Rights to the end of the original Constitution. (See this article)

One of the two chief chains by which the Bill of Rights seeks to bind the central government is the Ninth Amendment. The text of the Ninth Amendment reads:

> *The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.*

Still concerned that an enumeration of rights could work to enlarge the powers delegated by the Constitution, James Madison proposed the following alteration to the proposal that became the Ninth Amendment.

> *The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to*

> *enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.*

In support of his position, Madison delivered the following speech in the House of Representatives during the debate on the various measures offered for inclusion in the Bill of Rights:

> It has been said, by way of objection to a bill of rights…that in the Federal Government they are unnecessary, because the powers are enumerated, and it follows, that all that are not granted by the constitution are retained; that the constitution is a bill of powers, the great residuum being the rights of the people; and, therefore, a bill of rights cannot be so necessary as if the residuum was thrown into the hands of the Government. I admit that these arguments are not entirely without foundation, but they are not as conclusive to the extent it has been proposed. It is true the powers of the general government are circumscribed; they are directed to particular objects; but even if government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse.

Perhaps the most egregious abuse of the limited powers of government is the so-called individual mandate of the ObamaCare health care legislation. Under this law, every American must purchase a qualifying insurance by 2014 or be fined an amount equal to 2.5 percent of his income.

This mandate is the first time Congress has dared take the (even for them) radical step of forcing all Americans, regardless of personal preference, to purchase a commodity or participate in what is inarguably a personal activity. Predictably, this jurisprudential neologism is being challenged in several federal lawsuits. Sadly, though equally predictably, these challenges have been heretofore unsuccessful.

However, the latest legal decision, handed down in a complaint filed in federal court in Virginia, was somewhat more favorable to those who oppose this historic enlargement of the Congressional power to regulate commerce. As ably chronicled in this piece, U.S. District Court Judge Henry Hudson held that the individual mandate of ObamaCare exceeds the Commerce Clause powers vested in the Congress under Article I).

Given the split in the decisions of the lower courts, it is likely that one or more of these lawsuits challenging ObamaCare will wend its way to the Supreme Court. That prediction chills the blood of constitutionalists as the men and women who sit on the bench of the highest court have demonstrated a decades-long reluctance to buttress the sovereignty of states in the face of the Congressional Commerce Clause wrecking ball. In fact, more often than not, the decisions of the Supreme Court give weight to the actions of a Congress that is determined to disregard all limits on its legislative authority.

In decision after decision, the Supreme Court has colored nearly every conceivable activity, public and private, with the brush of commerce and therefore within the prerogative of Congress regulatory power. There are in fact few things that can be bought, sold, or grown in a backyard garden that remain outside of the unbounded bailiwick of legislative sway.

Advocates of the perpetuation of the Constitution and the enumerated powers granted thereby to the central government must pay heed to the progress of the various lawsuits seeking the overturn of ObamaCare and the individual mandate set forth therein. If the Supreme Court validates the requirements of this law, then there will be effectively no limits on the power of Congress to compel citizens to participate in any activity or purchase any commodity that it deems to be a legal expression of its Commerce Clause authority. A corollary to this compulsion will be the punishment of all those who

resist it.

Indeed, unless we begin the tireless and informed defense of the liberties won at the price of the lives, fortunes, and sacred honor of our forefathers, our children and grandchildren will uncover the tattered remains of the Ninth and Tenth Amendments buried deeply under the rubble and scree of what was once the mighty and impregnable Constitution of our Republic.

Photo: This 2010 handout photo provided by U.S. District Judge Henry Hudson, who declared a key provision of the Obama administration's health care law unconstitutional: AP Images