

Villanova University Charles Widger School of Law

From the Selected Works of Patrick McKinley Brennan

2011

The Individual Mandate, Sovereignty, and the Ends of Good Government: A Reply to Professor Randy Barnett

Patrick McKinley Brennan



Available at: https://works.bepress.com/patrick_brennan/69/

ARTICLE

THE INDIVIDUAL MANDATE, SOVEREIGNTY, AND THE ENDS OF GOOD GOVERNMENT: A REPLY TO PROFESSOR RANDY BARNETT

PATRICK MCKINLEY BRENNAN[†]

INTRODUCTION	1623
I. SETTING THE CONSTITUTIONAL DOCTRINAL CONTEXT	1625
II. MULTIPLYING SOVEREIGNS	1631
III. MAKING SOME SENSE OF SOVEREIGNTY.....	1637
IV. TRANSFORMING THE POLITICO-LEGAL CULTURE AWAY FROM COMPETING “SOVEREIGNS”	1641
V. QUESTIONS MORE FUNDAMENTAL THAN ASSERTIONS OF “SOVEREIGNTY”	1645

INTRODUCTION

People who are politically “conservative” or “libertarian” in the way those terms are often deployed in contemporary American public discourse almost universally regard the Patient Protection and Affordable Care Act (PPACA)¹ as objectionable and, in a related but distinct vein, unconstitutional. The favorite focus of such conservative and libertarian protest is the Act’s so-called individual mandate—the requirement that individuals buy health insurance from a private mar-

[†] Associate Dean for Academic Affairs, Professor of Law, and John F. Scarpa Chair, Villanova University School of Law. I am grateful to the editors of the *University of Pennsylvania Law Review* for their invitation to participate in their Symposium, “The New American Health Care System: Reform, Revolution, or Missed Opportunity,” for their warm hospitality on the occasion, and for their fine editing. I am also grateful to Professors Ted Ruger and Mark Hall for their probing but encouraging questions during and after the Symposium. Ethan Townsend and Emily Rasmussen provided helpful research assistance.

¹ Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified as amended in scattered sections of 21, 25, 26, 29, and 42 U.S.C.).

ket.² As of the time of writing, federal district courts in Florida and Virginia have held the Act unconstitutional on account of the individual mandate.³ In each case Republican presidents had appointed the district judge.⁴ The two district judges that have upheld the Act against constitutional challenge⁵ were appointed by Democratic presidents.⁶ Regardless of whether one approaches the issue from the right, the left, or the middle, however, the individual mandate merits a hard look: a statutory requirement that an individual spend his or her money on health insurance unsettles many entrenched American moral, political, and legal expectations. Whether this requirement does so for good or for ill remains to be seen.

The conservative and libertarian objections to the individual mandate implicate some of the deepest and most contested questions concerning our Constitution, constitutionalism in general, and the relation of positive law—including constitutional law—to the ends of good government. It is no exaggeration to say that it even implicates questions about who we are. Professor Randy Barnett has recently argued that the mandate raises questions about the sovereignty of “We the People.”⁷ Specifically, Barnett contends that the mandate is unconstitutional because it violates the people’s sovereignty by “commandeering” them into buying health insurance.⁸ Why, one must therefore ask, is it wrong for a government to commandeer its own people?

The *Oxford English Dictionary* (*OED*) first defines commandeer as “to command or force into military service,”⁹ which is not something the Act assays. The *OED* further defines commandeer as “to take arbitrary possession of.”¹⁰ But who can possibly contend that the individual mandate, whatever its perceived merits or demerits, is an “arbitrary” act by Congress? It was instead deeply deliberate. Perhaps Barnett’s

² PPACA § 1501, 42 U.S.C.A § 18091 (West. Supp. 1B 2010).

³ Florida *ex rel.* Bondi v. U.S. Dep’t of Health & Human Servs., No. 10-0091, 2011 WL 285683, at *33 (N.D. Fla. Jan. 31, 2011); Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 782 (E.D. Va. 2010).

⁴ See Kevin Sack, *Federal Judge Rules That Health Law Violates Constitution*, N.Y. TIMES, Feb. 1, 2011, at A1.

⁵ Liberty Univ. v. Geithner, No. 10-0015, 2010 WL 4860299, at *11 (W.D. Va. Nov. 30, 2010); Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882, 891-95 (E.D. Mich. 2010).

⁶ See Sack, *supra* note 4.

⁷ U.S. CONST. pmbl.

⁸ Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 586-87 (2011).

⁹ 3 THE OXFORD ENGLISH DICTIONARY 542 (2d ed. 1989).

¹⁰ *Id.*

objection is better phrased as the government *commanding* citizens to take this particular action? Is it not, however, part of the essential function of government to command people on certain matters?

In what follows, I will suggest that Barnett's position depends upon a reading of our moral, political, and legal traditions of understanding that is both debatable and, in fact, mistaken. I will suggest, moreover, that as we gradually make and remake American politico-legal culture, as we necessarily do from one season to the next, we would do best to acknowledge and live within a creative tension regarding the work required of the civil ruling authority. This paradigm requires, in turn, foregoing the cheap fictions of sovereignty that, alas, stud contemporary and historical Supreme Court jurisprudence.

Why a "creative tension?" On the one hand, we cannot reasonably assume that the government that governs least is best; government can deliver some important human goods more efficiently, and there are still other goods that government alone can provide. On the other hand, we cannot reasonably presume that government can solve all problems; there are some human goods that individuals or private groups can better or uniquely achieve. The nature and extent of government action properly vary across time and circumstance, and thus, so do the very forms of government itself. Always, however, determining what role government should play in particular times and places precludes absolutism—the absolutism of imagined popular, individual, or state "sovereignty." This determination also precludes the stealth absolutism of some forms of "originalism" in constitutional interpretation.

I. SETTING THE CONSTITUTIONAL DOCTRINAL CONTEXT

The individual mandate invites constitutional scrutiny on any number of grounds, but the focus here will be its constitutional status vis-à-vis the Commerce Clause in conjunction with the Necessary and Proper Clause. The focus, more specifically, will be its status under the Commerce Clause as currently construed.¹¹ As such—with a possible exception to be noted below—the mandate must be sustainable, if at all, as a regulation of economic activity that works a "substantial effect" on interstate commerce. Under *United States v. Lopez*,¹² there are

three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels

¹¹ The mandate's status under any number of possible "originalist" or other interpretations will for now be put to the side.

¹² 514 U.S. 549 (1995).

of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.¹³

Plainly, if the individual mandate is sustainable under the Commerce Clause, it would be thanks to the third prong of the *Lopez* test—regulation of activity that has a “substantial effect” on interstate commerce.

Unlike the first two prongs of the *Lopez* test, the substantial effects test is not, according to Barnett, the product of an interpretation of the Commerce Clause.¹⁴ Rather, according to Barnett, the substantial effects test is correctly interpreted as an application of the Necessary and Proper Clause “in the context of the regulation of interstate commerce.”¹⁵ While others view the matter differently—believing that the Court has expanded the very meaning of “commerce” since the New Deal¹⁶—I will simply stipulate to Barnett's position here. The presence of the Necessary and Proper Clause as a link in the chain of argument provides Barnett with the textual predicate for his argument: the individual mandate is unconstitutional because it violates our sovereignty.

According to Barnett, a regulation of economic activity is constitutionally permissible provided that it is *both* necessary *and* proper.¹⁷ If one were to treat “necessary” and “proper” either as a unit or as an instance of pleonasm, what is necessary would also necessarily be proper. If each word is given its own meaning, however, what is necessary

¹³ *Id.* at 558-59 (internal citations omitted).

