WHY THE DEBATE OVER THE CONSTITUTIONALITY OF THE FEDERAL HEALTH CARE LAW IS ABOUT MUCH MORE THAN HEALTH CARE

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I. INTRODUCTION

"In the tension between federal and state power lies the promise of liberty."[1] But that can remain true in any practical sense only if courts give effect to the familiar proposition that "'[t]he Constitution created a Federal Government of limited powers'"[2] under which "[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."[3]

The police power is the antithesis of limited, enumerated powers. According to Sir William Blackstone, parliament "can, in short, do everything that is not naturally impossible."[4] One traditional view of the state police power defines it to include all the plenary power of parliament not forbidden to a State by its own constitution or by that of the United States.[5] Given the breadth of that power, it cannot be exercised by the federal government without overwhelming the limitations intended by the Constitution's scheme of enumerated powers. That is why it is logically necessary for the Supreme Court to say – and to continue to say: "We *always* have rejected readings of the Commerce Clause and the scope of Federal power that would permit Congress to exercise a police power."[6]

For those such as Professor Tribe who contend that upholding the federal healthcare mandate is an easy case to

1. Gregory v. Ashcroft, 501 U.S. 452, 459 (1991). The Constitution transcends the merely utilitarian by declaring that a fundamental purpose of the document is "to . . . secure the Blessings of Liberty to ourselves and our Posterity . . ." U.S. CONST. Preamble. *See also*, United States v. Lopez, 514 U.S. 549, 578 (1995) ("[T]he federal balance is too essential a part of our constitutional structure, and plays too vital a role in securing freedom for us to admit inability to intervene when one of the other levels of Government has tipped the scales too far.") (Kennedy, J., concurring).

2. New York v. United States, 505 U.S. 144, 155 (1995).

3. US CONST. amend. X.

4. 2 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, ch. 2 (St. George Tucker ed., 1803).

5. Thorpe v. The Rutland & Burlington Railroad Co., 27 Vt. 149 (1855).

6. United States v. Morrison, 529 U.S. 598, 618–19 (2000).

decide,[7] the undeveloped subtext is that Virginia and other challengers either do not understand the Progressive/Roosevelt constitutional settlement or are quixotically trying to overturn it. Nothing could be farther from the truth in the case of Virginia's suit. Virginia has modestly framed its case within the scope of present authority. No existing case needs to be overruled and no existing doctrine needs to be curtailed or expanded for Virginia to prevail on the merits. Nor does Virginia remotely suggest that the United States lacks the power to erect a system of national healthcare. Virginia expressly pled that Congress has the authority to act under the taxing and spending powers as it did with respect to social security and Medicare, but that Congress in this instance lacked the political capital and will to do so.[8] No challenge has been mounted by Virginia to the vast sweep and scope of the Patient Protection and Affordable Care Act (PPACA).[9] Instead, only the mandate and penalty were challenged because the claimed power is tantamount to a national police power inasmuch as it lacks principled limits.

The conclusion reached in this article is that Congress lacks the power to enact the mandate and penalty[10] for that reason. But it is also a purpose of this article to demonstrate how maintaining an activity/inactivity distinction vindicates the insights of *Gregory*[11] and of Justice Kennedy's concurrence in *Lopez,*[12] that there is a practical sense in which our liberties are preserved by federalism. This is so because, after the Roosevelt Court settlement, very little individual economic activity remained free from potential federal regulation. However, inactivity until now has been permitted to remain as an opt-out from regulation. Because this domain of inactivity is not protected by any of the other checks and balances, permitting regulation of inactivity under the Commerce Clause would subject the entire person to federal control in a way that would be deemed intolerable

7. Lawrence H. Tribe, *On Health Care, Justice Will Prevail*, N.Y. TIMES, Feb. 7, 2011.

8. Pacer E.D. Va. Case 3:10-cv-00188-HEH Doc. 1 ¶11. See Helvering v. Davis, 301 U.S. 619 (1937).

9. Pub. L. No. 111–148, 124 Stat. 119 (2010).

10. PPACA § 1501.

11. 501 U.S. at 452.

12. 505 U.S. at 155.

by citizens who value individualism above the meliorist programs of government.

In Part II, we describe the old jurisprudential regime which at least supposed itself to be a guardian of economic liberty founded upon the reasonableness principle of the natural law held to be implicit in the Due Process Clauses of the Fifth and Fourteenth Amendments. In Part III, we review the Progressive critique of that regime. In Part IV, we describe the New Deal settlement. And in Part V, we suggest why overleaping the activity/inactivity divide would be destructive of liberty interests now shielded by federalism.

II. THE NATURAL LAW OF REASONABLENESS

The Commonwealth of Virginia is the only American State to have officially published its colonial statutes.[13] In the second third of the seventeenth century, laws began to reflect a practice of stating the occasion and premises of an enactment in a preamble composed of "whereas" clauses. It can hardly be doubted that in doing so the Assembly acted under the influence of "the Chief English prose work of the sixteenth century," Richard Hooker's *Of The Laws Of Ecclesiastical Polity*.[14] What the Assembly wished to demonstrate was that its laws were reasonable. Book I of Hooker's work, entitled *Concerning Laws, and their several kinds in general*, was published in 1593 together with a preface and three other books. In that first book, Hooker appears as "one of the first writers to use the term 'law of nature' in the modern sense of a physical law, in contrast with the stoic and medieval sense (which he also employs) of universally valid moral principles." Hooker also insists upon "some form of consent of the governed as a basis for legitimate political power: 'without which consent there were no reason that one man should take it upon him to be lord or judge over another.'" And he judges harshly those who would try: "Again, 'for any prince or potentate of what

13. WILLIAM WALLER HENING, THE STATUTES AT LARGE, BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619 (University Press of Virginia Charlottesville 1969) (Facsimile edition in XIII Volumes).

14. ARTHUR STEPHEN, HOOKER OF THE LAW OF ECCLESIASTICAL POLITY at xiv (McGrade ed., Cambridge Univ. Press 1989) (2004 reprint).

kind so ever upon earth to exercise the same [i.e., legislative power] of himself, and not either by express commission immediately and personally received from God, or else by authority derived at the first from their consent upon whose persons they impose laws, it is no better than mere tyranny."[15]

For Hooker, to be legitimate, a law must be consistent with right reason derived from an intelligible cosmos created by a rational God. The argument is "that the precepts of the law of reason derive from a series of intuitively self-evident propositions which human beings are capable of discovering for themselves through the natural light of reason."[16]

Although scholars can debate how original, or derivative of Hooker, John Locke's thought may be,[17] there can be no question that Locke's views on the role of reason in defining rights and his demand for the consent of the governed rest upon Hooker as a foundation. Thus, "Locke was correct in principle when he cited the 'judicious Hooker' near the beginning of the *Second Treatise of Government* to support his own conception of morality as based on a natural human equality without political subordination of one person to another."[18]

Although the Declaration of Independence is the most perfect summary of Locke's political thought ever penned, that document does not explain why natural law thinking dominated the American bench and bar for the next hundred years and more. The reason is found in the work of Blackstone. Despite his high regard for the powers of parliament, William Blackstone was a natural law thinker and his *Commentaries on the Laws of England* dominated American legal training in the late eighteenth and for most of the nineteenth century. "In the first century of American independence, the *Commentaries* were not merely an approach to the study of law; for most lawyers they constituted all there was of the law." So prominent a legal voice as that of Chancellor Kent was largely repeating

15. *Id.* at xxiii.

16. RICHARD HOOKER, THE FOLGER LIBRARY EDITION OF THE WORKS OF RICHARD HOOKER, Vol VI, Part One at 107 (W. Speed Hill, ed., Medieval & Renaissance Texts & Studies, Binghampton, N.Y. 1993).

17. *Id.* at 112 n.48.

18. Stephen, *supra* note 14 at xxiii.

Blackstone. Something Kent willingly acknowledged when he said "that 'he owed his reputation to the fact that, when studying law . . . he had but one book, Blackstone's *Commentaries*, but that one book he mastered.'"[19] As commented upon "by numerous American editors" like St. George Tucker, the *Commentaries* "became the bible of American legal institutions."[20]

Of course, when we read Blackstone, we hear Locke. Here is the heart of the matter for Blackstone: "'For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion, so, when he created man and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of these laws.'" This law is superior in obligation to all other. "'It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.'"[21]

So it was in no way surprising that American courts began to review laws in light of their reasonableness. A celebrated example is *Commonwealth v. Alger*[22] in which the Court balanced the public interest in the police power against the rights of private property. At common law, the law of nuisance adhered to the principle *sic utere tuo ut alienum non laedas*.[23] Regulation beyond the law of nuisance might in some cases be "necessary and expedient" but it must be at the same time "reasonable."[24]

The adoption of the Fourteenth Amendment's prohibition against any State "mak[ing] or enforce[ing] any law which shall abridge the privileges or immunities of citizens of the United States," or "deprive any person of life, liberty, or

19. DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW at 3 (University of Chicago Press 1941) (1996 ed.).
20. *Id.* at xv.
21. *Id.* at 49.
22. 7 Cush. 53 (1851).
23. To use your own in such a manner as to not injure another's.
24. Holden v. Hardy, 169 U.S. 366, 392 (1898) (quoting *Alger* with approval).

property, without due process of law" or "deny to any person within its jurisdiction the equal protection of the laws," would in time lead to an almost complete reversal of the holding in *Barron v. Baltimore*[25] that the Bill of Rights restrained only federal and not State power.

