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

Patrick McKinley Brennan*

*1567, brennan@law.villanova.edu

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Abstract

Randy Barnett has recently argued that the individual mandate is unconstitutional because it is an improper regulation under the Necessary and Proper Clause (in conjunction with the Commerce Clause) because it improperly "commandeers" the people and thereby violates their sovereignty. In this paper, I counter that the argument from sovereignty is unavailing because it is, among other defects, hopelessly ambiguous. The variety of historically attested meanings of "sovereignty" renders the concept useless for purposes of answering questions of comparative authority, including the authority of the Congress to mandate that individuals purchase health insurance from a private market. There is no analytical help to be had from following the Supreme Court's lead and imputing "sovereignty" to the nation state, each of the fifty states, the people, the people of each state, tribes, and each individual. Sovereignty purports to be a scalar quantity, but such a quantity cannot be univocally predicated of these many different kinds of things. There is a better way forward. When the libertarian element in contemporary "conservativism" is judged against a traditional account of natural law and of the natural and positive-law rights it generates, there is room to ask whether the individual mandate is (1) within our particular government's scope and (2) good, in fact, for the people for whom the government exists. The paper argues that, in addition to being hopelessly ambiguous, claims to sovereignty are false.

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

Patrick McKinley Brennan[1]

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) as objectionable and, in a related but distinct vein, unconstitutional. The favorite focus of such conservative/ libertarian protest is the Act's so-called individual mandate, the requirement that individuals buy health insurance from a private market.[2] As of the time of writing, two federal district courts (one in Florida, the other in Virginia) have held the Act unconstitutional on account of the individual mandate, and in each case the district judge was appointed by a Republican president.[3] The two district judges that have upheld the Act against constitutional challenge were appointed by a Democratic president.[4]

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[1] 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 for their invitation to participate in their symposium "The New American Health Care System: Reform, Revolution, or Missed Opportunity" and for their warm hospitality on the occasion. I am also grateful to Professor Ted Ruger and Professor Mark Hall for their probing but encouraging questions during and after the symposium.

[2] Patient Protection and Affordable Care Act, Pub. L. 111-148, § 1501, 124 Stat. 119 (2010).

[3] Florida *ex rel* Bondi v. U.S. Dept. of Health & Human Servs., No. 3:10-cv-91-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011); Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010).

[4] Liberty Univ. Ctr. v. Geithner, No. 6:10-cv-00015-nkm, 2010 WL 4860299 (W.D. Va. Nov. 30, 2010); Thomas Moore Law Ctr. v. Obama, 720 F. Supp. 2d 822 (E.D. Mich. 2010).

Regardless of whether one comes at it from the right, from the left, or from 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 it does so for good or for ill, remains to be seen.

Consideration of some of the conservative/libertarian objections to the individual mandate implicates some of the deepest and most contested questions concerning our Constitution, constitutionalism in general, and the relation of positive law, including the 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 implicates questions about the sovereignty of We the People. Specifically, Barnett contends that the mandate is unconstitutional because it violates the people's sovereignty by "commandeering" them (into buying health insurance).[5] Why, one must therefore ask, is it wrong for government to commandeer its people? *The Oxford English Dictionary* defines commandeer as "to command or force into military service," which is not something the Act assays. The *OED* also defines commandeer as "to take arbitrary possession of."[6] But who can possibly contend that the individual mandate, whatever its perceived merits or demerits, is an "arbitrary" act by Congress; it was deeply deliberate. Perhaps Barnett's objection is better phrased as government's *commanding* citizens to take this particular act? Is it not, however, part of the essential function of government to command people on certain matters?

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[5] Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional* __ N.Y.U.J. L. & LIBERTY __ (forthcoming 2011), *available at* http://ssrn.com/abstract=1680392.
[6] THE OXFORD ENGLISH DICTIONARY III.542 (2d ed. 2004).

In what follows, I will suggest why 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 do best to acknowledge and live within a creative tension regarding the jurisdiction of the civil ruling authority, which 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 that government is best that governs least; there may be some important human goods that only government can deliver. On the other, we cannot reasonably presume that government is the proper solvent of all problems; some human goods only individuals or groups other than the state can achieve. The amount and forms of government that are required or desirable, moreover, vary across time and circumstance. Always, however, determining what role government should play in particular times and places precludes absolutism – the absolutism of imagined popular or individual or state "sovereignty." It also precludes the stealth absolutism of "originalism," of a particular sort, in constitutional interpretation.