¹⁴ See Barnett, *supra* note 8, at 593 (“Therefore, all future cases applying this doctrine are not, strictly speaking, ‘Commerce Clause cases.’”).

¹⁵ See *id.* (citing J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 619); see also Michael Paulsen & Randy Barnett, *Debate on the Original Meaning of the Commerce, Spending, and Necessary and Proper Clauses*, (Barnett, Statement) (discussing the history and later expansion of the Necessary and Proper Clause) in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 262-73 (Steven Calabresi ed., 2007). Because the Clause was added to the Constitution by the Committee of Detail, without any previous discussion in the Constitutional Convention, it has proved especially difficult for originalists to settle on its meaning. Paulsen & Barnett, *supra*.

¹⁶ See Barnett, *supra* note 8, at 587-89 (describing the “law professors’ understanding” of the expanding Commerce Clause).

¹⁷ See *id.* at 590-93 (explaining how the Supreme Court expanded the Commerce Clause doctrine to include the Necessary and Proper Clause).

must also be proper to withstand a challenge to its constitutionality.¹⁸ Barnett makes a strong case for giving each word its own bite.¹⁹ In Barnett's view, there are right ways (proper) and wrong ways (improper) of regulating those activities that have a substantial effect on interstate commerce (necessary).²⁰ I will say more shortly about the demands of "proper," but first there is a further reason why this question that so rarely gets asked—What is "proper" regulation?—is apt.

That further reason involves a legal argument that seems to be picking up steam, though it still lacks a majority vote in recent Supreme Court jurisprudence. While conditionally conceding that the mandate must meet the "economic activity" test of *Lopez* and its progeny, some proponents of the mandate have also recently defended it on an alternative ground. Specifically, they contend that although not *itself* regulation of an economic act, the mandate is nonetheless constitutional because it is part of a larger regulatory scheme that is necessary and proper to the regulation of interstate commerce.²¹

These proponents have on their side not only dicta and implications of *Lopez* itself, but also language from the majority opinion of the more recent case *Gonzales v. Raich*.²² Additionally, Justice Scalia explicitly developed this theory in his concurring opinion in the same case: "As we implicitly acknowledged in *Lopez* . . . Congress's authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce."²³

Although the Court has yet to adopt Justice Scalia's theory that Congress's power to regulate is not confined to economic activity, one can reasonably question how the individual mandate would fare under Scalia's theory. If one concedes that the mandate itself is not a

¹⁸ See *id.* at 621 ("The Necessary and Proper Clause requires that laws be 'proper' as well.")

¹⁹ See *id.* at 621-26 (arguing that both "Necessary" and "Proper" should be afforded proper weight by judges); see also Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 271 (1993) ("We submit that the word 'proper' serves a critical, although previously largely unacknowledged, constitutional purpose . . .").

²⁰ See Barnett, *supra* note 8, at 624 (describing decisions in which Justices have distinguished between proper and improper means of regulation).

²¹ Cf. *id.* at 614-18 (acknowledging but rejecting the argument that the individual mandate is constitutional because it rests within a broader regulatory framework).

²² 545 U.S. 1 (2005). The Court found the Controlled Substances Act to be constitutional because it was part of a broad regulatory framework, unlike the statutes declared unconstitutional in *Lopez* and *United States v. Morrison*. *Id.* at 23-26.

²³ *Id.* at 36 (Scalia, J., concurring).

regulation of economic activity but is nonetheless “necessary” because it is essential to a broader scheme of regulation of interstate commerce, then there remains a further question to be asked: is it a “proper” means by which Congress may exercise its power over interstate commerce? According to the enduring test set out by Chief Justice Marshall in *McCulloch v. Maryland*: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”²⁴ As parsed by Barnett, this sentence establishes that a means is proper when it is, first, not prohibited and, second, otherwise consistent “with the letter and spirit of the constitution.”²⁵

Accepting for present purposes this understanding of the requirements of what it means to be “proper,” is the individual mandate proper? Assuming it is not forbidden, does it yet “consist with the letter and spirit of the constitution?”²⁶

In order to establish that it does *not* so consist, Barnett next invokes the recent line of “anti-commandeering” cases, which hold that Congress cannot “commandeer” the states in certain respects.²⁷ For the definitional reason mentioned at the outset, this line of cases seems to operate under a misnomer: military service is not involved, and there is no hint that the congressional commands at issue are arbitrary. Definitional concerns aside, it has long been established that the Supremacy Clause requires that state judges can be “commandeered” to follow federal law.²⁸ The principle that Congress cannot commandeer state legislative or executive actions²⁹ is of more recent vintage and of questionable strength.³⁰ There is also the question of

²⁴ 17 U.S. (4 Wheat.) 316, 421 (1819).

²⁵ Barnett, *supra* note 8, at 621.

²⁶ *Id.*

²⁷ *See id.* at 626-27 (“As we have seen, the anti-commandeering cases that limit the commerce power of Congress were ultimately grounded by the Supreme Court in the text of the Tenth Amendment.”).

²⁸ *See* *Testa v. Katt*, 330 U.S. 386, 392, 394 (1947) (holding that state courts cannot refuse to enforce federal law absent a “valid excuse”).

²⁹ *See* *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

³⁰ Saikrishna Prakash has defended the view that the Framers were hostile to national commandeering of state legislatures because they are “sovereign,” but open to national commandeering of state magistracy. Saikrishna Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1961-62 (1993). Evan Caminker maintains that the Framers expected Congress to be able to commandeer state legislatures as well as state executive and

whether the principle has more than an “attenuated” basis in the Tenth Amendment.³¹ Nevertheless, the relevant aspects of the anti-commandeering cases are familiar.

In the first such case, *New York v. United States*, the Court struck down Congress’s attempt to use its commerce power to mandate that any state that refused to enter into interstate compacts to dispose of nuclear waste must itself take title to the nuclear waste.³² In her opinion for the Court, Justice O’Connor explained that “the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”³³ Justice O’Connor characterized Congress’s instructions to the states as unconstitutional “commandeering”: “Congress may not simply ‘commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”³⁴ In *New York*, the Court held that “‘the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,’ an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.”³⁵

Five years later, Congress used its commerce power to mandate that local sheriffs run background checks on gun buyers. In *Printz v. United States*, the Supreme Court held that this, too, was an improper commandeering of state officials.³⁶ Writing for the Court, Justice Scalia recognized a principle of state sovereignty underlying several provisions of the Constitution,³⁷ but he relied primarily on the Tenth Amendment:

judicial officials. Evan Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1042-50 (1995).

³¹ See WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 444 (2010) (describing the “rule against federal ‘commandeering’ of state legislatures or executive officers” as “loosely associated with the Tenth Amendment”).

³² 505 U.S. 144, 149 (1992).

³³ *Id.* at 162.

³⁴ *Id.* at 161 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)).

³⁵ *Id.* at 176 (quoting *Hodel*, 452 U.S. at 288).

³⁶ 521 U.S. 898, 935 (1997).