The Court's first encounter with the Fourteenth Amendment was in the *Slaughter-House Cases*.[26] John A. Campbell, who had resigned from the Supreme Court when Alabama seceded, argued for The Butcher's Benevolent Association of New Orleans against a monopoly secured by widespread bribery that benefitted seventeen men. "[F]ormer Senator Matthew H. Carpenter (who had helped draft the Fourteenth Amendment)" appeared "for the monopoly."[27] Campbell advanced constitutional arguments under the Thirteenth Amendment as well as the Privileges and Immunities, Equal Protection, and Due Process clauses of the Fourteenth Amendment.[28] The argument from the Thirteenth Amendment was rejected with the observation that any effort to turn the meaning of the amendment from the abolition of the institution of slavery as it actually existed, "and with a microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it."[29] Because the Fourteenth Amendment distinguishes between national and state citizenship, while guaranteeing only the privileges and immunities of the former, the scope of the clause was restricted to purely national matters, such as the right to be protected abroad and on the high seas.[30] The Court then brushed aside the remaining arguments saying, "The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiff's of their property without due process of law, or that it denies to them the equal protection of the law." With respect to due process, both the Fifth Amendment and most state constitutions guaranteed it, and

25. 32 U.S. (7 Pet.) 243, 249 (1833).
26. 83 U.S. (16 Wall.) 36 (1873).
27. BERNARD SWARTZ, A HISTORY OF THE SUPREME COURT at 159 (Oxford University Press Paperback 1995).
28. 83 U.S. (16 Wall.) at 66.
29. *Id.* at 69.
30. *Id.* at 74, 79.

the meaning of that guarantee had been frequently litigated. This permitted the Court "to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision."[31] And if the Louisiana law is viewed as a good faith regulation of a noxious trade for the protection of public health, as the majority said, then this conclusion was compelled under existing doctrine because the enactment then became merely a reasonable exercise of the police power.[32]

In dissent, Justice Field recognized that the state police "power undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society, and is exercised on a great variety of subjects, and in almost numberless ways." But he noted that the restrictions on where animals could be kept and slaughtered were the only health measures in the law and that "[w]hen these requirements are complied with, the sanitary purposes of the act are accomplished." Because nothing required the exclusion of other butchers from this area, he thought the appeal to the police power pretextual, saying, "The pretense of sanitary regulations for the grant of the exclusive privileges is a shallow one, which merits only this passing notice."[33]

Justice Field was prepared to say that the individual "right to pursue one of the ordinary trades or callings of life" was protected by the Fourteenth Amendment "and was so intended by the Congress which framed and the States which adopted it." Field located that protection in the privileges and immunities guarantee of the amendment and it is difficult to read the debate on the amendment in the *Congressional Globe* without concluding that as a matter of history he was probably correct.[34]

31. *Id.* at 80–81.

32. *See* DAVID E. BERNSTEIN, REHABILITATING LOCHNER at 13 (University of Chicago Press) *(*"Miller may have meant only that the Due Process Clause does not reach *valid* police power measures . . . .").

33. *Id.* at 87–88.

34. *Id.* at 96–97. *See also,* McDonald v. City of Chicago, 130 S. Ct. 3020, 3058 (2010) (Thomas, J., concurring in part and concurring in the judgment).

When Field stated that the purpose of the Fourteenth Amendment was to incorporate the inalienable rights declared in the Declaration of Independence into the Constitution,[35] he was adhering to what became a central tenet of the Republican Party worked out by James G. Birney and Salmon P. Chase twenty years before the war.[36] "Chase's interpretation of the Constitution was summed up in the First Liberty Party address he composed, in December, 1841: 'The Constitution found slavery and left it a State institution – the creature and dependent of State law – wholly local in its existence and character.'" All men were persons in contemplation of the Constitution. "The Fifth Amendment, which barred Congress from depriving any 'person' of 'life, liberty, or property' without due process of law, was intended in Chase's view, to prevent the National government from sanctioning slavery anywhere within its exclusive jurisdiction." The national "government 'cannot create or continue the relationship of master and slave,' he insisted, and therefore whenever a slave came into an area of Federal authority, he automatically became free."[37]

Dred Scott claimed to be free because he had been taken to the Illinois and the Wisconsin Territory.[38] He lost of course. "Southern politicians had been instrumental in the repeal of the Missouri Compromise, and their Constitutional position was accepted by the Supreme Court in the Dred Scott decision."[39] But no one doubted that a purpose of the Fourteenth Amendment was to overturn *Dred Scott*. As Justice Bradley put it in his dissent in the *Slaughter-House Cases*, "it was the intention of the people of this country in adopting that amendment to provide National security

35. 83 U.S. (16 Wall.) at 115–16, 121–22.

36. ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN at 76 (Oxford University Press 1974 reprint). Field was a Democrat when appointed to the Court by Abraham Lincoln. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT at 151 (Oxford University Press) (paperback edition 1995).

37. Foner, *supra* note 36 at 76. "Chase did not take the extreme position of some anti-slavery men that the fugitive slave clause was a violation of natural law and therefore void . . ." He pointed out instead that that it differed from other clauses in neglecting to delegate to Congress power to enforce it by appropriate legislation. This left each free State as the only judge of its obligations under it. "During the secession crisis he suggested that the North might agree to pay compensation for fugitive slaves instead of returning them." *Id.* at 77.

38. Schwartz, *supra* note 36 at 111.

39. Foner, *supra* note 36 at 100.

against violation by the States of the fundamental rights of the citizen."[40] Both Bradley and Swayne, another Lincoln appointee, writing in dissent were prepared, as an alternative to the Privileges and Immunities Clause, to lodge the guarantee of those fundamental rights in the Due Process Clause of the Fourteenth Amendment.[41] Presumably they remembered that "John A. Bingham of Ohio, who almost alone was responsible for the choice of phraseology in Section 1" of the Fourteenth Amendment, had "in the slavery controversy . . . invoked due process in a substantive sense."[42]

It has been said that "[b]efore his retirement, Field was to see the elevation of his earlier dissents on the matter into the law of the land." Or, "as Justice Frankfurter put it, the Justices 'wrote Mr. Justice's Field's dissents into the opinions of the Court."[43]

"Three weeks after the *Slaughter-House* decisions, Chief Justice Chase suddenly died."[44] And when *Munn v. Illinois*[45] was written by the new Chief Justice Morrison R. Waite in 1877, Field was still in dissent, joined by Justice Strong. Although the majority upheld state regulation of the price charged by certain grain elevators, everyone now agreed that the enactment had to pass muster under the Due Process Clause of the Fourteenth Amendment.

40. 83 U.S. (16 Wall.) at 122.

41. *Id.* at 122, 128. Justice Swayne expressed his natural law thinking thusly: "it is necessary to enable the government of the nation to secure to everyone within its jurisdiction the rights and privileges enumerated, which, according to the plainest considerations of reason and justice and the fundamental principles of the social compact, all are entitled to enjoy." *Id.* at 129. Justice Bradley averted to another component of Natural Law thinking by limiting the police power "to uniform regulations equally applicable to all." *Id.* at 119. The notion that enactments for the benefit of special interests are illegitimate in the natural law tradition is reflected in the oath for Burgesses adopted by the Virginia Assembly in March 1657/58:

> You and every of you shall swear upon the holy Evangelist and in the sight of God to deliver your opinions faithfully, justly and honestly according to your best understanding and conscience for the general good and prosperity of this country and every particular member thereof, And to do your utmost endeavor to prosecute that without mingling with it any particular interest of any person or persons whatsoever, So helpe you God and the contents of this booke.

1 Hening at 508.

42. Willard Hurst, *Book Review*, 52 HARV. L. REV. 851, 857 (1939).

43. Schwartz, *supra* note 36 at 151.

44. *Id.* at 161.

45. 94 U.S. at 113 (1877).

"Soon after Waite succeeded to his position, Bradley struck up a close relationship with him and the new Chief Justice relied on Bradley in his work."[46] Indeed, Waite relied upon an outline prepared by Bradley to such a degree in *Munn* "that he has been characterized as a virtual co-author of the famous opinion there." As "the Court's leading legal scholar, Justice Bradley" found the exercise of police power at issue reasonable based upon the common law, "especially Lord Hale's seventeenth-century statement that when private property is 'affected with a public interest, it ceases to be *juris private* only.'"[47]

Under the influence of Justice Bradley's natural law thinking, the majority began with first principles.

> When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private, *Thorpe v. R. & B. Railroad Co.*, 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas*. From this source come the police powers . . . Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum charge to be made for services rendered, accommodations furnished, and articles sold.[48]

46. Schwartz, *supra* note 36 at 162, 165.
47. *Id.* at 165. *Juris privati* – private of right.
48. *Id.* at 124–25.

In distinguishing between property which is truly private and beyond the reach of regulation under the Due Process Clause, and property being used to affect the common interest, the Court made an observation that bears on the activity/inactivity distinction that has arisen in the health care litigation.