I. Setting the Constitutional Doctrinal Context

The individual mandate invites inspection for possible (un)constitutionality on any number of grounds, but the focus here will be its constitutional status vis-a-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, as

opposed to its status under any number of possible "originalist" or other construals. As such (but with a possible exception to be noted below), the mandate must be sustainable, if at all, as a regulation of economic (as opposed to non-economic) activity that works a "substantial effect" on interstate commerce. Under *United v. Lopez* (1995), there are "three broad categories of activity that Congress may regulate under its commerce power."[7] First, Congress may regulate the use of the channels of interstate commerce."[8] 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."[9] And third, "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, those activities that substantially affect interstate commerce."[10] Plainly, if the individual mandate is sustainable under the Commerce Clause, it would be thanks to the third prong of the *Lopez* test, i.e., regulation of activity that has a "substantial effect" on interstate commerce.

Unlike the first two prongs of the test set out in *Lopez*, the substantial effects test is not, according to Barnett, the product of an interpretation of the Commerce Clause standing alone, nor even exactly of the Commerce Clause. Rather, according to Barnett, that test is correctly interpreted as an application of the Necessary and Proper Clause "in the context of the regulation of interstate commerce."[11] While others view the matter

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[7] U.S. v. Lopez, 514 U.S. 549, 558 (1995).
[8] *Id.*
[9] *Id.*
[10] *Id.* at 558-59.
[11] Barnett, *supra* note 5, at 10. Barnett cites J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 619 (2002): "the 'affecting commerce' cases derive from the Necessary and Proper Clause. . . ." *See also* STEVEN CALABRESI, ORIGINALISM: A QUARTER-CENTURY OF DEBATE 262-73 (2007) (quoting Barnett in panel discussion on meaning of Necessary and Proper Clause).

differently (and think that the Court has since the New Deal expanded the very meaning of "commerce"), I will simply stipulate to Barnett's position here, because it is this – the presence of the Necessary and Proper Clause as a link in the chain of argument – that provides Barnett with the textual predicate for his argument that the individual mandate is unconstitutional because it violates our sovereignty.

According to Barnett, if the regulation is of economic activity, then it is constitutionally permissible *provided* that it is *both* necessary *and* proper. Very often, "necessary" and "proper" are treated either as a unit or as an instance of pleonasm. If each word is given its own meaning, however, what is necessary must also be proper. Barnett makes a strong case for giving each word its own bite.[12] On Barnett's view, there are right ways (proper) and wrong ways (improper) of going about regulating what has a substantial effect on interstate commerce (necessary). There is more to be said shortly about the demands of "proper," but first there is a further reason why this question that so rarely gets asked – about what is "proper" regulation – is apt.

That further reason involves a legal argument that seems to be picking up steam, though not yet 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, in the alternative, on the ground that, although not *itself* regulation of an economic act, it is a necessary and proper component of a larger regulatory scheme, which combination they

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Because the Clause was added to 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.

[12] Barnett, *supra* note 5, at 31-35. *See also* Gary Lawson and Patricia Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

contend is sufficient to pass constitutional muster.[13] These proponents have on their side not only dicta and implicatures of *Lopez* itself, but also language in the majority opinion of the more recent case *Gonzales v. Raich,*[14] as well as a theory that Justice Scalia explicitly developed 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."[15]

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 ask how the individual mandate would fare if it did. If it be conceded that the mandate itself is not a regulation of economic activity but is "necessary" because it is essential to a broader scheme of regulation of interstate commerce, there remains that further question to be asked: Is it a "proper" means to Congress's exercise of its power over insurance commerce? According to the enduring test set out by Chief Justice Marshall in *McCulloch*: "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."[16] As parsed by Barnett, this sentence establishes that a means is proper when it, first, is not prohibited and, second, otherwise "consists with the letter and spirit of the constitution."[17]

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[13] *See* Barnett, *supra* note 5, at 27-31.
[14] 545 U.S. 1, 24-25 (2005).
[15] *Id.* at 36 (Scalia, J., concurring).
[16] 17 U.S. 316, 421 (1819).
[17] Barnett, *supra* note 5, at 31-35.

Accepting for present purposes this understanding of the requirements of what it is to be "proper," is the individual mandate proper, or not? Assuming it is not forbidden, does it yet "consist[] with the letter and spirit of the constitution," or not?

In order to establish that it does *not* so consist, Barnett next invokes a recent line of cases, the "anti-commandeering" cases, as they are often called, because they hold that Congress cannot "commandeer" the states (in certain respects). 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. In any event, it has long been established that the Supremacy Clause of Article VI requires that state judges can be "commandeered" – if that word even makes sense in this context – to follow federal law.[18] The principle that Congress cannot commandeer state legislative or executive actions is of more recent vintage and questionable strength.[19] There is also a question about whether the principle has more than an "attenuated basis" in the Tenth Amendment.[20] Be all of this as it may, the relevant aspects of the "anti-commandeering" cases are familiar.