³⁷ These provisions included:

the prohibition on any involuntary reduction or combination of a State’s territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the “Citizens” of the States; the amendment provision, Article V, which requires the votes of three-fourths of

Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[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."³⁸

In sum, wrote Justice Scalia, "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. . . . [S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty."³⁹

Responding to the argument that this statutory directive was "necessary and proper" for Congress to effectuate its commerce power, Justice Scalia memorably described the Necessary and Proper Clause as "the last, best hope of those who defend ultra vires congressional action."⁴⁰ He went on to assert that when a law enacted pursuant to the Commerce Clause violates the principle of state sovereignty reflected in the Tenth Amendment and other constitutional provisions, "it is not a 'La[w] . . . proper for carrying into Execution the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'"⁴¹

After marshalling additional evidence that the Court's constitutional prohibition on federal commandeering of states is rooted above all in the Tenth Amendment, Barnett makes his decisive next move, which is to note that the Tenth Amendment reserves undelegated powers not just to the states, but "to the states respectively, *or to the people*."⁴² He continues:

As Justice Thomas *has written*, the Tenth Amendment "avoids taking any position on the division of power between the state governments and the people of the States"—a position he reasserted just last term in his dissenting opinion in *Comstock* in which Justice Scalia joined. In this way, the text of the Tenth Amendment recognizes *popular* as well as state sovereignty.⁴³

the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4.

Id. at 919.

³⁸ *Id.* (quoting U.S. CONST. amend. X).

³⁹ *Id.* at 935.

⁴⁰ *Id.* at 923.

⁴¹ *Id.* at 923-24 (quoting THE FEDERALIST NO. 33, at 204 (Alexander Hamilton) (E.H. Scott ed., 1898)).

⁴² Barnett, *supra* note 8, at 627 (quoting U.S. CONST. amend. X (emphasis added)).

⁴³ *Id.* (footnotes omitted).

Barnett's syllogism is straightforward: just as Congress cannot commandeering states because they are sovereign, so too Congress cannot commandeer the people *because they are sovereign*. Therefore, the individual mandate, which surely "commandeers"—that is, commands—individuals by making them spend their money on health insurance, is unconstitutional.

Maybe, but maybe not. What could it possibly mean to assert that the Tenth Amendment—or anything else?—makes people or states "sovereign?" Saying it is so does not make it so. The question of whether the predication at issue is true cannot be answered in an historical or linguistic vacuum. Smooth though Barnett's syllogism is, there are reasons to question the validity of the premise that "We the People" are sovereign, and therefore not amenable to being commandeered. The argument from sovereignty proves too much, and thus proves nothing. It is a problem of too many "sovereigns," and therefore, of none at all.

II. MULTIPLYING SOVEREIGNS

The linguistic antecedent of the English word "sovereignty" traces to fourteenth-century French, where in common—and sometimes legal—parlance the word referred to any official endowed with superior force.⁴⁴ It did not mean freedom from *all* superior ruling authority and a *complete* self-determination and independence of judgment. Over time, however, "[s]uch was the idea, and the purpose for which the word Sovereignty was coined."⁴⁵ In the modern period, a claim to "sovereignty" veers, like a car out of alignment, in the direction of being a claim to complete independence and freedom from all interference with possible self-determination. In the contending historical claims of contest to emerge from the medieval social hierarchy of Christendom, to claim sovereignty was to deny all dependence or subordination. Those who today claim or assert sovereignty—whether they be nation-states, states, tribes, churches, or individuals—are essentially saying, "You're not the boss of me." Nations claiming sovereignty deny that other nations have the authority to rule them; states and tribal nations claiming sovereignty insist upon their own freedom of self-determination; and so forth.

Some claims to self-determination are commendable, indeed necessary. The brute assertion of power over another—whether that

⁴⁴ JACQUES MARITAIN, *MAN AND THE STATE* 38 n.31 (1951).

⁴⁵ *Id.* at 37-38.

other be a nation-state, a tribe, a church, a state, or an individual—is not legitimate. Power must be justified if it is to be legitimate. There are times when it is morally exigent to deny another’s claims to exercise ruling power, and a claim to be “sovereign” is one historically attested, if blunt, way to make just such a denial. Still, no one except the anarchist denies that some exertions of power over another are indeed legitimate. Somebody has to be the boss or else we would have no governance, no order, and none of the human goods that can only accrue thanks to order. This point is not one of sophisticated political theory, logic, or even debate. No group or its members can long exist, let alone prosper, without some measure of relatively stable agreement about who is in charge, and of what.⁴⁶ It is the work of politics and political philosophy (and perhaps theology) to draw the lines concerning who is properly the boss of whom, and concerning what.

The Framers drafted and ratified the Constitution against a background of fierce debate about the location of sovereignty and, specifically, the transference of sovereignty from Parliament to the people.⁴⁷ The Articles of Confederation imputed sovereignty to each of the thirteen colonies.⁴⁸ Even after the Constitution had been ratified, James Madison sought unsuccessfully to have recognition of the people’s sovereignty “prefixed to the constitution.”⁴⁹ To our Constitution as

⁴⁶ As Yves Simon has argued, even a perfectly virtuous group of people would require what he refers to as the essential function of authority, namely, the coordination, for example, of which side of the road one is to drive on. YVES R. SIMON, *A GENERAL THEORY OF AUTHORITY* 57-60 (2009). Simon further argued that,

Even in the smallest and most closely united community, unity of action cannot be taken for granted; it has to be caused, and, if it is to be steady, it has to be assured a steady cause. . . . Now unity of action depends upon unity of judgment, and unity of judgment can be procured either by way of unanimity or by way of authority; no third possibility is conceivable.

YVES R. SIMON, *PHILOSOPHY OF DEMOCRATIC GOVERNMENT* 19 (1951).

⁴⁷ See, e.g., EDMUND S. MORGAN, *INVENTING THE PEOPLE* 56 (1988) (contending, convincingly, that the concept of sovereignty was developed in England in opposition to the divine rights of kings). On the role of imagination in making the people sovereign, see PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* 189 (1997). On the historical process by which the English Parliament became “sovereign,” see generally JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY* (1999).

⁴⁸ See ARTICLES OF CONFEDERATION of 1781, art. II (“Each state retains its sovereignty, freedom and independence . . .”).

⁴⁹ Madison Resolution (June 8, 1789), *reprinted in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 11 (Helen E. Veit et al. eds., 1991).

enacted, ratified, and handed down, however, the term “sovereignty” is wholly foreign: the word simply does not appear in the document.

Despite that deafening constitutional silence, our constitutional jurisprudence is thick with the concept of sovereignty. Indeed, a brief inspection of the evidence reveals that the Supreme Court tries to solve some of the nation’s most important socio-legal questions by multiplying predications of sovereignty and applying them to just about all comers. One can hardly blame Barnett for resorting to argument that sounds in sovereignty: contemporary Supreme Court jurisprudence would make practically everybody except the family dog a sovereign. Ironically, such jurisprudence ultimately makes the Court the closest thing to a true sovereign, because it is the Court that has final say over which “sovereign” will prevail in which contests. But this gets ahead of things.

Although the term “sovereign” does not appear in the Constitution, it entered our constitutional jurisprudence early, and with a vengeance, in the celebrated 1793 case of *Chisholm v. Georgia*.⁵⁰ In its first big constitutional case, the Supreme Court declined to order the dismissal of Chisholm’s suit against Georgia in federal court for money damages.⁵¹ The Court disagreed with Georgia’s argument that it was a sovereign state clothed with the sovereign’s traditional immunity to suit without its consent.⁵²

The *Chisholm* Court’s jurisdictional decision was promptly overruled by the adoption of the Eleventh Amendment, of course, but the theory that the states were sovereign was just getting started. Although the Eleventh Amendment speaks only of the federal courts’ lack of jurisdiction over suits against states by citizens of other states,⁵³ since 1890 and the decision in *Hans v. Louisiana*, the Court has “understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms: that the States entered into the federal system with their sovereignty intact.”⁵⁴ After a

⁵⁰ 2 U.S. (2 Dall.) 419 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

⁵¹ *Id.* at 479.

⁵² *See id.* (“[A] state is suable by citizens of another state . . .”).