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.*[49]

Field in dissent distinguished the common law arguments by noting that "[w]hen Sir Matthew Hale, and the sages of the law in his day, spoke of property as affected with a public interest . . . , they referred to property dedicated by the owner to public uses," as when a street is opened on private land, "or to property the use of which was granted by the government, or in which special privileges were conferred."[50] According to Field, the Due Process Clause grants power over private property in four circumstances only. First, it may be taken for public purposes upon adequate compensation. Second, it may be taxed. Third, government may regulate under the police power within the limits of the maxim *sic utere tuo ut alienum non laedas*, and finally property "may be destroyed to arrest a conflagration or the ravages of pestilence, or be taken under the pressure of an immediate and overwhelming necessity to prevent public calamity . . ."[51]

Melville Weston Fuller was elevated to the Supreme Court as Chief Justice in 1888 and held that office until he died in 1910. "Even before Chief Justice Fuller took his seat," state courts "had used substantive due process to strike down regulatory laws on the ground that such a law 'arbitrarily

49. *Id.* at 126 (emphasis added).
50. *Id.* at 139.
51. *Id.* at 145.

deprives him of his property and some portion of his personal liberty."[52] It was not until 1897 that the Supreme Court followed suit in *Allgeyer v. Louisiana*.[53] In an opinion written by Rufus Wheeler Peckham, the court struck down a prohibition of purchasing out-of-state insurance as violative of the Fourteenth Amendment. "The liberty mentioned in that amendment, Peckham wrote, 'means not only the right of the citizen to be free from the mere physical restraint on his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to purchase any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to the carrying out to a successful conclusion the purposes above mentioned.'"[54] While still on the New York Court of Appeals, Peckham had identified liberty with freedom of contract and freedom of contract with personality: "'the faculties with which [man] has been endowed by his Creator."[55] According to one contemporary observer, in *Allgeyer*, "'all that happened was that the Supreme Court joined hands with most of the appellate tribunals of the older States.'"[56]

Justice Field resigned in 1897[57] and died in 1899 so he never saw the apotheiosis of his judicial philosophy set out in *Lochner v. New York*.[58] However, his nephew, Justice David J. Brewer was in the majority in that case.

The statute under review in *Lochner* was a law of New York limiting employment to a sixty hour week. Justice Peckham declared, with no evident doubt, that "[t]he statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer" in

52. *Id.* at 181 quoting Matter of Application of Jacobs, 98 N.Y. 98, 105 (1885).
53. 165 U.S. 578 (1897).
54. *Id.* at 589.
55. Schwartz, *supra* note 36 at 180 quoting People v. Gillson, 109 N.Y. 389, 398 (1888).
56. *Id.* at 181 quoting Hough, *Due Process of Law-Today*, 32 HARV. L. REV. 218, 228 (1919).
57. Schwartz, *supra* note 36 at 178.
58. 198 U.S. at 45 (1905).

violation of the Fourteenth Amendment.[59] He acknowledged that "[b]oth property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in exercise of" its police "powers, and with such conditions the Fourteenth Amendment was not designed to interfere." New York, "therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection." The majority noted that the Court had "recognized the existence and upheld the exercise of the police powers of the States in many cases which might fairly be considered as border ones, and it has, in the course of its determination of questions regarding the asserted invalidity of such statutes, on the ground of their violation of the rights secured by the Federal Constitution, been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of state statutes thus assailed," including a Utah statute limiting employment in mines and shelters to an eight hour day.[60] But the police power must have justiciable limits. "Otherwise the Fourteenth Amendment would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be." So, whenever the right of contract was limited this question had to be judicially determined: "Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?"[61]

"In *Lochner*, it has been suggested, Justice McKenna, whose father had owned a bakery, may have persuaded Fuller and others in the majority that bakery work and that the health rationale was a sham."[62] Be that as it may, the

59. 198 U.S. at 53 (citing Allgeyer, 165 U.S. 578).
60. *Id*. at 53–54.
61. *Id.* at 56.
62. Schwartz, *supra* note 36 at 194.

majority did consider the health concerns advanced in support of the law pretextual: "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives."[63]

White and Day joined Harlan in dissent. Accepting that the Fourteenth Amendment protects liberty of contract, they were unable to "say that the State has acted without reasons nor ought we proceed upon the theory that its action is a mere sham."[64] They also found it significant that the law "applies only to work in bakery and confectionary establishments, in which, as all know, the air constantly breathed by workmen is not as pure and healthful as that to be found in some other establishments or out of doors."[65]

Holmes's dissent is rightly regarded as a rhetorical tour de force.[66] It initially declares, "This case is decided upon an economic theory which a large part of the country does entertain." And whose theory might that be? Why Herbert Spencer's of course.

Spencer undertook in his *Social Statics, Abridged and Revised*[67] to demonstrate philosophically that a society organized on *laissez faire* principles come closer than any other to realizing the Benthamite calculus of the greatest happiness of the greatest number. His argument proceeded from this first principle: "Every man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man."[68] This permits Holmes to observe, "The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not." Furthermore,

63. 198 U.S. at 64.
64. *Id.* at 73.
65. *Id.* at 70.
66. Judge Posner regards it as "a rhetorical masterpiece." Schwartz, *supra* note 36 at 197.
67. HERBERT SPENCER, SOCIAL STATICS, ABRIDGED AND REVISED (New York: D. Appleton and Company 1896).
68. *Id.* at 55.

Holmes famously declares, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's social statics." And so, we should recognize that "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*."[69]

What is not often remarked upon is that the rhetorical force of Holmes's dissent depends on a strawman argument. Spencer's First Principle is simply *sic utere tu ut alienum non laedas*. And he expressly notes that this principle has been asserted through time by Locke, by the American Founders in the Declaration of Independence, as well as "Judge Blackstone and 'the judicious Hooker.'"[70] It is one thing to maintain that "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." That powerfully advances the thought that the recent musings of an English social philosopher are not in the Constitution. It would have been quite another thing for Holmes to have said "The Fourteenth Amendment does not enact the principles of John Locke." This would have been regarded as puzzling at best and at worst demonstrably false.

Holmes's overarching concern was that majority political opinion be given effect. "Every opinion tends to become a law," he wrote, and "I think that the word liberty in the Fourteenth Amendment is preverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." Not only could a reasonable man think the law in *Lochner* was "a proper measure on the score of health," Holmes said he knew "[m]en whom I certainly could not pronounce unreasonable [who] would uphold it as a first installment of a general regulation of the hours of work."[71]

Because so many applications of the police power were upheld before and after *Lochner*, that case was something of an outlier as a practical matter. After acknowledging that

69. Lochner, 198 U.S. at 75 (Holmes, J., dissenting).
70. Spencer, *supra* note 67 at 47.
71. Lochner, 198 U.S. at 76.

fact, Francis J. Swayze still found it provocative. Writing in the November 1912 number of the Harvard Law Review he said of *Lochner*: "The result cannot be called satisfactory."[72]

In 1930 the Harvard University Press published *The Revival of Natural Law Concepts*, by Charles Grove Haines. A review of that book in the Harvard Law Review noticed that "the author has included a polemic on the usurpation of legislative powers by the judiciary of the United States and especially by the Supreme Court." According to this view, "the courts have made natural law theories a part of current constitutional law" defining this natural law in terms of "'the eighteenth-century notion of fundamental rights beyond the realm of governmental interference and the concept of inalienable rights as formulated in the Declaration of Independence.'" Then, "[t]o his history of the restoration, or rather the continuance of natural law thinking in our constitutional law the author gives an economic interpretation." What Haines thought had happened was that "under the guise of the phrases 'due process of law,' 'equal protection of the laws,' 'public purpose' for taxation, 'public use' for eminent domain, and 'reasonableness,'" the courts had assumed the power "to pass upon the wisdom or unwisdom of legislation, although ostensibly applying the words of a written constitution in a mechanical manner; and in passing upon the legislation in this way they ha[d] judged it from the point of view of eighteenth-century individualism." As a consequence "the forces of economic *laissez faire* and conservatism ha[d] been able to block legislation to deal with economic and social needs." Haines was sufficiently upset with this turn of events to foresee amending the Fourteenth Amendment or if that were not possible, changing the type of person populating the Federal bench."[73] What was going on?

III. THE PROGRESSIVE CRITIQUE

If it is true that there was a homegrown, American natural law jurisprudence founded on Locke and Blackstone, and transmitted through the non-academic training of

72. Francis J. Swayze, *Judicial Construction of the Fourteenth Amendment*, 26 HARV. L. REV. 1 (1912).

73. William C. VanVleck, *Book Review*, 44 HARV. L. REV. 317, 318 (1930).

lawyers, that system would become vulnerable whenever it encountered a declining belief in the claims of reason.[74] Following its formation in 1878, the American Bar Association successfully pursued a policy of largely limiting the practice of law to graduates of ABA accredited law schools. When brought into the academy, the American legal tradition was exposed to various criticisms.

Prior to the New Deal, there was a "general constitutional ideology of leading Progressive jurists, especially a highly influential group of Progressive judges and law professors associated with Harvard Law School, including Louis Brandeis, Felix Frankfurter, Learned Hand, and Roscoe Pound." Adopting "Justice Oliver Wendell Holmes, and later Brandeis, as its-standard-bearers on the Supreme Court," this group pursued "a political agenda that favored a significant increase in government involvement in American economic and social life."[75] The fact that the regulatory welfare state grew remarkably during the New Deal and afterwards gives rise to vague expectations that the preparatory thought and writings of the Progressive critics of the old jurisprudence is somehow co-extensive with what was accomplished in the Supreme Court when *Lochner* was overturned. A comparison of Section II with Section III dispels those expectations. Like most men and movements, the reach of the Progressive legal elite exceeded its grasp in large measure because the Progressive constitutional

74. *See* Boorstin, *supra* note 19 at 5. ("In the course of the last hundred years, and under the influence of the ideas of Compte, Darwin, Marx, Freud, and Veblen, we have come to minimize the importance of 'reason' in determining the course of history. According to these ideas, 'reason' ceases to be the power holding in check the dark forces of superstition, self-interest, and unreason, and instead rational systems become themselves the expression of dark and uncontrollable forces."). Although Compte still counted for something to Boorstin in 1941, by 1957 the Harvard Law Review would publish a book review of Irving Berlin's inaugural lecture in a memorial series in honor of Compte. Berlin's efforts were described in these terms:

> [A]fter a very tepid tribute to the memory of the great man, which suggests he was not quite such a *big* fool as he seems in spite of 'his grotesque pedantry, the unreadable dullness of his writing, his vanity, his eccentricity, his solemnity, the pathos of his private life, his insane dogmatism, his authoritarianism, his philosophical fallacies' . . . , Mr. Berlin denotes the rest of his lecture to a devastating and merciless attack not merely on Compte's philosophy of history but on the very foundation of his lifework – the concept of sociology as a true science.