In the first, *New York v. United States* (1992), 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. In her opinion for the Court, Justice O'Connor explained that "the Constitution has never

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[18] Testa v. Katt, 330 U.S. 386 (1947).

[19] 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. *Field Office Federalism*, 79 VA. L. REV. 1957 (1993). Evan Caminker maintains that the Framers expected Congress to be able to commandeer state legislatures as well as state executive and judicial officials. *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995).

[20] WILLIAM ESKRIDGE & JOHN FEREJOHN, A REPUBLIC OF STATUTES: AMERICA'S NEW CONSTITUTION 444 (2010).

been understood to confer upon Congress the ability to require the states to govern according to Congress' instructions."[21] Congress's giving governing instructions to the states Justice O'Connor characterized as an unconstitutional "commandeering," which term she took from the 1981 case *Hodel v. Virginia Surface Mining*: "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[22] 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."[23]

Then, five years later, Congress used its commerce power to mandate that local sheriffs run background checks on gun buyers. In *Printz v. United States*[24], the Supreme Court held that this, too, was an improper "commandeering" of state officials. Writing for the Court, Justice Scalia recognized a principle of state sovereignty underlying several provisions of the Constitution,[25] primarily, however, the Tenth Amendment. "[R]esidual 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, sec.8," wrote Justice Scalia, "which implication was rendered express by the Tenth Amendment's statement 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

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[21] 505 U.S. 144, 162 (1992).
[22] 452 U.S. 264, 288 (1981).
[23] *New York*, 505 U.S. at 176.
[24] 521 U.S. 898 (1997).
[25] These included the prohibition on any involuntary reduction or combination of a State's territory in Art. IV, sec. 3; the Judicial Power Clause in Art. III, sec. 2, and the Privileges and Immunities Clause in Art. IV, sec. 2, "which speak of the 'Citizens' of the States"; the amendment provision in Art. V, "which requires the votes of three fourths of the states to amend the Constitution"; and the Guarantee Clause in Art. IV, sec. 4. *Printz*, 521 U.S. at 919.

to the people.'"[26] 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."[27]

Responding to the argument that this statutory directive was "necessary and proper" as a means of Congress's effectuating its commerce power, Justice Scalia memorably described that the Necessary and Proper Clause as "the last, best hope of those who would defend *ultra vires* congressional action."[28] He went on to assert: "When a 'La[w] . . . for carrying into Execution' 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 deserves to be treated as such.'"[29]

Barnett, after marshalling additional evidence that the Court's constitutional prohibition on national "commandeering" of states is rooted above all in the Tenth Amendment, 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*."[30] He continues:

> As Justice Thomas wrote in his dissenting opinion in *U.S. Term Limits v. Thornton*, the Tenth Amendment "avoids taking any position on the division of power between the

[26] *Id.*
[27] *Id.* at 935.
[28] *Id.* at 923.
[29] *Id.* at 923-24.
[30] Barnett, *supra* note 5, at 36 (quoting U.S. CONST. amend. X) (emphasis added).

> states 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 sovereignty as it does state sovereignty.[31]

Barnett's syllogism is straightforward: Just as Congress cannot commandeer 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 – people (by making them spend their own money on health insurance), is unconstitutional.

Maybe, but maybe not. What on earth does it 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 suggest 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" is traceable to fourteenth-century French, where in common and sometimes in legal parlance it referred to any official endowed with superior force.[32] It did not originally signify a freedom from *all* superior ruling authority and a *complete independence* of judgment and self-

[31] Barnett, *supra* note 5, at 36.
[32] JACQUES MARITAIN, MAN AND THE STATE 38 n.31 (1951).

determination, but over time, however, "[s]uch was the idea, and the purpose for which the word Sovereignty was coined."[33] In the modern period, a claim to "sovereignty" veers, like a car out of alignment, in the direction of being a claim to be free from all interference with possible self-determination and complete independence. Though that was not the original meaning of the term, such is what it was sculpted to mean in the contending historical claims of contest to emerge from the medieaval social hierarchy of Christendom. Those who today claim or assert sovereignty – whether they be nation states, states, tribes, churches, or individuals – are saying in a highfalutin way what in the vernacular goes as follows: "you're not the boss of me." Nations claiming sovereignty deny other nations the authority to rule over 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 needful: the brute assertion of power over another – whether that other be a nation state, a tribe, a church, a state, or an individual – does not entail legitimacy. 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 of somebody, else we shall have no governance and, as a result, no order and none of the human goods that can accrue only thanks to order. This is not a point of sophisticated political theory or of logic, nor, even, of 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. It is the work of politics and

[33] *Id.* at 37-38.

political philosophy (and perhaps theology) to draw the lines concerning who is properly the boss of whom, and concerning what.

