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TAX CONSTITUTIONAL QUESTIONS IN OBAMACARE CONTINUED:
NFIB V. SEBELIUS IN LIGHT OF CITIZENS UNITED V. FEC,
SPEISER V. RANDALL, WINDSOR V. UNITED STATES, LAWRENCE V. TEXAS, ET AL.

BY: JOHN DOROCK

INTRODUCTION

Faculty, students, administrators, guests, distinguished fellow speakers.

I have been asked to address the future of Obamacare in light of my past scholarship involving NFIB v. Sebelius.\(^1\)

In the presence of my fellow very distinguished speakers and this audience, I feel, as I often do, to be something of an interloper. I am merely the tax professor trying to understand how Obamacare was ever constitutional. The fact that this presentation was not much altered by the events concerning the ACA and AHCA likely speaks either to the timelessness or irrelevance of the topic. I prefer to believe it is the former.

Now retired Professor Erik Jensen, of my J.D. alma mater, Case Western Reserve University, has said, in an article Critical Theory and the Loneliness of the Tax Prof, “[T]he issues of race, gender, and class have not been addressed very much by tax professors, who have instead ‘focused on more narrow and technical issues in business and financial taxation.’”\(^2\)

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2 Erik M. Jensen, Critical Theory and the Loneliness of the Tax Prof, 76 N.C.L. Rev. 1753, 1756, & n.17 and accompanying text (1998) (citing Edward McCaffery, Statement at Taxation and the
Professor Jensen has also stated, “But raise one tax question with a conlaw person and he’s gone...”

Still, tax practitioners and tax academicians were forced to deal with Obamacare as it was first determined to be constitutional as a tax and subsequently implemented as a tax.

Many may have had a visceral reaction; how can the government force us to purchase medical insurance? What is next? Eating broccoli as Chief Justice Roberts wrote in his opinion in *NFIB v. Sebelius*, seemingly holding the Commerce Clause could not sustain a federal mandate on individuals to purchase health insurance? Or purchasing life insurance, as I have sometimes not so facetiously suggested?

Professor Randy Barnett of Georgetown Law School, has suggested, as I understand, that professors have missed the fact that individuals are not forced to buy health insurance, but rather to pay a tax if they do not choose to purchase health insurance. Many tax professors might say, what’s the difference? Professor Barnett was arguing for the no small feat of the anti-Obamacare litigants at the Supreme Court in *NFIB* prevailing on the argument that Obamacare could not be sustained as an extension of the Commerce Clause.

In any event, what constitutional arguments are available against Obamacare to support what I have suggested as the initial constitutional gut reaction? My first foray into examining the constitutionality of Obamacare may have been more unique—that liberty was the constitutional right violated by Obamacare. When I first wrote in New Hampshire Law Review in 2013, I drew upon Justice Kennedy’s analysis in *Lawrence v. Texas*, and the precursors—particularly Justice Goldberg’s concurring opinion in *Griswold v. Connecticut* (“The right to be let alone” protected by, of all things, the Ninth Amendment) and the language, which some have attributed to Justice Kennedy in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (“choices central to personal dignity and autonomy are central to the liberty protected by the Fourteenth Amendment”).

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3 Id. at 1753.
Subsequent to my publication in New Hampshire’s Law Review, Justice Kennedy, of course, wrote the majority opinion in *United States v. Windsor* revisiting his analysis, ten years after, from *Lawrence v. Texas*.\(^8\) Next, I wrote of Justice Kennedy’s analysis on the unconstitutionality of DOMA (The Defense of Marriage Act) in GMU Civil Rights Law Journal.\(^9\) Thirdly, I asked in Connecticut Public Interest Law Review, Why is Obamacare constitutional while DOMA was not?\(^10\) Certainly, there are other arguments that legislation such as, and similar to, Obamacare is unconstitutional. Some have written, as mentioned, of the exceptional campaign mounted, and the success at the U.S. Supreme Court, in arguing that Obamacare could not be sustained under the Commerce Clause. Others have raised additional arguments, which I attempted to summarize in the Connecticut article, against the constitutionality of Obamacare, including the following:

1. the aforementioned lack of Commerce Clause support;
2. the Origination Clause (that Obamacare legislation originated in the Senate essentially rather than, as required by the Constitution, in the House);
3. the Uniformity Clause (that Obamacare, if it is a tax, is not uniform throughout the United States, as required by the Constitution);
4. the direct tax clause (that Obamacare was in violation of the Constitutional prohibition on direct taxes unless apportioned among the states); and
5. the lack of an Enumerated Power for the federal government to enact such a program.\(^6\) The fact that, despite Chief Justice Roberts’ majority opinion in *NFIB*, the Obamacare tax is not a tax, at least not a tax seen before.\(^11\)

The focus of my comments today will be how legislation, such as Obamacare, violates liberty or liberty rights conferred by the Constitution.