⁵³ “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.

⁵⁴ *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)). For a chronicle of the American jurisprudential history of sovereignty, see Patrick McKinley Brennan, *Against Sovereignty: A Cautionary Note on*

century of incremental growth and occasional recession, that presupposition came to full flower in a trinity of cases decided over a span of seven years by the Rehnquist Court: *Seminole Tribe v. Florida*,⁵⁵ *Alden v. Maine*,⁵⁶ and *Federal Maritime Commission v. South Carolina Ports Authority*.⁵⁷ In these cases the Court found that states were immune to unconscionable private suits for money damages in, respectively, federal court, state court, and federal administrative tribunals. In each case the ground was the same, namely, the “presupposition” that Chief Justice Rehnquist stated boldly in *Seminole*: “each State is a sovereign entity in our federal system.”⁵⁸

These declarations of the sovereignty of the states presuppose, however, the contending claim that the United States—the nation—is sovereign. How can there be two sovereigns in the same place at the same time? Does this not vitiate the very concept of sovereignty: freedom from *all* higher ruling authority and *complete* independence? This is exactly the problem the Framers set out to solve, and they persuaded many, including Justice Anthony Kennedy,⁵⁹ that they succeeded.

In the late eighteenth century, political theorists derided the idea of an *imperium in imperio* (an empire within an empire), frequently terming it a “solecism.”⁶⁰ In his well-known concurrence in *U.S. Term Limits v. Thornton*, Justice Kennedy undertook to dissolve the lingering appearance of solecism by the use of metaphor: “[t]he Framers split the atom of sovereignty.”⁶¹ Five years later, in his opinion for the Court in *Alden v. Maine*, Justice Kennedy switched descriptive gears, explaining that the United States enjoys “primary sovereignty,”⁶² whereas the states enjoy a “residuary and inviolable sovereignty.”⁶³

the Normative Power of the Actual, 82 NOTRE DAME L. REV. 181, 195-204 (2006), which summarizes the “conventional” view of Eleventh Amendment sovereignty.

⁵⁵ See 517 U.S. 44, 76 (1996) (granting sovereign immunity to Florida in a suit by an Indian tribe in federal court).

⁵⁶ See 527 U.S. 706, 749 (1999) (explaining how states retain sovereignty in their own courts against their own citizens).

⁵⁷ See 535 U.S. 743, 769 (2002) (extending the *Seminole Tribe* reasoning to administrative tribunals).

⁵⁸ *Seminole Tribe*, 517 U.S. at 54.

⁵⁹ See *infra* notes 61-63 and accompanying text.

⁶⁰ See ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 14 (2010).

⁶¹ 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

⁶² 527 U.S. 706, 714 (1999).

⁶³ *Id.* at 715 (citing THE FEDERALIST NO. 39, at 214 (James Madison) (E.H. Scott ed., 1898)).

Even this impressive multiplication of sovereigns hardly exhausts the roster. Way back in *Chisholm*, the seriatim opinions of Chief Justice John Jay and Justice James Wilson rejected the sovereignty of the states on the very basis of the sovereignty of the people. Chief Justice Jay wrote that “at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country.”⁶⁴ Justice Wilson, who had written and lectured on the concept of sovereignty (including in his famed Lectures on Law at the University of Pennsylvania) in the period before *Chisholm* was decided,⁶⁵ was ripe to the task in his opinion in the case:

To the Constitution of the *United States* the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who *ordained and established* that Constitution. They *might* have announced themselves “SOVEREIGN” people of the *United States*: But serenely conscious of the *fact*, they avoided the *ostentatious declaration*.⁶⁶

In his remarks in the Pennsylvania Convention to Ratify the Constitution of the United States in 1787, Wilson opposed those who were absolutists about the sovereignty of the states under the Articles of Confederation, arguing “that, in this country, the supreme, absolute, and uncontrollable power resides in the people at large.”⁶⁷

This is a thick concept of sovereignty indeed, and it is this that provides Barnett with the premise necessary to his syllogism: “[I]n affirming the underlying principle of state sovereignty within the federal system, the Supreme Court has never repudiated its early affirmation of popular sovereignty in *Chisholm*. . . . [I]f imposing mandates on state legislatures and executives intrudes improperly into state sovereignty, might mandating the people improperly infringe on popular sovereignty?”⁶⁸ Barnett’s answer is yes, in support of which he also quotes *Yick Wo v. Hopkins*, in which the Court explained that “in our

⁶⁴ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471 (1793).

⁶⁵ See James Wilson, *Of the Constitutions of the United States and of Pennsylvania—Of the Legislative Department*, in 2 COLLECTED WORKS OF JAMES WILSON 829-32 (Kermit L. Hall & Mark David Hall eds., 2007); James Wilson, *Of the General Principles of Law*, in 1 COLLECTED WORKS OF JAMES WILSON, *supra*, at 494-99; James Wilson, *Of Municipal Law*, in 1 COLLECTED WORKS OF JAMES WILSON, *supra*, at 549-58, 567-70, 572-78; James Wilson, *Of The Study of Law in the United States*, in 1 COLLECTED WORKS OF JAMES WILSON, *supra*, at 443-46.

⁶⁶ *Chisholm*, 2 U.S. (2 Dall.) at 454.

⁶⁷ James Wilson, *Remarks in the Pennsylvania Convention to Ratify the Constitution of the United States, 1787*, in 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 65, at 215.

⁶⁸ Barnett, *supra* note 8, at 629.

system, while sovereign powers are delegated to agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.”⁶⁹

National, state, and popular pretensions to sovereignty already dazzle the analytic mind. Even this swelling collection of “sovereigns,” however, does not exhaust the contest for complete independence. Justice Wilson did not maintain only that the people en bloc are sovereign. The people can be sovereign, according to Wilson, because each individual is an “original sovereign” who can aggregate himself with other original sovereigns to create “a collection of original sovereigns.”⁷⁰

Under modern Supreme Court jurisprudence, moreover, every individual approximates a sovereign in a sense more impressive than Wilson ever could have imagined. That jurisprudence recognizes the individual’s right to live by his own norms, subject only—so far as appears—to the constitutional limit of the Millian harm principle, the idea, that is, that “the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection.”⁷¹ According to Mill and his followers, “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”⁷² While the Court did not mention either sovereignty or Mill by name in *Lawrence v. Texas*, in which the Court struck down a Texas statute that criminalized “deviate sexual intercourse with another individual of the same sex,”⁷³ the case has been widely celebrated as a recognition of the right of individuals to be “self-norming,” limited only by the harm principle.

⁶⁹ *Id.* (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

⁷⁰ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 456 (1793).

⁷¹ JOHN STUART MILL, ON LIBERTY 80 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

⁷² *Id.* “John Stuart Mill argued in effect that the harm principle is the *only* valid principle for determining legitimate invasions of liberty, so that no conduct that fails to satisfy its terms can properly be made criminal.” 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 11 (1984). Occasionally and as an afterthought, however, Mill seems to include the additional category of “offense” within the scope of the criminal law. See MILL, *supra* note 71, at 160 (“[T]here are many acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly . . . may rightfully be prohibited.”).

⁷³ 539 U.S. 558, 563, 578-79 (2003) (citing TEX. PENAL CODE ANN. § 21.06(a) (West 2003)).