Christopher Dawson, *Book Review*, 70 HARV. L. REV. 584 (1957).

75. Bernstein, *supra* note 32 at 41.

ideology was too radically different from what had gone before. As a consequence, the Natural Law tradition continued to operate through substantive due process for fundamental rights. And the augmentation of federal power under the taxing power and Commerce Clause left sufficient limits on federal power to make the PPACA mandate and penalty unconstitutional.

A. *Academics and Judges*

In 1880, Oliver Wendell Holmes was a private practitioner and part time lecturer at Harvard Law School. Asked to give a series of lectures "[h]e chose as his topic *The Common Law* and the lectures were published in a book of that name in 1881." In its opening sentence Holmes repudiates any jurisprudence of reason: "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." On the strength of this book, he was made a Professor in 1882, but at the end of that year, he was elevated to the Supreme Judicial Court of Massachusetts, where he remained until his elevation to the Supreme Court in 1902.[76]

As a judge, Holmes continued, on and off the bench, to speak out as a philosopher of the law, having identified that as his life's goal when he wrote Ralph Waldo Emerson in 1876.[77] On January 8, 1897, Holmes delivered a speech, on the occasion of the dedication of the new hall of the Boston University School of Law, entitled *The Path of the Law*, which he copyrighted. In it, Holmes declared that "Nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law." Natural law might be used to justify revolution, but that is the end of it. "No doubt

76. Schwartz, *supra* note 36 at 191–92.

77. Mark DeWolfe Howe, *Oliver Wendell Holmes at Harvard Law School*, 70 HARV. L. REV. 401, 417 n. 45 (1957) (Letter of April 16, 1876: "It seems to me that I have learned, after a laborious and somewhat painful period of probation, that the law opens a way to philosophy as well as anything else, if pursued far enough, and I hope to prove it before I die.").

simple and extreme cases can be put of imaginable laws which the statute-making power would not dare to enact, even in the absence of written constitutional prohibitions, because the community would rise in rebellion and fight; and this gives some plausibility to the proposition that the law, if not a part of morality, is limited by it."[78] In these remarks he gave "vast encouragement . . . to legal positivism."[79]

On January 17, 1899, Holmes delivered an address entitled *Law in Science and Science in Law* to the New York State Bar Association. In it, he deprecated equating the science of the law, as it was then called, with an historical understanding of it.

> I trust that I have shown that I appreciate what I thus far have spoken of as if it were the only form of the scientific study of law, but of course I think, as other people do, that the main ends of the subject are practical, and from a practical point of view, history with which I have been dealing thus far, is only a means, and one of the least of the means, of mastering a tool. From a practical point of view, as I have illustrated upon another occasion, its use is mainly negative and skeptical. It may help us to know the true limit of a doctrine, but its chief good is to burst inflated explanations.[80]

Holmes supposed that "[e]very one instinctively recognizes in these days the justification of a law for us cannot be found in the fact that our fathers always have followed it." Instead, "[i]t must be found in some help which the law brings toward reaching a social end which the governing power of the community has made up its mind that it wants." All in all, Holmes thought that "the practical study of the law ought also to be scientific" in this sense: "The true science of law does not consist mainly in a theological working out of dogma or a logical development as in mathematics, or only in a study of it as an anthropological document from the outside; an even more important part consists in the

78. Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 993 (1997).

79. Henry M. Hart, Jr., *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929, 935 (1950–51).

80. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 452 (1899).

establishment of its postulants from within upon accurately measured social desires instead of tradition."[81]

Lest we see some form of what became known as legal realism lurking between the lines, Holmes reassured his audience with these words:

> I do not expect or think it desirable that the judges should undertake to renovate the law. That is not their province. Indeed precisely because I believe that the world would be just as well off if it lived under laws that differed from ours in many ways, and because I believe that the claim of our especial code to respect is simply that it exists, that it is the one to which we have become accustomed and not that it represents an eternal principle, I am slow to consent to overruling a precedent, and think that our most important duty is to see that the judicial duel shall be fought out in the accustomed way.[82]

Still, close and doubtful cases do arise, and in those cases Holmes says "the simple tool of logic does not suffice and even if it is disguised and unconscious the judges are called on to exercise the sovereign prerogative of choice."[83] That choice should be exercised with "an ultimate dependence upon science because it is finally for science to determine, so far as it can, the relative worth of our social ends, and, as I have tried to hint, it is our estimate of the proportion between these, now often blind and unconscious, that leads us to insist upon and to enlarge the sphere of one principle and to allow another gradually to dwindle into atrophy."[84] How far this differs from a prescription that a good judge will intuit the better future and then help bring it about we cannot say. What is clear is that Holmes's concept of legal science at a minimum includes sociology.[85]

Perhaps no dismissal of the role of reason in the law has ever been written with a greater show of brutality than in Holmes's *Natural Law*, published in the *Harvard Law*

81. *Id.*
82. *Id.* at 460.
83. *Id.* at 461.
84. *Id.* at 462.
85. *Id.* "Very likely it may be that with all the help that statistics and every modern appliance can bring us there never will be a Commonwealth in which science is everywhere supreme. But it is an ideal, and without ideals what is life worth?"

Review in the closing months of World War I. He begins by dismissing the traditionalists as hopeless romantics.

> It is not enough for the knight of romance that you agree that his lady is a very nice girl – if you do not admit that she is the very best that God ever made or will make, you must fight.
>
> . . .
>
> It seems to me that this demand is at the bottom of the philospher's effort to prove that truth is absolute and of the jurist's search for criteria of universal validity which he collects under the head of natural law.[86]

Holmes next equates truth with might and numbers: "I used to say, when I was young, that truth was the majority vote of that nation that could lick all others . . . and I think that the statement was correct in so far as it implied that our test of truth is a reference to either a present or an imagined majority in favor of our view."[87]

There is also a suggestion that a code of laws that abolished all existing fundamental rights would have equal legitimacy with the existing code of laws and that we prefer what we now have out of naive familiarity.

> The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere. No doubt it is true that, so far as we can see ahead, some arrangements and the rudiments of familiar institutions seem to be necessary elements in any society that may spring from our own and that would seem to us to be civilized – some form of permanent association between the sexes – some residue of property individually owned – some mode of binding oneself to specified future conduct – at the bottom of all, some protection for the person. But without speculating whether a group is imaginable in which all but the last of these might disappear and the last be subject to qualifications that most of us would abhor, the question remains as to the *Ought* of natural law.[88]

86. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918).
87. *Id.*
88. *Id.* at 41.

As always for Holmes, after publication of *The Common Law,* duties and rights are simply predictions about what the state will do in any particular circumstance and rights rest on "the fighting will of the subject to maintain them"; on the proposition: "A dog will fight for his bone."[89]

"On the occasion of the ninetieth birthday of Mr. Justice Holmes, his" soon to be "successor on the Supreme Court of the United States said Holmes was 'for all students of the law and for all students of human society the philosopher and the seer, the greatest of our age in the domain of jurisprudence, and one of the greatest of the ages."[90] This reputation celebrated by Cardozo largely rested on dissents. The dissent in *Lochner* was followed by others of note, particularly that in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), as the Court continued to protect the right of contract against what it deemed to be unreasonable regulation. "'Since 1920, 'Professor Frankfurter noted in 1930,' the Court had invalidated more legislation than in fifty years preceding.'"[91] Holmes, like Cardozo after him, had other views.

In 1949, eighteen years after Cardozo was elevated to the Supreme Court, and eleven after he died, Louis Jaffe wrote of a friend who said that a "judge wherever choice is possible should bring about the result most in accord with progressive policy. That is the test of a good judge, a liberal judge."[92] Cardozo was perfectly willing to share his view of judging, writing a book in 1921 entitled *The Nature of the Judicial Process*.[93] When Learned Hand reviewed it in the *Harvard Law Review*, he summarized Cardozo's judicial vision in these terms: "He must be faithful to the past, of which he is the inheritor, but not too faithful; he must

89. *Id.* at 42.

90. Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529 (1951), citing Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 683, 684 (1931). In point of fact because Holmes practiced sociological jurisprudence he was particularly susceptible to conventional wisdom such as eugenics. *See* Buck v. Bell, 274 U.S. 200, 207 (1927) ("Three generations of imbeciles is enough."). "Roscoe Pound launched the sociological jurisprudence movement with a series of influential attacks on the Supreme Court's nascent liberty of contract jurisprudence." Bernstein, *supra* note 32 at 42.

91. Schwartz, *supra* note 36 at 218.

92. Louis L. Jaffe, *The Judicial Universe of Mr. Justice Frankfurter*, 62 HARV. L. REV. 357, 358 (1949).

93. Learned Hand, *Book Review*, 35 HARV. L. REV. 479 (1921–22).

remember that he lays down a rule of general application, - consistency for him is a jewel; but beyond all he must remember that he is a priest of his time, the interpreter of an inarticulate will, which accepts the past only in part, - no more of it than the present has not yet awakened to repudiate."[94] Not only does Hand approve, but he is more than a little elitist in his approval as he wonders what the people will think of such candor.