The Constitution of the United States was drafted and ratified against a background of fierce debate about the location of sovereignty, and specifically the transference of sovereignty from Parliament to the people.[34] The Articles of Confederation imputed sovereignty to each of the thirteen colonies.[35] Even after the Constitution had been ratified, James Madison sought unsuccessfully to have recognition of the people's sovereignty "prefixed to the constitution."[36] To our Constitution as enacted and ratified and handed down, the term "sovereignty" is wholly unknown: the word simply does not appear in the document

Despite that deafening constitutional silence, however, 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 litigation argument that sounds in terms of sovereignty: contemporary Supreme Court jurisprudence would make practically everybody except the family dog a sovereign. Ironically, such jurisprudence ends up making nobody but the Court the closest thing to a

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[34] *See, e.g.*, EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1988). Morgan contends, convincingly, that the concept of sovereignty was developed in England in opposition to the divine rights of kings. "The way to fight divinity is with divinity." *Id.* at 18. 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 (1997). On the historical process by which the English Parliament became "sovereign," see JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY (1999).

[35] ARTICLES OF CONFEDERATION of 1781, art. 2.

[36] Madison Resolution (June 8, 1789), *reprinted in*, CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 11 (Helen E. Veit, Kenneth R. Bowling, & Charlene Bickford, eds., 1991).

true sovereign, because it is the Court that has final say over which "sovereign" will prevail in which contests. But this is to get ahead of things.

While to the Constitution of the United States the term "sovereign" is totally unknown, the term entered our constitutional jurisprudence early, and with a vengeance, in the celebrated 1793 case *Chisholm v. Georgia*. In its first big constitutional case, the Supreme Court there held that the state of Georgia was not entitled to have Chisholm's suit in federal court for money damages dismissed on the ground that Georgia was a sovereign state clothed with the sovereign's traditional immunity to unconsented suit. The *Chisholm* Court's jurisdictional decision was promptly overruled by the adoption of the Eleventh Amendment, of course, but the thesis that the states were sovereign was just getting going. Although the Eleventh Amendment speaks only in terms of the lack of jurisdiction of the federal courts in suits against states by citizens of other states[37], 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."[38] After a century of incremental growth and occasional recession, that presupposition came to full flower in a trinity of cases decided over seven years by the Rehnquist Court, *Seminole Tribe v. Florida* (1996),[39] *Alden v. Maine* (1999),[40] and *Federal Maritime Commission v. South Carolina Ports Authority* (2002),[41] in which the Court found that states were immune to unconsented private suits for money damages in,

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[37] "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.
[38] Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991). I have chronicled the American jurisprudential history of sovereignty in my *Against Sovereignty: A Cautionary Note on the Normative Power of the Actual*, 82 NOTRE DAME L.REV. 181 (2006).
[39] 517 U.S. 44 (1996).
[40] 527 U.S. 706 (1999).
[41] 535 U.S. 743 (2002).

respectively, federal court, state court, and federal administrative tribunals. In each case the ground was the same, *viz*., the "presupposition" that Chief Justice Rehnquist stated baldly in *Seminole*: "each State is a sovereign entity in our federal system."[42]

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? Isn't this to 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 not a few, including Justice Anthony Kennedy, 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."[43] In his well known concurrence in *U.S. Term Limits v. Thornton* (1994), Justice Kennedy undertook to dissolve the lingering appearance of solecism by the use of metaphor: "[t]he Framers split the atom of sovereignty."[44] Five years later, in his opinion for the Court in *Alden v. Maine*, Justice Kennedy switched descriptive gears and explained that the Nation enjoys "primary sovereignty," while the states enjoy a "'residual and inviolable sovereignty.'"[45]

Even this impressive multiplication of sovereigns hardly exhausts the roster. Way back in *Chisholm* already, 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*. Jay wrote that "at the Revolution, the sovereignty devolved on the people;

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[42] *Seminole Tribe*, 517 U.S. at 54.
[43] *See* ALISON LA CROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 14, 81, 200, 226 n.12, 277 n.8 (2010).
[44] 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).
[45] *Alden*, 527 U.S. at 714-15 (citation omitted).

and they are truly the sovereigns of the country . . . ."[46] Justice Wilson, whose famed Lectures on Law at Penn had addressed the concept of sovereignty extensively in the two years preceding the decision in *Chisholm*, 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*.[47]