In fact, Barnett has been among the leading champions of such a reading of *Lawrence*.⁷⁴ Another, more critical commentator summed up this reading of *Lawrence* as follows:

In *Lawrence* . . . the Court in effect held, in agreement with and at the urging of the libertarian Cato Institute, that the Constitution does enact John Stuart Mill's *On Liberty*. The result, if consistently followed, would be to presume unconstitutional all laws limiting "liberty," i.e., substantially all laws, and put on the states or national government the burden of justifying them. As a corollary of this philosophic position and illustrating its potential, the Court explicitly rejected traditional standards of morality as a means of meeting the government's burden of justification.⁷⁵

To fill in the unstated but operative intermediate premise in *Lawrence*, one need only quote the language of Mill's *On Liberty* itself: "Over himself, over his own body and mind, the individual is sovereign."⁷⁶

In sum, under current American constitutional jurisprudence, "sovereignty" is predicated either explicitly or implicitly of four very different entities: the nation, each state, the people, and the individual.⁷⁷ Given this diversity, one can safely concede that the concept signified by the word "sovereign" is not univocal. In exactly what sense, then, is each of these very different entities "sovereign?" What is it to be possessed of "sovereignty?"

III. MAKING SOME SENSE OF SOVEREIGNTY

Predications of sovereignty abound and multiply in contemporary culture, but the concept of sovereignty is associated with no one more than it is with Thomas Hobbes, a man whose political theory terrified many of his contemporaries.⁷⁸ By "sovereignty," Hobbes meant the powers of nothing short of a "mortal god":

⁷⁴ See Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas, 2002–2003 CATO SUP. CT. REV. 21, 35–36 (2003)* (arguing that *Lawrence* was "potentially revolutionary" because it required government "to justify its restriction on liberty" without declaring homosexual sex to be a fundamental right).

⁷⁵ Lino A. Graglia, *Lawrence v. Texas: Our Philosopher-Kings Adopt Libertarianism as Our Official National Philosophy and Reject Traditional Morality as a Basis for Law*, 65 OHIO ST. L.J. 1139, 1140 (2004).

⁷⁶ MILL, *supra* note 71, at 81.

⁷⁷ While not entirely relevant here, there is actually a fifth category of "sovereign" under current Supreme Court jurisprudence, the tribal nation. See generally ROBERT ODAWI PORTER, *SOVEREIGNTY, COLONIALISM AND THE INDIGENOUS NATIONS: A READER* 3–230 (2005).

⁷⁸ The reception of *Leviathan* was by no means uniform, however. See G.A.J. Rogers, *Hobbes and His Contemporaries* (noting that some of Hobbes's positions "attracted a

[T]he multitude so united in one Person, is called a COMMONWEALTH, in Latin CIVITAS. This is the generation of that great LEVIATHAN, or rather (to speak more reverently) of that *Mortal God* to which we owe, under the *Immortal God*, our peace and defence. For by this authority, given him by every particular man in the commonwealth, he hath the use of so much power and strength conferred on him that by terror thereof, he is enabled to conform the wills of them all to peace at home and mutual aid against their enemies abroad. . . .

And he that carrieth this person, is called SOVEREIGN, and said to have *Sovereign Power*; and everyone besides, his SUBJECT.⁷⁹

As Philip Pettit has pointed out,

Hobbes is conscious that this doctrine of more or less absolute sovereign authority may seem incredible when applied to individual monarchs He therefore tries to make a general case for the absolute extent of sovereignty by insisting that the rights that seem natural in the case of a wholly democratic sovereign—if indeed they do seem natural—must be ascribed on parallel grounds to a sovereign of any kind.⁸⁰

On Hobbes's account, to be sovereign is to be bound by no law—neither laws of one's own making, nor even the divine natural law. As Pettit underscores, “the sovereign may behave toward subjects in a way that breaches natural law.”⁸¹

Hobbes's is not the only canonical account of what it means to be sovereign. When Jean Bodin clarified—and, in important respects, standardized—the nature of sovereignty three-quarters of a century earlier, the focal meaning was instructively different from the one Hobbes would later proffer. Bodin examined the relationship between the lawgiver—what we would now call the state—and the law, and in particular whether the lawgiver was “sovereign” in the sense of not being bound by the law. Bodin concluded that the lawgiver was indeed above—that is, not bound by—*some* human law. At the same

following” despite a “general hostility” toward his views), in *THE CAMBRIDGE COMPANION TO HOBBS'S LEVIATHAN* 413 (Patricia Springborg ed., 2007).

⁷⁹ THOMAS HOBBS, *LEVIATHAN* 109 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1651).

⁸⁰ PHILIP PETTIT, *MADE WITH WORDS: HOBBS ON LANGUAGE, MIND, AND POLITICS* 127 (2008).

⁸¹ *Id.*; cf. NORBERTO BOBBIO, *THOMAS HOBBS AND THE NATURAL LAW TRADITION* 165 (Daniela Gobetti trans., 1993) (noting “Hobbes's particular thesis that it pertains to the sovereign to determine the content of natural laws”). Machiavelli, though engaged in a different project, comes close to Hobbes on the lawgiver's complete independence from antecedent law. See J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 160-61 (1975) (noting that the legitimacy of Machiavelli's innovating prince does not necessarily depend upon law).

time, however, Bodin's definition of sovereignty was *not* the same as the definition Hobbes would later adopt, which stated that the prince or government is not subject to higher law.⁸² Indeed, as Kenneth Pennington has demonstrated beyond cavil, for Bodin, the relation between the lawgiver and higher law is quite the opposite: the human lawgiver, though "sovereign" in the sense of not being bound by *all* human laws, remains bound by higher law.⁸³ Though commentators frequently miss the point, Bodin is unmistakably clear about the sovereign human lawmaker's subordination to higher law:

[T]hese doctors do not say what absolute power is. For if we say that to have absolute power is not to be subject to any law at all, no prince of this world will be sovereign, since every earthly prince is subject to the laws of God and of nature and to various human laws that are common to all peoples.⁸⁴

Bodin continues,

Hence, those who state it as a general rule that princes are not subject to their laws, or even to their contracts, give offense to God unless they make an exception for the laws of God and of nature and the just contracts and treaties that princes have entered into⁸⁵

If sovereignty sometimes means the ruler's complete independence from all law (unless, until, and for as long as the sovereign agrees to be bound by it), it assuredly did not mean that for Bodin or the tradition he continued.⁸⁶ The more expansive meaning of governmental power came later, first with Hobbes and then with others.⁸⁷

⁸² In contrasting the two definitions of sovereignty, Perez Zagorin noted that, Bodin's treatise, which exerted a wide influence, was included in the Harvard Library and was familiar to Hobbes, who cited it in *The Elements of Law* to support his argument that the rights of sovereignty are indivisible. . . . Despite the amplitude of his conception of sovereignty, [Bodin] qualified its powers in several respects. Hobbes's theory of sovereignty, in contrast, was clarity itself and logically consistent as an analytic deduction from his understanding of the nature and function of government. It differed from Bodin's, moreover, in that his sovereign as supreme power and commander was not subject to any legal limits in the state that it ruled.

PEREZ ZAGORIN, *HOBBS AND THE LAW OF NATURE* 68 (2009).

⁸³ KENNETH PENNINGTON, *THE PRINCE AND THE LAW 1200-1600: SOVEREIGNTY AND RIGHTS IN THE WESTERN LEGAL TRADITION* 276-83 (1993).

⁸⁴ JEAN BODIN, *ON SOVEREIGNTY* 10 (Julian H. Franklin ed. & trans., Cambridge Univ. Press 1992) (1576).

⁸⁵ *Id.* at 31-32.