> That a judge of Judge Cardozo's standing should so frankly own the way in which he works is itself a portent, though in fact he probably disposes of his cases by no saliently different methods from the judges who have preceeded him. Indeed he is analyzing, not his own mind alone, but the ways in which all judges decide their cases. But the self-scrutiny which can learn how it works and the candor which will avow it, are rare in such high places. The masters assure us that ours is a time of change in the law, when it is to be recast; one of those periods when the bud is bursting its sheath and the flower unfolding. If they are right – and who are we to question them? – the development will be self-conscious as never before. How Demos will accept it is another matter. Hitherto he has been lulled to rest by unctious protests of docility from his judges. Will he awaken in a rage when they admit that they are not all "mind," but entertain a will as well? Perhaps not; most judges are more pious than Judge Cardozo – and less sincere.[95]

In 1915, Hand wrote an unsigned editorial for *The New Republic* calling for the repeal of the Fifth and Fourteenth Amendments' due process clauses. In 1924, Frankfurter did the same thing. More "[p]rivately, Justice Brandeis supported repeal of the entire Fourteenth Amendment."[96]

In 1931, Felix Frankfurter published in the Harvard Law Review a review of *The American Leviathan: The Republic In the Machine Age*, by Charles A. and William Beard. The review includes this assertion:

> The machine age, however, leads more and more to governmental permeation in matters which to some

94. *Id.*
95. *Id.* at 480.
96. Bernstein, *supra* note 32 at 44.

> lawyers and judges still seem peculiarly reserved for exclusively private arrangement, immune against state interference. But the *laissaz faire* of law is as doomed as the *laissaz faire* of economics. Even to the most gallant survivor of economic individualism, the 'economic man' is now seen in the context of society; the issues center upon the nature of the context and how the individual fits into it. Also law will more and more heed these realities, and cease to concern itself with abstract individuals of an obsolete age.[97]

This is obviously a philosophic reference. To what does it refer?

B. *The Progressive Philosophic Critique of Individualism*

In 1924, John C.H. Wu described Roscoe Pound "as a pragmatist, and among the pragmatists he is most akin to John Dewey."[98] Pound, in 1934, associated himself with Dewey's philosophic critique.[99] In February and March 1919, John Dewey delivered lectures at the Imperial University of Japan, which he published later that year under the title *Reconstruction in Philosophy*.[100] Dewey's first premise was that all prior rationalistic philosophy falsely claimed to "demonstrate[e] the existence of a transcendent, absolute or inner reality and of revealing to man the nature and features of this ultimate and higher reality." To Dewey, this tradition had no true explanatory power because it was "originally dictated by man's imagination working under the influence of love and hate and in the interest of emotional excitement and satisfaction." Indeed the goal of the first lecture was to present the "reasonable hypothesis . . . that philosophy originated not out of intellectual, but out of social and emotional material" leading to "a changed attitude toward traditional philosophies."[101]

97. Felix Frankfurter, *Book Review*, 44 HARV. L. REV. 661 (1931).

98. John C.H. Wu, *The Justice Philosophy of Roscoe Pound*, 18 ILL. L. REV. 285 (1924). Wu also noted that Pound "resorts to what he calls 'a social engineering' . . . ."

99. Roscoe Pound, *Law and The Science of Law In Recent Theories*, 43 YALE L.J., 525, 526 (1934).

100. JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY (First Beacon Paperback ed. 1957).

101. *Id.* at 23–25.

For Dewey, reason was a chimera and what a reconstructed philosophy should value is intelligence. "It will regard intelligence not as the original shaper and final causes of things, but as a purposeful energetic re-shaper of those phases of nature and life that obstruct social well being."[102] That is, the future human project should be to use the scientific method of trial and error, of hypothesis and experimentation, to endlessly improve the social sphere.

In his fourth chapter, Dewey promised "to show how and why it is now possible to make claims for experience as a guide in science and moral life which the older empiricists did not and could not make for it."[103] As we consider this point, we are told that "[r]eason, as a Kantian faculty that introduces generality and regularity into experience, strikes us more and more as superfluous – the unnecessary creation of men addicted to traditional formalism and to elaborate terminology." Reason is supplanted by or merged into intelligence "conceived after the pattern of science, and used in the creation of the social arts."[104]

According to Dewey, the old philosophy sought the ultimate unchanging absolute.[105] In the reconstructed philosophy, change "becomes prophetic of a better future."[106] And once "the belief that knowledge is active and operative takes hold of men, the ideal realm is no longer something aloof and separate; it is rather that collection of imagined possibilities that stimulate men to new efforts and realizations."[107] If we are to embark upon a program of experimental utilitarianism based upon the recognition that there is no truth other than whatever is verified by the scientific method, what will keep the effort from becoming exploitive? "The only guarantee of impartial, disinterested inquiry is the social sensitiveness of the inquirer to the needs and problems of those with whom he is associated."[108] When this system is operative it "places upon men the responsibility for surrendering political and moral dogmas,

102. *Id.* at 51.
103. *Id.* at 78.
104. *Id.* at 95–96.
105. *Id.* at 106–07.
106. *Id.* at 116.
107. *Id.* at 118.
108. *Id.* at 147–48.

and subjecting to the test of consequences their most cherished prejudices."[109]

In his seventh, and next to last chapter, Dewey presents morality as situational, relative, and collective. "*Moral* goods and ends exist only when something has to be done."[110] And with change lies the opportunity of "doing away once [and] for all with the traditional distinction between moral goods, like the virtues, and natural goods like health, economic security, art, science and the like."[111]

"Inquiry, discovery take the same place in morals that they have come to occupy in sciences of nature" which in turn become "the technique of social and moral engineering."[112] The morality of an action is to be judged only by its consequences and "[n]o past decision nor old principle can ever be relied upon to justify a course of action."[113] When growth becomes the end, "[m]istakes are no longer either mere unavoidable accidents to be mourned or moral sins to be expiated and forgiven." They are simply lessons. As a consequence "[n]o individual or group will be judged by whether they come up to or fall short of some fixed result, but by the direction in which they are moving."[114]

In his final chapter Dewey continued the thought that morality is exclusively social.

> When the self is regarded as something complete within itself, then it is readily argued that only internal moralistic changes are of importance in general reform.
>
> . . .
>
> But when self-hood is perceived to be an active process it is also seen that social modifications are the only means of changed personalities.[115]

It is here that Dewey fixes the relationship between the individual and society. There are only "three alternatives: Society must exist for the sake of individuals; or individuals must have their ends and ways of living set for them by society; or else society and individuals are correlative,

109. *Id.* at 160.
110. *Id.* at 169.
111. *Id.* at 172.
112. *Id.* at 173–74.
113. *Id.* at 174–75.
114. *Id.* at 175–76.
115. *Id.* at 156.

organic, to one another, society requiring the service and subordination of individuals, and at the same time existing to serve them."[116] In selecting the third alternative, Dewey makes the individual very much the junior partner: "Now it is true that social arrangements, laws, institutions are made for man, rather that man is made for them; that they are means and agencies of human welfare and progress. But they are not means for obtaining something for individuals, not even happiness. They are means of *creating* individuals."[117]

Although Dewey was a prominent purveyor of these ideas, they were, in a sense, in the air. As Roscoe Pound had written in 1911, "Hence we find American jurists working out the applications of common individualism after the individualist philosophy and economics have lost their momentum, and we find our courts and lawyers insisting upon views of liberty of contract, of risk of employment, and of the fellow-servant rule which are out of all relation to actual life."[118] For those entertaining similar thoughts, the work of affording constitutional protection against regulation of the private rights of contract would seem philosophically illicit.

C. *Critique of the Historians*

The Progressives argued that the burden of proof was never on reformers until the experiment had been undertaken and the consequences known. In this spirit Charles A. Beard declared in 1913, "'The theory of economic determinism has not been tried out in American History, and until it is tried out, it cannot be found wanting.'"[119]

In 1944, Charles A. and Mary R. Beard published their final major work, *A Basic History of the United States*.[120] In a Prefatory Note, they declared that "the book is no mere

116. *Id.* at 187.
117. *Id.* at 194.
118. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591, 611 (1911).
119. Cecelia M. Kenyon, *Book Review*, 70 HARV. L. REV. 1497 (1957), quoting C.A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 7 (1913).
120. CHARLES A. AND MARY R. BEARD, A BASIC HISTORY OF THE UNITED STATES (Doubleday, Doran & Company New York).

summary or digest of our previous works." Neither was "it a collection of excerpts from any or all of them." Instead, it was "newly written to express the historical judgment which" the Beards had "reached after more than forty years devoted to the study of" American history.[121] We notice Charles Beard in particular because he was immensely influential and his professional life spanned the Progressive movement and the New Deal in a way that make his description of the motives of the contending parties revealing of the polemics of the time. Following a chapter entitled "Revolts Against Plutocracy Grow," the Beards offered another entitled "Realizations in Social Improvement." In it, the motives of reformers are presented as entirely disinterested, while those of their opponents have no visible public policy component but instead rest on financial interest.