In his remarks in the Pennsylvania Convention to Ratify the Constitution of the United States (1787), Wilson had argued, against those who were absolutists about the sovereignty of the states under the Articles of Confederation, "that, in this country, the supreme, absolute, and uncontrollable power resides in the people at large."[48]

This is a thick concept of sovereignty indeed, and it is this that provides Barnett with 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 affirmations of popular sovereignty in *Chisholm*. . . . If imposing mandates on state legislatures and executives intrudes improperly into state sovereignty, might mandating the people improperly infringe popular sovereignty?"[49] His answer is yes, in support of which Barnett also cites later Supreme Court cases that do undertake to reaffirm the popular sovereignty jurisprudence of *Chisholm*. For example, in *Yick Wo v. Hopkins* (1886), the Court explained that "in our system, while sovereign powers are delegated to

[46] Chisholm v. Georgia, 2 U.S. 419, 471-72 (1793).
[47] *Id.* at 454.
[48] COLLECTED WORKS OF JAMES WILSON 215 (Kermit Hall & Mark Hall eds., 2007).
[49] Barnett, *supra* note 5, at 38.

agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts."[50]

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. No, the reason "the people" can be sovereign, according to Wilson, is that each individual person is an "original sovereign" who can aggregate himself or herself with other original sovereigns to create "a collection of original sovereigns."[51] Under contemporary Supreme Court jurisprudence, moreover, every individual is something approximating a sovereign in a sense more impressive than Wilson ever could have imagined. That jurisprudence, as is familiar, recognizes the individual's right to be self-norming, subject only – so far as appears – to the constitutional limit of the Millean harm principle. While the Court did not mention either sovereignty or Mill by name in *Lawrence v. Texas* (2003)[52], in which it struck down a Texas statute that criminalized "deviate sexual intercourse, namely anal sex, with a member of the same sex (a man)," *Lawrence* has been widely celebrated as a recognition of the right of individuals to be self-norming, limited only by the harm principle.

Barnett himself, in fact, has been among the leading champions of such a reading of *Lawrence*.[53] Another commentator summed up this reading of *Lawrence* as follows, here from a critical angle:

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[50] 118 U.S. 356, 370 (1886).
[51] *Chisholm*, 2 U.S. at 456.
[52] 539 U.S. 558 (2003).
[53] Randy Barnett, *Justice Kennedy's Libertarian Revolution*: Lawrence v. Texas, 2003 CATO SUP. CT. REV. 21, 35-36.

> In *Lawrence* . . . the Court in effect held, in agreement with and at the urging of the libertarian Cato Institute, that the Constitution . . . enact[s] 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.[54]

To fill in the unstated but operative intermediate premise in *Lawrence*, one need only quote the very language of Mill's *On Liberty* itself: "Over himself, over his own body and mind, the individual is sovereign."[55]

In sum, under current American constitutional jurisprudence, "sovereignty" is predicated (either explicitly or implicitly) of four very different types of thing: the nation, each state, the people, and the individual. (Actually, there is a fifth category of "sovereign" under current Supreme Court jurisprudence, the tribal nation).[56] Given this diversity, it can safely be conceded that the property signified by the word "sovereign" -- whatever that property turns out to be -- is not being predicated univocally. In exactly what sense, then, is each of these very different things "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 as much as with Thomas Hobbes, a man

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[54] Lino Graglia, Lawrence v. Texas: *Our Philosopher-Kings Adopt Libertarianism as our Official National Policy and Reject Traditional Morality as a Basis for Law*, 65 OHIO ST. L.J. 1139, 1140 (2004).
[55] JOHN STUART MILL, ON LIBERTY (1859; 2004).
[56] *See* ROBERT ODAWI PORTER, SOVEREIGNTY, COLONIALISM AND THE INDIGENOUS NATIONS 3-230 (2005).

whose political theory many of his contemporaries found terrifying.[57] By "sovereignty" Hobbes meant the powers of a nothing short of a "mortal god:"

> The multitude 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 by that 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.[58]

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," Pettit continues, "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."[59] On Hobbes's account, to be sovereign is to be bound by no law – not laws of his own making, nor even the divine natural law, as Pettit underlines: "the sovereign may behave toward subjects in a way that breaches natural law."[60]

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[57] The reception of Leviathan was by no means uniform, however. PATRICIA SPRINGBORG, THE CAMBRIDGE COMPANION TO HOBBES'S LEVIATHAN 413-99 (2007).
[58] THOMAS HOBBES, LEVIATHAN II.17, at 109 (1651; Edwin Curley ed., 1994).
[59] PHILIP PETTIT, MADE WITH WORDS: HOBBES ON LANGUAGE, MIND, AND POLITICS 127 (208).
[60] *Id.* *See also* NORBERTO BOBBIO, THOMAS HOBBES AND THE NATURAL LAW TRADITION 165 (1993). 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, MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 159 (1975).