⁸⁶ Alison LaCroix seems to overlook this point when discussing Bodin in her otherwise excellent book *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM*, *supra* note 60, at 13 & 225 n.5. One of the particular strengths of LaCroix's account is its recogni-

The sovereign governor's claim to be above the law, moreover, has now been all but conferred on the "governed"—those who were previously governable. These changes have not been unrelated. "Liberty of the sovereign was as much outside the philosophy of the Middle Ages as was radical liberty of the individual. The period during which emancipation of the individual made progress was the same as that in which emancipation of the sovereign was achieved."⁸⁸ Wilson was a man ahead of his time when, as we have seen, he propounded at the University of Pennsylvania the normative principle that every person is an "original sovereign," such that unless and until she puts herself under law, she cannot be bound by law. Today, under *Lawrence*, sovereignty has become a judicially enforceable claim for individuals to be something *approaching* self-norming. Barnett has on his side both the thrust of much modern intellectual history and the Supreme Court of the United States when he contends that we begin from individual sovereignty and a "presumption of liberty,"⁸⁹ meaning that the individual is presumptively ungoverned.

As Barnett himself concedes, however, the presumption of individual liberty is a conditional claim that one can rebut. Even Barnett does not deny that government can and should refuse some attempts by individuals to assert their "liberty," namely, those who would cause "harm." Individuals are not, therefore, meaningfully sovereign—unless that term means only that individuals are subject to legal regu-

tion that the creators of American federalism drew on a long tradition of discussion of sovereignty and related concepts. *Id.* at 12-16. Patrick Thomas Riley also provides an outstanding account. See generally Patrick Thomas Riley, *Historical Development of the Theory of Federalism, 16th–19th Centuries* (1968) (unpublished Ph.D. dissertation, Harvard University) (on file with Pusey Library, Harvard University).

⁸⁷ The struggle to locate "sovereignty" was considerable. See OTTO GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY: 1500 TO 1800*, at 40-44 (Ernest Barker trans., Beacon Press 1957) (1913) (discussing the debate over whether the people or the ruler was possessed of sovereignty). Catholic social thought in the mid-twentieth century struggled with whether to reject the concept of "sovereignty," as Maritain had insisted it should, or instead to attempt to cabin it, as Johannes Messner and Heinrich Rommen did. See generally JOHANNES MESSNER, *SOCIAL ETHICS: NATURAL LAW IN THE WESTERN WORLD* 574-629 (J.J. Doherty trans., 1965); HEINRICH A. ROMMEN, *THE STATE IN CATHOLIC THOUGHT* 397-410 (1945). Harold Laski preceded Maritain in outright rejecting the "sovereignty" of the state. See HAROLD J. LASKI, *STUDIES IN THE PROBLEM OF SOVEREIGNTY* 1-25 (1917).

⁸⁸ BERTRAND DE JOUVENEL, *SOVEREIGNTY: AN INQUIRY INTO THE POLITICAL GOOD* 192 (J.F. Huntington trans., 1957).

⁸⁹ See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 253-69 (2004) (advocating for protection of enumerated and unenumerated rights).

lation only when they are in fact subject to legal regulation.⁹⁰ Nor are the people writ large meaningfully sovereign: they are subject to valid laws of general applicability. Are the states meaningfully sovereign? They are subject to valid regulation by the national government. Is the nation sovereign? It is subject to the norms of international law. It is also, at least arguably, subject to the norms of higher law—the contention and condition Hobbes set out to deny.

IV. TRANSFORMING THE POLITICO-LEGAL CULTURE AWAY FROM COMPETING “SOVEREIGNS”

This last point, about the bearing of higher law on government, expands the context in which to evaluate the individual mandate. Barnett wants us—indeed, wants the Supreme Court—to begin from a presumption of liberty and, what he takes to be its correlate, a presumption against regulation. Leaving aside for the moment the unstated justifications for those presumptions, however, we should note that a presumption in favor of liberty does not itself entail an absence of regulation. For example, some individuals may not be “free” to be healthy unless they obtain medical care. These same individuals may not be able to obtain medical care unless they have health insurance. And they may on occasion not have health insurance unless regulations compel them to buy it. The category of “liberty” is not exhausted by negative liberty, or freedom *from* interference; it also includes positive liberty, or freedom *to* act or be in a certain way.⁹¹ The freedom to be healthy may be enhanced by regulation, and this apparently is what Congress thought when it passed PPACA.

⁹⁰ The libertarian left rarely faces the governmental arbitrariness that is entailed by giving legal effect to revisable selves. Discussing the *Planned Parenthood of Southeastern Pennsylvania v. Casey* dictum that “[a]t the heart of liberty is the right to define one’s own concept of existence,” 505 U.S. 833, 851 (1992), Russell Hittinger argues that

[t]here may well be a kernel of moral truth in the *Casey* dictum, but as it stands the “right” is under-specified. Until it is further specified, no one can know who is bound to do (or not do) *what* to *whom*. And so long as that condition persists, there is no *limit* to the government. On the one hand, we have a principle of unbounded individual liberty; on the other, a government responsible for enforcing that principle in a very arbitrary manner.

RUSSELL HITTINGER, *THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD* 130 (2003) (footnotes omitted).

⁹¹ See, e.g., ISAIAH BERLIN, *LIBERTY* 30-54, 216-17 (Henry Hardy ed., 2002) (defending negative liberty against government claims on behalf of positive liberty). On what this distinction between negative and positive liberty means for Hobbes in particular, see generally QUENTIN SKINNER, *HOBBS AND REPUBLICAN LIBERTY* (2008).

Even if that is indeed what Congress was thinking, as the legislative history suggests, Congress's regulatory activity on behalf of health immediately collides with our general views on the role of government, or at least *our* government, and, correlatively, ourselves. As William Eskridge and John Ferejohn have recently registered in *A Republic of Statutes: The New American Constitution*, the dominant model of constitutionalism in America today is one in which judges construe the Constitution to protect only negative rights. "The biggest shortcoming of America's judge-centric Constitution," Eskridge and Ferejohn write, "is its seeming emphasis on negative rights or, in common parlance, its libertarianism."⁹² While not denying that there has been a long Anglo-American tradition of limiting government's role in protecting negative liberty, predating even the framing and ratification of our Constitution, Eskridge and Ferejohn observe that "[t]he Supreme Court has focused Constitutionalism upon negative rights and governmental limits—much more than is justified even by the classic 'liberal' political philosophers such as Thomas Hobbes."⁹³

This is an intriguing claim, and its meaning turns in part on what is involved in "justifying" what we do with, or under, our Constitution. Without questioning the existence of the libertarian strand of our socio-political culture and what it might mean for constitutional interpretation, Eskridge and Ferejohn call attention to the other strands of that culture and what they in turn should mean for such interpretation. In particular, they contend that "superstatutes" form part of our nation's "fundamental law," alongside the Constitution itself.⁹⁴ PPACA was passed after *A Republic of Statutes* went to press, but Eskridge and Ferejohn do include the Medicare Act of 1965 as an example of a statutory commitment to a positive benefit that has become entrenched as part of America's fundamental law.⁹⁵

Eskridge and Ferejohn's elegant and controversial argument—that statutes and the administrative schemes they launch should be treated on par with the Constitution—defies summary here. What it establishes, though, at a minimum, is that there is a mainstream argument that highlights the ways in which our legal regime already—and largely without controversy—treats the people not as presumptively "sovereign," but instead as properly the subject of some regula-

⁹² ESKRIDGE & FEREJOHN, *supra* note 31, at 43.

⁹³ *Id.*

⁹⁴ *Id.* at 8, 42.