First, consider the reformers:

> Other than the political insurgency that went by the name Progressive, related to it, and yet in many respects fundamentally independent of political partisanship, were efforts of humanitarians to realize ideals social in nature that transcended personal desires for self-perfection, wealth, prestige, and power
>
> . . .
>
> They sought to apply the theories of social meliorism developed by the economists, sociologists, and political scientists who analyzed and pointed out inadequacies in the doctrines of individualism. The humanitarians were more than students, theorists, and writers, though some of them were all those persons; they were primarily activists anxious to get reforms established. They made minute surveys of blighted areas in national life and searched for ways and means of integrating social theory and social practice.[122]

Operating through many organizations they broke down resistence. "They also compelled a reconstruction or re-education of the United States Supreme Court which for more than forty years had been reading into the Federal Constitution, as Justice Oliver Wendell Holmes remarked,

121. *Id.* at Prefatory Note.
122. *Id.* at 393.

the laissez-faire doctrines of Mr. Herbert Spencer, English individualist."[123] The American people, "who observed poverty at first hand or suffered from it personally protested against it and demanded amelioration by concerted efforts, private and public; and leaders in the labor movement, who had direct contact with social condition in industrial cities, promoted what was frequently called the war on poverty."[124]

What of their opponents? "In the run-of-the-mill opinion social conservatism signified the support of measures and practices which protected concentrated wealth, and methods of acquiring wealth, against interference on the part of government." Individualists might believe that "[i]t is individuals struggling to make a living and acquire property who set productive activities in motion and create the wealth which makes the country great and prosperious." As a consequence, they might think that they held their wealth on just terms. But the Progressives knew better. "They accepted the contention of the sociologists such as Lester Ward and Anna Garlin Spencer to the effect that the individual, no matter how enterprising, derives the knowledge, the inventions he makes and uses, and the security he enjoys from the common life of society and the government that holds it together." The ills of society that held others back they attributed to impersonal causes which could be eliminated or mitigated by social change. This change, "they argued, can be brought about peacefully, by group and public action, and this dire poverty can be abolished, misfortunes mitigated, special privileges inimical to the interests of society destroyed, and the quality of the common life improved."[125]

Writing in the midst of World War II, Charles Beard had moderated some of his earlier rhetoric on the class interests underlying the Constitution. But strong rhetoric had been the norm in the historical critique of individualism. "Princeton University President (and later U.S. President) Woodrow Wilson . . . dismissed talk of 'the inalienable rights of the individual' as 'nonsense.'" For Wilson, "'[t]he object of constitutional government' was not to protect liberty, but 'to

123. *Id.* at 394.
124. *Id.* at 399.
125. *Id.* at 394–96.

bring the active, planning will of each part of the government into accord with the prevailing popular thought and need.'"[126]

D. *Distinguishing the Critique from the New Deal Settlement*

Positivism, Sociological Jurisprudence, Legal Realism, Law as Science, Dewey's Utilitarian Philosophy, and the claims of the Humanitarians to the moral high ground were all rhetorical auxiliaries or handmaidens in the run up to the New Deal constitutional settlement but they do not define it. These schools provided motive force to some of the actors and gave rise to an intellectual/emotional aura for the period. But they have no more been grafted into the Constitution than the *Social Statics* of Mr. Herbert Spencer. The constitutional substance of the Roosevelt shift resides in the Supreme Court caselaw from 1937 onward. The powers that are most capable of collapsing federalism unless restrained are the taxing power and the Commerce Clause; and in Part IV, we will look at how much and how little they were augmented in and after 1937, on our way to demonstrating that they are inadequate to support the healthcare mandate and penalty. But first we should notice how broadly Substantive Due Process, and its protections of individual rights, survived. Economic Substantive Due Process, to be sure, died as a practical matter, although review for reasonableness survives in a formal and vestigial way in the rational basis test.[127]

The use of natural law concepts, together with the Due Process Clauses of the Fifth and Fourteenth Amendments to authorize judicial restraint of legislative power is uniquely American. When Hooker declares divine law superior to positive law he merely licenses the subject to disobey positive law in good conscience while suffering the consequences. Locke allows a subject to revolt against seriously unjust laws if he has the power, or if not, to give such laws only grudging, outward and passive obedience. Blackstone accords natural law superior status, but he does

126. Bernstein, *supra* note 32 at 92.
127. See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

so in the context of claiming that the English common law is uniquely admirable because it does agree with natural law. Only in America did natural law become a significant tool of judicial review where it continues to operate in the guise of fundamental rights.

"Ironically, despite the calumny heaped on the due process liberty of contract decisions and the Supreme Court justices who wrote them, modern constitutional jurisprudence implicitly (and sometimes explicitly) draws a great deal from pre-New Deal due process decisions rejecting novel assertions of governmental power." Hence it can be said that "[m]odern 'liberal' constitutional jurisprudence, rather than being directly descended solely from the ideas of early-twentieth century Progressive jurists, is a synthesis of Progressive fondness for government economic regulation, and the classical liberal ('conservative') support for individual rights and skepticism of government power reflected in the liberty of contract cases."[128]

"With Roosevelt appointees joining a growing Progressive liberal majority on the Court the New Dealers had the opportunity to fulfill the old Progressive dream of emasculating the Due Process Clause and limiting its scope to purely procedural rights. Professor Bernstein has analyzed the reasons why they did not. They include the fact that the Court's protection of non-economic fundamental rights was popular, "especially . . . among the ethnic and religious groups that formed the core of the New Deal coalition." After the loss of the court-packing fight, New Dealers presented themselves as guarantors of civil rights. According to this narrative, "[n]ot only was a large and active federal government not a constitutional problem, but Americans needed such a government to protect them from abuses of state and corporate power."[129]

That leaves us with this familiar legal playing field. Infringement by government of rights deemed historically fundamental triggers strict scrutiny review. Under this outcome-determinative standard of review, the government is expected to lose, but a court escapes the subjectivity associated with direct reasonableness review because the

128. *Id.* at 55.
129. Bernstein, *supra* note 32 at 104–06.

standard of review decides the case and not any *ad hoc* judgment of a court. Questions arising from structural limitations of the Constitution are decided directly without resort to an outcome-determinative standard of review. Economic regulation is reviewed under the outcome-determinative rational basis test. The government is expected to win, but a fig leaf of reasonableness review is preserved while avoiding subjectivity, because the standard of review decides the case and not any *ad hoc* decision of a court concerning the objective reasonableness of an enactment.

What this means for the healthcare lawsuits is that the reviewing courts will be presented with a binary choice. Either Congress has the power to command a citizen to purchase a good or a service from another citizen or it does not. If we the people did not grant that power, we should expect the courts to strike down the mandate and penalty. If we do not want to see the principle that such purchases can be mandated across the full range of our national life, then we should not want the mandate and penalty upheld simply as an expedient to address the exigencies supposedly addressed by the healthcare law. This is so because once a power is allowed, Congress has plenary power to fully exercise it within its utmost scope and reach subject only to political restraints.[130]

IV. THE MANDATE AND PENALTY ARE BEYOND THE MODERN LIMITS ON THE TAXING POWER AND OF THE COMMERCE CLAUSE, NOTWITHSTANDING NEW DEAL JURISPRUDENCE

"Wilson appointee James McReynolds, Taft appointee Willis Van De Vanter, and Harding appointees George Sutherland and Pierce Butler" were caricatured in the 1920's by Progressives "as the 'Four Horsemen' – as in 'of the apocalypse.'" Although they had controlled the court "through alliances with various other justices, especially Harding appointees William Howard Taft and Edward Sanford,"[131] in 1930, with the country sunk in depression, Chief Justice Taft resigned and Sanford died. This left the

130. Morrison, 529 U.S. at 616, n.7.
131. Bernstein, *supra* note 32 at 49.

Four Horsemen—now reduced to three—balanced by Holmes, Brandeis and Stone—whom Taft had labeled "'the Bolsheviki.'"[132] In 1930, former Associate Justice and Republican Presidential candidate Charles Evans Hughes replaced Taft as Chief Justice and Owen J. Roberts replaced Sanford. Of course, as we have seen, Cardozo replaced Holmes in 1932.

As governor of New York between 1906–10, Hughes helped erect the modern bureaucratic regulatory state,[133] so it was not especially surprising that, in company with Roberts, he joined Brandeis, Stone and Cardozo in 1934 in upholding a New York law regulating the price of milk. This decision, *Nebbia v. New York*,[134] is notable because, "[i]n his opinion of the Court, Justice Roberts transformed the Court's attitude toward the legality of price fixing by doing away with the limited category of 'business affected with a public interest' upon which the price-fixing power had until then been based."[135]

Although the Court engaged in perhaps the most obvious disregard of original intent ever when the same five justices upheld a state moratorium on debts in *Home Building & Loan Association v. Blaisdell*,[136] because this too was an exercise in State police power, it was not necessarily diagnostic of the view of the Hughes Court with respect to attempts to expand national power. The next year, however, that view was clarified when the Court struck down a section of the National Industrial Recovery Act of 1933 (NIRA) in *A.L.A. Schechter Poultry Corp. v. United States*.[137] Although commentators include this case in the *Lochner* narrative,[138] it is an underremarked fact that all nine justices voted to declare the NIRA unconstitutional.

The most radical feature of the NIRA was that it permitted voluntary trade groups to issue codes of fair competition having the force of law. Petitioners had been

132. James A. Henretta, *Charles Evans Hughes and the Strange Death of Liberal Americ*a, (*available at* http://www.historycooperative.org/journals/1hr./24.1/henretta.html p. 3 of 51).

133. *Id.*, at p. 10 of 51.

134. 291 U.S. 502 (1938).

135. Schwartz, *supra* note 36 at 231.

136. 290 U.S. 398 (1934).

137. 295 U.S. 495 (1935).