Hobbes's is not the only canonical account of what it means to be sovereign. When the nature of sovereignty was clarified – and, in important respects, standardized – three-quarters of a century earlier by Jean Bodin, the focal meaning was instructively different from the one Hobbes would later proffer. Bodin's context was the relationship between the lawgiver (what we would now routinely refer to as the state) and the law, and the question on his plate was whether the lawgiver was "sovereign" in the sense of not being bound even by the law. The answer Bodin gave was that the lawgiver was indeed above – that is, not bound by – *some* human law. Bodin did not, however, defend a complete independence from antecedent law on the part of the lawgiver. Sovereignty as Bodin defended it did *not* mean what it would later mean for Hobbes, *viz*., that the prince or government is not subject to higher law.[61] Indeed, as Kenneth Pennington has demonstrated beyond cavil, for Bodin (and the tradition he continued), the relation between the lawgiver and higher law is quite the opposite: while free from some human laws, the human lawgiver, though "sovereign" in the exact sense of not being bound by some human laws, remains bound by higher (and, again, *some* human) law.[62] Though commentators on Bodin frequently miss the point, Bodin is unmistakably clear about the human lawmaker's – the "sovereign's" – subordination to higher law:

> These doctors do not say what absolute power is. For if we say that to have absolute power is not to be subject to any laws at all, no prince of this world will be sovereign, since every earthly prince is subject to the laws of God and of

[61] "Bodin's treatise, which exerted a wide influence, was included in the Hardwick 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, HOBBES AND THE LAW OF NATURE 68 (2009).
[62] KENNETH PENNINGTON, THE PRINCE AND THE LAW 1200-1600: SOVEREIGNTY AND RIGHTS IN THE WESTERN LEGAL TRADITION 276-84 (1993).

> nature and to various human laws that are common to all peoples.[63]

And again:

> 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 law of God and of nature and the just contracts and treaties that princes have entered into . . . .[64]

If sovereignty sometimes means the ruler's complete independence from all law (unless and until and for as long as one agree to be bound by it), it assuredly did not mean that for Bodin[65] or the tradition he continued. That meaning about governmental power came later, first with Hobbes and later with others.[66]

The sovereign governor's claim to be above the law, moreover, has now been *all but* conferred on the governed. These changes have not been unrelated to each other. "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."[67] Sovereignty has become a normative claim for individuals to be something

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[63] JEAN BODIN, ON SOVEREIGNTY 10 (Julian H. Franklin ed., 2004).
[64] *Id.* at 31-32.
[65] Alison La Croix seems to overlook this point when discussing Bodin in her otherwise excellent book *The Ideological Origins of Federalism*, *supra* note 43, 13, 225 n.5. One of the particular strengths of La Croix's account is its recognition of how the creators of American federalism were drawing on a long tradition of discussion of sovereignty and related concepts. Also for this purpose, Patrick Thomas Riley, Historical Development of Federalism, 16th-19th Centuries (1968) (unpublished Ph.D. dissertation, Harvard University), is outstanding.
[66] The struggle to locate "sovereignty" was considerable. *See* OTTO GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY 1500 TO 1800 35-61 (1950; 2003). 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* HEINRICH ROMMEN, THE STATE IN CATHOLIC SOCIAL THOUGHT 389-410 (1945); JOHANNES MESSNER, SOCIAL ETHICS: NATURAL LAW IN THE WESTERN WORLD 574-629 (1949, 1965). Harold Laski preceded Maritain in outright rejecting the "sovereignty" of the state. HAROLD LASKI, STUDIES IN THE PROBLEM OF SOVEREIGNTY 1-26 (1917).
[67] BERTRAND DE JOUVENEL, SOVEREIGNTY: AN INQUIRY INTO THE POLITICAL GOOD 230 (1957, 1997).

approaching self-norming, as in *Lawrence*. Wilson was a purely modern man when he propounded at Penn that unless and until a person put himself under law, he cannot be bound by law. Barnett is a thoroughly modern man when he agrees with Wilson and argues that we begin from individual sovereignty and "a presumption of liberty,"[68] where these mean that the individual is presumptively ungoverned.

As Barnett himself concedes, however, including in this very context, the presumption of individual liberty is only that, a conditional claim that can be rebutted. Even Barnett does not deny that government can and should refuse some attempts at "liberty," viz., those that would cause "harm." Individuals are not, therefore, meaningfully "sovereign" – *unless* all that term means is that individuals are subject to legal regulation only when they are in fact subject to legal regulation.[69] 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 was out to deny.