⁹⁵ *See id.* at 196-98 (providing a brief history of the enactment of the Medicare Act of 1965).

tion that confers positive liberties.⁹⁶ Even if such regulation is arguably inconsistent with the original meaning of the Constitution, Eskridge and Ferejohn argue, we should now treat it as functionally amending the Constitution, in part because the procedures for formal amendment are too cumbersome to be carried out except in exceptional circumstances.⁹⁷

No one could plausibly think that the Constitution as originally understood included a right to adequate medical care, but when Franklin Delano Roosevelt announced a Second Bill of Rights in his State of the Union Address, on January 11, 1944, he asserted just such a right. Eskridge and Ferejohn note that “FDR did *not* believe these rights,” including the right to adequate medical care, “were already in the Constitution, nor did he seek an Article V amendment.”⁹⁸ Rather, they continue,

[h]is project was to recognize these affirmative rights as fundamental commitments that a democratic government should be making to its citizens; FDR’s deeper project was to perfect the Lockean state and recast government legitimacy as resting on its capacity to create structures allowing every American to create a flourishing life—the concrete starting point for the *consumerist constitution* that has governed our country for the past two generations.⁹⁹ The primary mechanism for Roosevelt’s grand project was superstatutes.

The names of many of those statutes passed in the 1930s, such as the Agriculture Adjustment Act of 1935 and the Social Security Act of 1935, are familiar to students of American history and law. As mentioned above, Congress passed the Medicare Act thirty years after the passage of the Social Security Act.¹⁰⁰ And, needless to say, it took until just last year for Congress to enact legislation aimed at a comprehen-

⁹⁶ *Id.* at 43-48.

⁹⁷ *See id.* at 48-51 (characterizing the Constitution as “old, short, and hard to amend” and noting that “its intractable process for updating . . . has generated an amendment rate for the U.S. Constitution that is much lower than for any state constitution”).

⁹⁸ *Id.* at 46.

⁹⁹ *Id.*

¹⁰⁰ Discussing Lyndon B. Johnson’s “Great Society,” Morton Keller has noted that it was as representative of late-twentieth-century America and the populist-bureaucratic regime as the New Deal was of Depression America. It was fed not by depression or war but by a growing demand for rights by spokesmen of previously deprived groups and by a heightened concern for the quality of life in a mature industrial society: products of the affluent, booming post-war years.

MORTON KELLER, *AMERICA’S THREE REGIMES: A NEW POLITICAL HISTORY* 225 (2007).

sive guarantee of the seventh right enumerated by FDR: the right “to adequate medical care” and “good health.”¹⁰¹

Barnett contends that a fatal defect in the individual mandate is that there is no “pre-existing duty” on the part of individuals to act, even for their own health.¹⁰² There was indeed no *legal* duty prior to the passage of the mandate, but are duty and obligation exhausted by positive law? Yes, if we begin with Barnett’s splendidly simple presumption of liberty and assign a purely or largely negative role for the state. But we need not begin with that presumption, as Eskridge and Ferejohn have demonstrated. As times change, the positive obligations of government and the correlative positive rights of the governed can change too. Civic republicans, such as Eskridge and Ferejohn, affirm this proposition.¹⁰³ Moreover, those who approach the question of the role of government from a moral perfectionist point of view in ethics should also affirm this proposition and affirm that it is the role of government to provide for those who do not provide for themselves. This may be paternalistic, but that is no argument against it.

Still, someone may object, ours is a written constitution meant to endure the ages without alteration except through the mechanisms of amendment provided in Article V: our Constitution enumerates and thus limits the realm of legally enforceable rights. As mentioned, Eskridge and Ferejohn have specifically denied this normative argument about Article V’s position as the exclusive mechanism for amendment. They argue instead that we should read “superstatutes,” such as PPA-CA, as *de facto* constitutional amendments, sources of new rights and duties of the highest positive-law order.¹⁰⁴ Whether or not one agrees

¹⁰¹ ESKRIDGE & FEREJOHN, *supra* note 31, at 46.

¹⁰² Barnett, *supra* note 8, at 634.

¹⁰³ See also Vivienne Brown, *Self-Government: The Master Trope of Republican Liberty*, 84 *MONIST* 60, 71-72 (2001) (arguing that “republican liberty is distinct both from the notion of liberty as ‘freedom from’ actual or potential interference, and from the notion of liberty as ‘freedom to’”).

¹⁰⁴ See ESKRIDGE & FEREJOHN, *supra* note 31, at 6-9, 18. For a forceful argument that the only way to amend the Constitution is through Article V, see John R. Vile, *Legally Amending the United States Constitution: The Exclusivity of Article V’s Mechanisms*, 21 *CUMB. L. REV.* 271, 271-72 (1991), which describes the two methods for amending the Constitution, both of which require Article V. See also Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 *COLUM. L. REV.* 121, 148 (1996) (“Examining the available writings to the extent that I . . . could, I can find no evidence—none at all—for the proposition that Article V was understood not to be the exclusive method of amendment because of an overriding and widely shared conception of national popular sovereignty.”). For a defense of “common law” techniques of enforcing new constitutional positive rights, see generally Helen Hershkoff, *Just*

with that sentiment, the prospect of giving a nonoriginalist meaning to the Constitution reflects a cautionary point I raised at the outset. There are deep reasons to be wary of originalism in the absolutist way it is often understood.

V. QUESTIONS MORE FUNDAMENTAL THAN ASSERTIONS OF “SOVEREIGNTY”

One of the remarkable facts about constitutional originalists is that they are only *sometimes* originalists about the objects of their political affection. The focus here, sovereignty, is perhaps the most glaring example of originalists’ selectivity. Even though originalists sometimes disagree about the definition of originalism, they do all agree that it includes a close attention to the words of the Constitution. As we have seen, however, “sovereignty” does not make even a passing appearance in the Constitution, let alone as a property of the nation, the states, the people, individuals, or tribes. The originalist arguments in favor of sovereignty can only be defended *on originalist grounds*, so without words from which to argue, originalists must turn to original *purposes* of the Constitution.

But if it is legitimate to consider the purposes behind the Constitution where there are no enacted words to guide us in discerning those purposes, then a fortiori we should consider the Constitution’s purposes as well where there *are* words to guide us. Some might counter by appealing to the doctrine of *expressio unius est exclusio alterius*, which in this context would mean that words preempt purposes. This should be so, however, only if those who framed and ratified the Constitution wished their words to be treated as exhausting their purposes. But why would we, in turn, agree to be bound by a document that we cannot integrate into purposive human living? Many originalists, Justice Antonin Scalia among them, will answer this last question by arguing that the very point of any written constitution, including our own, is to establish an unchanging legal bedrock.¹⁰⁵

Words”: *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521 (2010).

¹⁰⁵ See Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws* (“There is plenty of room for disagreement as to what original meaning was, and even more as to how that original meaning applies to the situation before the court. But the originalist at least knows what he is looking for: the original meaning of the text.”), in *A MATTER OF INTERPRETATION* 3, 45 (Amy Guttmann ed., 1998).