138. *See, e.g.*, Schwartz, *supra* note 36 at 232–33.

indicted and convicted of violations of, and conspiracy to violate, the "'Live Poultry Code.'"[139] At the beginning of the year, the Court in *Panama Refining Co. v. Ryan*[140] had voted eight to one (Cardozo dissenting) to strike down a grant of administrative authority to the executive branch on the grounds of improper delegation of legislative power. The Court concluded that the situation in *Schechter* was even worse. Here private associations were allowed to make law without limitation or restriction.[141] Not only did the Court strike the Poultry Code down on improper delegation grounds, Cardozo, the lone dissenter in *Panama Refining,* agreed, calling the delegation in *Schechter* "unconfirmed and vagrant" as well as "delegation run riot."[142]

The Court also found the Poultry Code unconstitutional under the Commerce Clause because the effects on commerce were insufficiently direct. Cardozo agreed. After noticing and rejecting Learned Hand's analysis in the Second Circuit, he wrote: "Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere."[143]

Publicly, the Court was conciliatory or firm depending on how its statements are parsed. Before reaching the merits, the majority opinion noted that the United States had argued "that the provision of the statute authorizing the adoption of codes must be viewed in light of the grave national crisis with which Congress was confronted." The answer to that was this: "The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants." The United States had also "urged

139. 295 U.S. at 521.
140. 293 U.S. 388 (1935).
141. 295 U.S. at 541–42.
142. 295 U.S. at 551, 553.
143. *Id.* at 554 (citation omitted). Hand in upholding most of the convictions below had urged the proposition that "[a] society such as ours 'is an elastic medium which transmits all tremors throughout its territory; the only question is of its size."

that the national crisis demanded a broad and intensive cooperative effort by those engaged in trade and industry, and that this necessary cooperation was sought to be fostered by permitting them to initiate the adoption of codes." The problem with that for the Court was that those codes "place all persons within their reach under the obligation of positive law, binding equally those who assent and those who do not assent." To make matters more dire, violations were "punishable as crimes."[144]

In addition to this public message, there is a story of a private one.

> No sooner had the decision been read from the bench than Brandeis spelled out its meaning in blunt terms to New Deal lawyer Tom Corcosan. Brandeis had known him since Corcosan clerked at the Court for Justice Holmes. Summoning him to the justices' robing room, Brandeis told Corcosan: This is the end of this business of centralization, and I want you to go back and tell the president that we're not going to let this government centralize everything. It's come to an end.[145]

Early in January 1936, the Court struck down the Agricultural Adjustment Act (AAA) in *United States v. Butler*.[146] Under the AAA, Congress sought to regulate agricultural supply and demand by requiring payments from processors and making payments to producers.[147] The United States did not seek to uphold the AAA under the Commerce Clause, so *Butler* broke down into two issues.

First, the Court held that the exaction from the processors could not be sustained under the taxing power because it was not a tax. The Court had decided in the *Child Labor Tax Case*[148] in 1922 that the definition of a tax was justiciable and that a penalty to enforce a regulation had to be supported by an enumerated power other than the taxing power.

144. *Id.* at 528-29.

145. ROBERT SHOGAN, PRECLUDE TO CATASTROPHE at 82 (Chicago *Ivan R. Dee* 2010) (citing ARTHUR M. SCHLESINGER, THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL at 280 (Boston, Houghton Mifflin, 1960)).

146. 297 U.S. 1 (1936).

147. *Id.* at 52–57.

148. 259 U.S. 20 (1922).

With respect to payments to producers, the Court held that the spending power was limited to payments in execution of the enumerated powers of Article I, Section 8. The Court also stated that payments to encourage conduct where the payments were not made to execute an enumerated power intruded upon the reserved powers of the States. Stone, Brandeis and Cardozo dissented.

Although Franklin Roosevelt did not campaign against the Supreme Court in the election of 1936, his defeat of the "Old Bull Mooser", Governor Alf Landon of Kansas, with 60.7 percent of the popular vote, and with the electoral votes of every State except Maine and Vermont, was stunning.[149] Flush with victory, Roosevelt devised his court packing plan. "Given advance warning by Corcosan, Brandeis told his young friend plainly that he was dead set against the plan and warned that the president was making a serious mistake." Then, "working behind the scenes he engineered the release of a letter from Chief Justice Hughes forcefully disputing FDR's claim that the Court was overworked (the rationale for the president's proposal), which many viewed as the decisive blow in killing the idea."[150] Announced in February 1937, the plan did prove to be a mistake and Congress refused to pass it.[151]

Even before the Court packing plan was publicly announced, the Court had voted in conference to uphold the National Labor Relations Act (NLRA). Although *National Labor Relations Board v. Jones & Laughlin Steel Corp.,*[152] was immediately recognized as revolutionary in effect, no new doctrine had yet been worked out. It instead preserved the old indirect and remote test,[153] simply finding that the activities at issue were not too indirect and remote.

The NLRA prohibited "unfair labor practices affecting commerce."[154] Commerce was statutorily defined as "trade, traffic, commerce, transportation or communication" among States, foreign states, territories or the District of

149. SAMUEL ELIOT MORRISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE, at 975–76 (New York Oxford University Press 1965).
150. Shogan, *supra* note 145 at 82.
151. Morrison, *supra* note 149 at 970.
152. 301 U.S. 1 (1937).
153. *Id.* at 37.
154. *Id.* at 22.

Columbia.[155] The statutory definition of "affecting commerce" spoke in terms of "in commerce, or burdening or obstructing commerce or the free flow of commerce or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." Because Congress traditionally had the power to regulate things in commerce, as well as the channels of commerce, the NLRA was carefully drafted to make it possible to present arguments in its favor in the best light possible under existing doctrine.

The truly revolutionary decision of the 1937 term was *Helvering v. Davis*,[156] which conservative or libertarian commentators have labeled "the most harmful" case ever decided by the Supreme Court.[157] There the Court in a seven to two decision reversed the second prong of *Butler* and held that the spending power is not limited by the enumeration of powers in Article I, Section 8.

Davis is of no help to the United States in the health care litigation because the social security tax upheld in that case is a constitutionally authorized excise tax on employment as judged by historic standards. Thus, there was no occasion to revisit the first prong of *Butler* or the *Child Labor Tax Case*, which remain good law.[158] Indeed, the proposition that there is a judicially ascertainable difference between a penalty and a tax was restated in *United States v. LaFranca,*[159] which observed: "A tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act." This definition was affirmed and quoted as recently as 1996 in *United States v. Reorganized CF&I Fabricators of Utah, Inc.*[160] The health care penalty under this definition is clearly just that, a penalty. It is a penalty in aid of the

155. *Id.* at 31.

156. 301 U.S. 619 (1937).

157. ROBERT A. LEVY & WILLIAM MELLOR *DIRTY DOZEN* at xiii, 19 (forward by Richard A. Epstein, Sentinel 2008).

158. Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989) (The Supreme Court reserves to itself the prerogative of overruling its cases.). *See also* Pacer E.D. Va. Case 3:10-cv-00188-HEH Doc. 70 Amicus Curiae Brief of Constitutional Law Professors [Jack M. Balkin, Gillian E. Metzger, Trevor W. Morrison] In Support of Motion to Dismiss at 18 (recognizing that these cases "have not been explicitly overruled.").

159. 282 U.S. 568, 572 (1931).

160. 518 U.S. 568, 572 (1996).

health care mandate so it is not even a "tax penalty." There are, of course, tax penalties in the tax laws generally, but the term in the Virginia case is a meaningless neologism. Furthermore, as stated in *Dep't of Revenue of Montana v. Kurth Ranch*,[161] even if the penalty had been denominated a tax in the PPACA, "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty . . . ." The fact that the Supreme Court reaffirmed this central principle of the *Child Labor Tax Case* and the first prong of *Butler* as recently as 1994, necessitates that the heath care penalty be supported by an enumerated power other than the taxing power. Thus, the claim that the penalty can be sustained as a tax collapses back into the Commerce Clause argument. In the face of these difficulties "every court which has considered whether § 1501 operates as a tax has concluded that it does not."[162]

Things are no better for the United States under the Commerce Clause. The case described by the Supreme Court as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity,"[163] *Wickard v. Filburn*,[164] was not decided until 1942, when the Horsemen were long gone and six of the justices were Roosevelt appointees. In *Gibbons v. Ogden,*[165] the Supreme Court had found that the terms "regulate" and "commerce" had justiciable meanings and limits. "For nearly a century" after *Gibbons v. Ogden*, the Court's decisions "under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause, and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce."[166] Writing near the end of his life, Madison told a friend that the principles underlying this negative view of the Commerce Clause had been the

161. 511 U.S. 767, 779 (1994).

162. Mead v. Holder, No. 10-950 (GK), 2011 U.S. Dist. LEXIS 18592, at 69–70 (D.D.C. Feb. 22, 2011).

163. United States v. Lopez, 514 U.S. 549, 560 (1995).

164. 317 U.S. 111 (1942).

165. 22 U.S. (9 Wheat.) 1 (1824).

166. Wickard, 317 U.S. at 121.

true purpose of it. It was intended to permit the commerce of inland states to escape taxation by the coastal states.[167]

Be that as it may, beginning with the Interstate Commerce Act in 1887, the Sherman Antitrust Act in 1890, and other enactments after 1903, Congress began asserting its positive power under the Commerce Clause. As we have seen, it was first met with significant checks from the Supreme Court.[168] "In general," the Court protected state authority over intrastate commerce by excluding from the concept of interstate commerce "activities such as 'production,' 'manufacturing,' and 'mining,'" and by removing from its definition activities that merely affected interstate commerce, unless the effect was "direct" rather than indirect.[169] When the Supreme Court in *Wickard* upheld the Agricultural Adjustment Act of 1938 it held that "even if [an] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time be defined as 'direct' or 'indirect.'"[170] Although this was very broad compared with what had been permitted before, there were still palpable connections with economic activity as traditionally understood. Nothing in the Court's formulation provides authority for the regulation under the Commerce Clause of the passive status of being uninsured.