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[68] RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

[69] The libertarian left rarely faces the governmental arbitrariness that is entailed by giving legal effect to revisable selves: "There may well be a kernel of moral truth in the Casey dictum [that "at the heart of liberty is the right to define one's own concept of existence"], 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).

IV. Transforming the Politico-Legal Culture Away from Competing "Sovereigns"

This last point, about the bearing of higher law on government, raises a larger context in which to evaluate the individual mandate. Barnett wants us – indeed, wants the Supreme Court – to begin from a baseline presumption of liberty and (what he takes to be its correlate) a presumption against regulation. Leaving aside for the moment the unstated justifications of those presumptions, however, it should be noted 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 the occasion not have health insurance unless by regulation they have been compelled to buy such insurance. As is familiar, the category of "liberty" is not exhausted by negative liberty (freedom *from* interference); it also includes positive liberty (freedom *to* act or be in a certain way).[70] The freedom to be healthy may be enhanced by regulation, and this apparently is what the Congress that passed the PPACA thought.

Even if that is indeed what Congress was up to (as the legislative history suggests it is), Congress's regulatory activity on behalf of health immediately bumps up against the fact of how we generally think about the role of government, or at least *our* government, and, correlatively, of 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 the Constitution is

[70] On the distinction between negative and positive liberty, see, e.g., ISAIAH BERLIN, LIBERTY 37-43, 48-50, 216-17 (2008) (defending negative liberty against government claims on behalf of positive liberty). On what this means for Hobbes in particular, see QUENTIN SKINNER, HOBBES AND REPUBLICAN LIBERTY (2008).

construed, by judges, 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."[71] While not denying that there has been a long Anglo-American tradition (even one predating the framing and ratification of our Constitution) of limiting government's role to protecting negative liberty, 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."[72]

This is an intriguing claim, and its meaning turns in part on what it is involved in "justifying" what we do with or under our Constitution. Without questioning *the fact* 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 "mega-statutes" form part of our nation's "fundamental law," right alongside the Constitution itself.[73] The 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.[74]

Eskridge and Ferejohn's elegant and controversial argument in favor of treating statutes and the administrative schemes they launch on a par with the Constitution defies summary here. What it establishes, though, at a minimum, is that there is a mainstream

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[71] ESKRIDGE & FEREJOHN, *supra* note 20, at 43.
[72] *Id.* at 43.
[73] *Id.* at 42.
[74] *Id.* at 197.

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 regulation that confers positive liberties. Even if such regulation is arguably inconsistent with the original meaning of the Constitution, Eskridge and Ferejohn continue, it ought now to be treated as functionally amending the document, in part because that document's procedures for formal amendment are too cumbersome to be met except in exceptional circumstances.

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 Union Address, on January 11, 1944, he included just such a right. "FDR did *not* believe these rights," including the right to adequate medical are, "were already in the Constitution, nor did he seek an Article V amendment. His project," Eskridge and Ferejohn explain, "was to recognize these affirmative rights as fundamental commitments that a democratic government should be making to its citizens; FDR's deeper project," they continue,

> 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. The primary mechanism for Roosevelt's grand project was superstatutes.[75]

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, passage of the Medicare Act took thirty

[75] *Id.* at 46.

years from the time of passage of Social Security Act.[76] And, needless to say, it took until just last year for Congress to enact legislation aimed a comprehensive guarantee of the seventh right enumerated by FDR: "to adequate medical care" and "good health."[77]

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.[78] There was indeed no *legal* duty prior to 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 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. This is a proposition civic republicans, such as Eskridge and Ferejohn, affirm.[79] It should also be affirmed, moreover, by those, whether civic republican or not, who approach the question of the role of government from a moral perfectionist point of view in ethics and go on to affirm, on that basis, that it is the role of government to be prevenant on behalf of those who do not provide for themselves. Call this paternalism if you like, but that is no argument against it.

Still, someone may object, ours is a written constitution, meant to endure for ages without alteration except through the mechanisms of amendment provided in Article V, and our Constitution provides whatever legally enforceable rights there are. As mentioned, Eskridge and Ferejohn have specifically denied this normative argument

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[76] "The Great Society 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).
[77] *Id.* at 46.
[78] Barnett, *supra* note 5, at 41.
[79] *See* Brown, *supra* note <>, at 71-72.

about Article V's being the exclusive mechanism for amendment, arguing instead that superstatutes, such as the PPACA, should be read as *de facto* constitutional amendments, sources of new rights and duties of the highest positive-law order.[80] Whether or not one agrees with them about that, though, the prospect of giving a non-originalist meaning to the Constitution returns us to a cautionary point I flagged 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 "Sovereingty"