The question, though, is whether we can *properly* do just that. Can we humans properly write a text and agree to bind ourselves to it, come what may? In other words, is it morally permissible for us to be absolutists about a written constitution?¹⁰⁶ If, as Justice Wilson contended, we are “original sovereigns,” then the answer is presumably yes: it is the privilege of an original sovereign to do what he or she will, including in concert with other original sovereigns. If, however, we start from the judgment that we have an indefeasible moral obligation to set up good government in order to meet our human needs and worthy aspirations, then the question of the tenability of an “unchangeable” constitution alters. Humans operating under a moral obligation to set up worthy government can bind themselves to a text only to the extent that doing so is a prudent way of achieving the ends of good governance. What is prudent will vary from time to time and place to place. This variability is the locus of the creative tension to which I referred at the beginning.¹⁰⁷

We come, then, to a fundamental decision about who we think we are, and it is on the basis of this decision that some of our most basic

¹⁰⁶ Of course, the Constitution avoids absolutism of a sort by providing for its own amendment, but Eskridge and Ferejohn make a strong case that those mechanisms are so cumbersome as to render the Constitution *functionally* close to unamendable. ESKRIDGE & FERREJOHN, *supra* note 31, at 49-50. More important, however, is that having a written constitution does not entail that all that is “constitutional” in a particular nation can be found within that constitution and the case law construing it. The current transformation of the British Constitution demonstrates aspects of the creative tension I have in mind. “The truth is that constitutions . . . are never—repeat, *never*—written down in their entirety, so the fact that Britain lacks a capital-C Constitution is far less important than is often made out.” ANTHONY KING, *THE BRITISH CONSTITUTION* 5 (2007). What is part of the constitution, therefore, will be the legitimate subject of ongoing debate. Even Parliament’s pretensions to sovereignty are subject to rejection—a development with lessons worthy of export. See Stephen Sedley, *On the Move*, LONDON REV. OF BOOKS, Oct. 8, 2009, at 3, 3-5 (chronicling the emergence of a new rule of recognition in British constitutionalism).

¹⁰⁷ It is beyond my current purpose to provide much more detail about what I mean by a creative tension. It is sufficient to note that individuals under an indefeasible obligation to create and enforce good governance cannot use texts to absolve themselves of that obligation. I should underscore, however, that in morally heterogeneous cultures such as our own, prudence may well counsel in favor of stricter judicial discipline which, in turn, flirts with the absolutism that is anathema. The history of constitutionalism is the story of how to limit government power while also keeping it in service of the people, their goods, and their rights. See, e.g., CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* (1947) (providing a history of the development of constitutionalism). For an especially insightful account of how a range of constitutional orders, including our own, are maintained and updated through interpretation, see WALTER F. MURPHY, *CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER* 460-96 (2007).

choices about the law's scope must be made. Are we "original sovereigns?"¹⁰⁸ Or are we, instead, under a moral obligation to set up worthy structures of government in order to achieve the good life for humans? The latter is the perspective of the natural law tradition, which has been neither completely dominant in nor completely absent from American political discourse.¹⁰⁹ And those who affirm this principle as true—those who believe that we are under a higher law obligation to seek the good life, including through good government and good laws—will view themselves as morally obligated, in an infeasible way, to struggle against those who would be absolutists about texts, or would assert a "presumption of liberty" and leave it at that. Texts, including constitutional texts, should serve worthy human purposes, and those purposes may sometimes require government aid rather than a laissez-faire libertarianism. Interestingly, the somewhat more expansive view of government's role, to which the traditional understanding of the natural law leads, tends to align its adherents more with the contemporary American left than with the contemporary American right, at least on some important matters (though certainly not on others).

I will not attempt to answer here whether the individual mandate is in fact a *prudent* legislative response to a perceived human problem.¹¹⁰ My aim has been to show why the argument that the mandate violates individual sovereignty assumes answers to metaphysical ques-

¹⁰⁸ In her Gifford Lectures, Jean Elshtain argues for the "less-than-sovereign self" on the basis of (among other grounds) our gendered dependency, our vulnerability, and our interrelatedness. JEAN BETHKE ELSHTAIN, *SOVEREIGNTY: GOD, STATE, AND SELF* 159-80, 227-45 (2008). Among the book's many virtues, it establishes how questions about sovereignty always involve, at least implicitly, tradeoffs among claims about God, the state, and the human person. Human vulnerability and dependence need to be at the center—not the margin—of political theory. See ALASDAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES* 1-11 (1999).

¹⁰⁹ For a compendious account, see Robert P. Kraynak, *Catholicism and the Declaration of Independence: An American Dilemma about Natural Rights*, in MARITAIN AND AMERICA 1-30 (Christopher Cullen & Joseph Allan Clair eds., 2009). The classic account, which is in need of an update, is CHARLES GROVE HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS: A STUDY OF THE ESTABLISHMENT AND OF THE INTERPRETATION OF LIMITS ON LEGISLATURES WITH SPECIAL REFERENCE TO THE DEVELOPMENT OF CERTAIN PHASES OF AMERICAN CONSTITUTIONAL LAW* (1930). John Hart Ely acknowledges some of the historical role of natural law argument in American constitutionalism but concludes prematurely that it is "discredited" and "no longer respectable." JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 48-52 (1980).

¹¹⁰ A forceful criticism of an insurance-based means of meeting the moral obligation to ensure adequate health care to all is presented in JOHN C. MÉDAILLE, *TOWARD A TRULY FREE MARKET: A DISTRIBUTIST PERSPECTIVE ON THE ROLE OF GOVERNMENT, TAXES, HEALTH CARE, DEFICITS, AND MORE* 207-22 (2010).

tions that Barnett does not provide.¹¹¹ Barnett and his supporters must argue for the claim that we are original sovereigns, not merely assert it. The natural law claim that we are not sovereign but are instead *obligated* to seek the good life, including through the creation of government that is at the service of the people, also requires argument.¹¹² This much is beyond dispute, however: “[W]hen we return to a conception of sovereignty that recognizes norms outside the state’s positive law, we shall be returning to a system of thought that has deep roots in Western law.”¹¹³ In this, I submit, we should take some real satisfaction, though Barnett would probably disagree. Meanwhile, “[t]he only obstacles in the way of [sovereignty’s] indefinite growth are three orders of laws, all of which came to be abrogated by three historical facts: irreligion, legal positivism and sovereignty of the people.”¹¹⁴

¹¹¹ At times, Barnett justifies his “presumption of liberty” as no more than a construction—as opposed to an interpretation, following Keith Whittington’s distinction—of the Constitution. See Paulsen & Barnett, *supra* note 15, at 275-76 (Barnett, Discussion) (stating that he does “not claim that the presumption of liberty is an interpretation of the Constitution” and is instead only a “construction”). When Barnett offers a modestly more ambitious argument in favor of natural rights that protect liberty, he does so with the condition that we “want a society in which people can pursue happiness.” BARNETT, *supra* note 89, at 82. The natural law tradition, by contrast, does not rest natural rights on the mercurial contingency of what individuals “want.” On a related point, Barnett states that “[n]atural law ethics or ‘natural right’ is a method of assessing the propriety of individual conduct.” *Id.* Classical proponents of natural law and natural right, however, would hardly find their position recognizable in this question-begging caricature. For them, the natural law and natural right govern everything for the *common* good, which includes but is not exhausted by individual goods. On the priority of the common good in the natural law tradition, see Charles De Koninck, *The Primary of the Common Good Against the Personalists*, in 2 THE WRITINGS OF CHARLES DE KONINCK 63-164 (Ralph McInerney ed., 2009).

¹¹² This will be the burden of my forthcoming book, *THE SOVEREIGNTY OF THE GOOD: AN ESSAY ON LAW, AUTHORITY, AND THE CHURCH* (forthcoming 2013). I have argued for this proposition before. See, e.g., Patrick McKinley Brennan, *The Place of “Higher Law” in the Quotidian Practice of Law: Herein of Practical Reason, Natural Law, Natural Rights, and Sex Toys*, 7 GEO. J.L. & PUB. POL. 437, 442 (2009) (“Natural law and the natural rights that derive from it . . . are all about what is concretely *good* for humans and their communities . . .”).

¹¹³ PENNINGTON, *supra* note 83, at 290.

¹¹⁴ DE JOUVENEL, *supra* note 88, at 185.