The marketing order that was employed against Mr. Filburn and against his home-grown wheat had defined marketing wheat "in addition to its conventional meaning" as "including" feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged." It had been Filburn's practice to sell milk, poultry and eggs from animals fed with his home-grown wheat.[171] The parties stipulated that the use of home-grown

167. *The Founders' Constitution*, vol. 2, Article 1, Section 8, Clause 3 (Commerce), Document 19 (*available at* http://press-pubs.vchicago.edu/Founders/al_8_3commerce19.html).

168. Wickard, 317 U.S. at 121-22 and 122, n.20 (collecting cases striking down congressional enactments).

169. *Id.* at 119–20.

170. *Id.* at 125.

171. *Id.* at 114.

wheat was the largest variable in the domestic consumption of wheat.[172] *Wickard* involved the voluntary activity of raising a commodity which, in the aggregate, was capable of affecting the common stock of wheat. What *Wickard* did was to establish the principle that, when an economic activity in the aggregate has a substantial impact on interstate commerce, there is no as-applied, *de minimus* constitutional defense to regulation under the Commerce Clause.

Despite its clear nexus with economic activity, for a long time it was thought that *Wickard* lacked a limiting principle. Writing in the mid-1980's, David Currie maintained that *Wickard* "expand[s] the commerce power to cover virtually everything."[173] In the mid 1990's, Judge Kozinski suggested that the Commerce Clause could just as easily be called the "Hey, you-can-do-whatever-you-feel-like Clause."[174] However, in the 1990's it became apparent that there is a limiting principle and that this limiting principle is to be found in the "proper" prong of the Necessary and Proper Clause.

In striking down a part of the Gun-Free School Zones Act of 1990 as violative of the Commerce Clause, the Supreme Court in *United States v. Lopez,*[175] observed that since *Wickard* it had progressed no further than to hold that Congress can regulate (1) channels of interstate commerce, (2) instrumentalities of and persons and things in interstate commerce, and (3) "activities that substantially affect interstate commerce."[176] The third area of regulation, however, is not regulation under the Commerce Clause alone but depends on the operation of the Necessary and Proper Clause because intrastate commerce is being regulated on account of its effect on interstate commerce.[177]

It has been known since *M'Culloch v. Maryland*[178] that the Necessary and Proper Clause may only be used consistent

172. *Id.* at 125, 127.

173. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT THE FIRST HUNDRED YEARS, 1789–1888 at 170 and n. 89 (University of Chicago Press 1985).

174. Levy, *supra* note 157 at 37. They view *Wickard* as the second most harmful decision of the Supreme Court.

175. 514 U.S. 549 (1995).

176. *Id.* at 558-59.

177 *See* Gonzales v. Raich, 545 U.S. 1, 34 (2006) (Scalia, J., concurring in judgment).

178. 17 U.S. (4 Wheat.) 159, 206 (1819).

with the letter and spirit of the Constitution and cannot be employed contrary to any other provision in it.[179] What became apparent beginning in the 1990's is that acts are "prohibited" and fail to "consist with the letter and spirit of the constitution" if they transgress against the principles of structural federalism. As the Court said in *Printz v. United States,*[180]

> When a "Law . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, *supra* at 919 [including enumerated powers and the Tenth Amendment], it is not a "Law . . . *proper* for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] act of usurpation" which "deserves to be treated as such."

This language was repeated in 1999 in *Alden v. Maine.*[181] This is the principle that undergirds the statement of the Court in *Morrison* in 2000: "We *always* have rejected readings of the Commerce Clause and the scope of Federal power that would permit Congress to exercise a police power."[182] That, in turn, is why the mandate and penalty are unconstitutional: A command to a citizen to purchase a good or service from another citizen has no principled limits.[183]

V. CONCLUSION: WHY THIS NEW CLAIM OF POWER SHOULD BE REJECTED

This is an odd moment in American history for Congress to claim the power to require one citizen to purchase a good or service from another. It has been asserted only recently

179. "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." *Id.*

180. 521 U.S. 898, 923–24 (1997) (emphasis in original).

181. 527 U.S. 706 (1999).

182. 529 U.S. at 618-19.

183. Raich, 545 U.S. 1 is no broader than *Wickard*. Indeed, because Angel Raich conceded that the statute at issue was facially valid, 545 U.S. at 15, she was trying to set up the as-applied, *de minimus* defense disallowed in *Wickard*. *See* Raich, 545 U.S. at 47-48 (O'Connor, J., dissenting) ("The task is to identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress get the terms of analysis.")).

without judicial foreshadowing or doctrinal preparation. Because of its sheer novelty, it arrives in the courts with a presumption of invalidity.[184] Nor does Congress require it in order to create, maintain, or enlarge the regulatory welfare state. Congress has been found to have plenary power to do that under the taxing and spending powers, and Virginia in its suit has challenged none of what has gone before. In short, the federal government may tax, spend and borrow to the extent of its political will. Therein lies the problem. The public perception is growing that the United States is dangerously in debt and that its social programs – like those in the rest of the economically advanced world – are unsustainable. The votes were not there to finance national health care in the usual way, i.e., via a new or higher tax, so the mandate and penalty were brought in.

This violates a foundational bargain of the New Deal era. The Progressive meliorists had argued that they should be accorded constitutional space in which to make a social experiment, agreeing in turn to be judged by the results. The New Dealers carried the experiment forward. Seventy years later, results are in suggesting that the experiment is living beyond its means. The statist heirs to the experiment say that it cannot and must not be curtailed, so now they claim this new power.

Acknowledging the legitimacy of that newly claimed power would fundamentally alter the relationship between government and the American citizen. For the first time in American history, government would become Hobbes' Leviathan. And the national government that would acquire this character would not be the level of government that lies closest to hand, but would be the one most susceptible to the effects of public choice theory; a government whose

184. Free Enterprise Fund v. Public Company Accounting Oversight Bd., 130 S. Ct. 3138, 3159 (2010)

> (Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity. Neither the majority opinion [in the Court of Appeals] nor the PCAOB nor the United States as intervenor has located any historical analogues for this novel structure. They have not identified any independent agency other than the PCAOB that is appointed by and removable only for cause by another independent agency.)

Printz, 521 U.S. at 918. (The Failure of Congress to assert a particular power for 200 years "tends to negate the existence of that power.").

enactments depend on entrenched career politicians who are more accessible to representatives of special interests than they are to their distant constituents.

Who does not believe that if the power is granted it will not be employed to its fullest extent? Who can claim to foresee the unintended consequences that will ensue? Who can say what the effect would be on the very notion of private capital, already so lightly protected under the heading of regulatory takings? For example, nothing in principle would prevent a mandate to purchase a government retirement annuity.

What we do know for sure is that economic rights and non-economic rights are mutually reinforcing. There is a sense in which, as F.A. Hayek said, economic rights are the "prerequisite of all other Freedoms."[185] Can we recognize a right to commandeer and regiment citizens who are in a state of repose without unacceptable damage to liberty?

The United States has argued that the analysis of the scope of Congressional power "cannot be driven by hypothetical statutes that no legislature would ever adopt."[186] But the corollary is also true: "the [Constitution] protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."[187]

Questions of the scope of congressional power are ultimately constitutional and judicial. Nor is the impulse to relegate the question solely to the ballot box particularly satisfying when the usual and ordinary forms have not been observed by Congress. PPACA was drafted in secret and passed the Senate without a committee hearing or report on Christmas Eve amid scenes of parliamentary brutality. Measured by polls, PPACA stands in the statute books contrary to the will of the American people. And, at the next election following its enactment, the Republican Party gained the largest number of seats in the House of Representatives since President Roosevelt was rebuked in

185. F.A. HAYEK, THE ROAD TO SERFDOM, 110 (5th Anniv. Ed. 1994).
186. Pacer, Nos. 11-1057 & 11-1058 (Doc. 21 at 69).
187. United States v. Stevens, 130 S. Ct. 1577, 1591 (2010).

the 1938 elections after his court packing plan had failed. So this is not 1937 and PPACA is not the AAA.

The issues, in any event, stand on a higher plain than electoral politics or health care policy. Questions of the scope of congressional power implicate the liberty interest of every citizen in a long term way. The Supreme Court has been quite clear on this point. It said in *Morrison*: the "assertion that, from *Gibbons* on, public opinion has been the only restraint on the congressional exercise of the commerce power is true only insofar as it contends that political accountability is and has been the only limit on Congress' exercise of the commerce power *within that power's outer bounds* . . . . *Gibbons* did not remove from this Court the authority to define that boundary."[188] And Justice Kennedy clearly identified in his *Lopez* concurrence the interests implicated in the health care argument when he said: "Although it is the obligation of all officers of the Government to respect the constitutional design, the Federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far."[189]

Interest group politics have carried this country significantly away from the old natural law concept of governance exclusively for the general good. But subordinating the Constitution to the perceived exigencies of the day would be against the common interest no matter how ardently the proponents of the mandate and penalty might desire them for utilitarian reasons. As the Supreme Court recently reiterated: "Calls to abandon [constitutional] protections in light of 'the era's perceived necessity,' *New York*, 505 U.S. at 187, are not unusual . . . . [something] may be a 'pressing national problem,' but 'a judiciary that licensed extra constitutional government with each issue of comparable gravity would, in the long run, be far worse.' *Id.* at 187-188.[190]

188. 529 U.S. at 616, n.7.
189. 514 U.S. at 578.
190. *Free Enterprise Fund*, 130 S. Ct. at 3157.

The battle for liberty is never over. The challenges to the health care law are our generation's battle field in that ceaseless struggle.