One of the remarkable facts about many of those who are originalists about the Constitution is that they are only *sometimes* originalist about the objects of their political affection. The topic that has been the focus here, sovereignty, is perhaps the most glaring example of originalists' selectivity. Even among originalists, originalism has more than one meaning, but common to all of them is a demand for close attention to the words of the Constitution. As we have seen, however, sovereignty does not so much as appear in the Constitution, let alone as a property of, respectively, the nation, the states, the people, and individuals, not to mention tribes. The originalist arguments in favor of sovereignty can only be defended *on originalist grounds*, therefore, on the theory that they are supported by the original *purposes* – though not the words – of the Constitution.

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[80] For a forceful argument that the only was to amend the Constitution is through Article V, see John R. Vile, *Legally Amending the Constitution: The Exclusivity of Article V's Mechanisms*, 21 CUMB. L. REV. 271 (1991). "Examining the available writings to the extent that I (and my seminar class) 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." Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment* 96 COLUM. L. REV. 121, 148 (1996). For a defense of "common law" techniques of enforcing new constitutional positive rights, see Helen Hershkoff, *"Just Words": Common Law and the Enforcement of State Constitutional and Economic Rights*, 62 STAN. L. REV. 1521 (2010).

But if it is legitimate to consider the purposes behind the Constitution where there are no words to guide us in discerning those purposes, it is surely almost *a fortiori* that we should consider the Constitution's purposes where there *are* words to guide us in that discernment. Someone might counter that *expressio unius est exclusio alterius*, which in this context would mean that words preempt purposes. This should be so, however, *if at all*, 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 Anton 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.[81]

The question, though, is whether we can *properly* do just that. Can we humans properly set up some 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?[82] 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 are instead under 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*

[81] ANTONIN SCALIA, A MATTER OF INTERPRETATION (1998).
[82] Of course, the Constitution does indeed make provision 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.

extent doing so is, all things considered, a prudent way of achieving the ends of good governance. What is prudent will predictably vary from time to time and place to place. This is the locus of the creative tension to which I referred at the beginning.

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 choices about law's scope must be made. Are we "original sovereigns?"[83] 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, though not dominant in American political discourse, has not been absent.[84] And those who affirm it as true – those who believe that we humans, including the lawgivers themselves, are under a higher law obligation to seek the good life, including by setting up good government and framing good laws – will view themselves as morally obligated, in an indefeasible way, to struggle against those who would be absolutists about texts, or would assert a "presumption of liberty" and leave it at that. Texts should be in the service of worthy human purposes, and some of those purposes 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.

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[83] 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 (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.

[84] For a compendious account, see Robert Kraynak, *Catholicism and the Declaration of Independence*, *in* MARITAIN IN AMERICA 1-30 (Christopher McCullen & Joseph Allan Clair eds., 2009). The classic account, which is in need of updating, is CHARLES HAINES, THE REVIVAL OF NATURAL 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 (1958).

Whether the individual mandate is in fact a *prudent* legislative response to a perceived human problem, is not a question I will attempt to answer here.[85] My aim has been to show why the argument that the mandate violates individual sovereignty assumes answers to metaphysical questions that I have not heard from Barnett.[86] That we are original sovereigns is a claim that must be argued for, not merely asserted. So, too, is that 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.[87] This much is beyond dispute, however: "when 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."[88] 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."[89]

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[85] 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. MEDAILLE, TOWARD A TRULY FREE MARKET: A DISTRIBUTIST PERSPECTIVE ON THE ROLE OF GOVERNMENT, TAXES, HEALTH CARE, DEFICITS, AND MORE 207-22 (2010).

[86] 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* CALABRESI, *surpa* note 11, at 275-76 (2007) (Barnett quoted in panel discussion). When Barnett offers a modestly more ambitious argument in favor of natural rights (that protect liberty), he does so conditionally, the condition being "if you want a society in which people can pursue happiness." BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 68, at 82. The natural law tradition, by contrast, does not rest natural rights on the mercurial contingency of what persons "want." On a related point, Barnett reports that "[n]atural law ethics or 'natural right' is a method of assessing the propriety of individual conduct." *Id.* at 82. 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.

[87] This will be the burden of my forthcoming book THE SOVEREIGNTY OF THE GOOD: AN ESSAY ON LAW, AUTHORITY, AND THE CHURCH (forthcoming Oxford University Press 2013). I have already argued for it (among many other venues) in, 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'Y 437 (2009).

[88] PENNINGTON, *supra* note 62, at 290.

[89] DE JOUVENEL, *supra* note 67, at 221.