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PART I. CITIZENS UNITED V. FEC AND SPEISER V. RANDALL—
CONDITIONING A (TAX) BENEFIT ON THE NONEXERCISE OF A
CONSTITUTIONAL RIGHT

In *Citizens United v. FEC*, not only did Justice Kennedy decide that corporations and labor unions had First Amendment Free Speech rights, thus laying the foundation for super PACs, he also employed, some might say resuscitated, the Constitutional Conditions Doctrine.\(^\text{12}\) That doctrine states that a benefit, including a tax benefit, cannot be conditioned on the non-exercise of a constitutional right.\(^\text{13}\) Justice Stewart stated in *Perry v. Sinderman* that allowing a benefit to be conditioned on the nonexercise of a constitutional right “would allow the government to ‘produce a result which [it] could not command directly.’”\(^\text{14}\)

In *Citizens United*, Justice Kennedy stated that the benefit of the corporate form of organization could not be conditioned on a corporation’s forfeiting its First Amendment Free Speech right to speak in political elections by making unlimited third-party expenditures, but not unlimited contributions, to candidates.\(^\text{15}\) Justice Kennedy cited to Justice Scalia’s dissent in another case, *Austin v. Mich. Chamber of Commerce*, but stopped literally just short of citing Justice Scalia’s citation to another case, *Speiser v. Randall*.\(^\text{16}\)

In *Speiser v. Randall*, the U.S. Supreme Court held that a California property tax exemption could not be conditioned on a veteran’s requirement to swear a loyalty oath, when the oath would violate free speech.\(^\text{17}\) Yes, taxation again involved in an important constitutional case. I had familiarity in my research with *Speiser* and *Citizens United* because of another article, which Professor Lloyd Peake and I had published in North Carolina First Amendment Law Review, on the political activities of tax-exempt churches in light of *Citizens United*.\(^\text{18}\)


\(^\text{14}\) 408 U.S. 593, 597 (1972) (citing Speiser v. Randall, 357 U.S. 513, 526 (1958)).

\(^\text{15}\) 558 U.S. 310, 346 (2010).

\(^\text{16}\) Id. at 346.

\(^\text{17}\) 357 U.S. 513 (1958).

In attempting an argument that Obamacare was unconstitutional, I was interested in using Speiser v. Randall and Citizens United. The question that arises, despite a possible gut reaction of unconstitutionality is, upon the non-exercise of what constitutional right would the benefit of no Obamacare tax be conditioned? In a eureka or aha! moment, it occurred to me that liberty might be that constitutional right. I had approached the constitutional condition analysis, I believe, as a traditional scholar, not an ideologue, as may be obvious from my movement from the Free Speech article on Citizens United. True, I had vague awareness as a tax professor that some scholars were fashioning arguments based on liberty or liberty rights found in the Constitution, or even in the Declaration of Independence, from such various sources as the Preamble, the Ninth Amendment, the Due Process Clauses of the Fifth and Fourteen Amendments, and the Equal Protection Clause. Although Justice Scalia, in his dissent in NFIB v. Sebelius, mentioned private conduct, he relied more explicitly on the list of the enumerated powers of the federal government and the reservation of power to the states by the Tenth Amendment. What may

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20 Dorocak, supra note 7, at nn.60-67 and accompanying text.
21 Id. at nn.63—67 and accompanying text.
23 The Declaration of Independence para. 2 (U.S. 1776) (“[T]hat all men . . . are endowed, by their Creator, with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness . . . .”).
24 U.S. Const. Pmbl. (“[S]ecure the Blessings of Liberty to ourselves and Posterity . . . .”).
25 U.S. Const. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).
27 Randy E. Barnett, Access to Justice: The Social Responsibility of Lawyers: The Presumption of Liberty and the Public Interest: Medical Marijuana and Fundamental Rights, 22 Wash. U. J.L. & Pol’y, 29, 31 (2006) (“The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying any person the equal protection of the laws . . . . [T]he equal protection of the Fourteenth Amendment makes the Fifth Amendment right all the more specific and all the better understood and preserved.”).
have informed my insight concerning liberty as the burdened constitutional right, as I documented in the New Hampshire Law Review, was an overnight Revolutionary War re-enactment outing I attended at the insistence of my then fifth-grade son. In Southern California at an establishment named Riley’s Farm, the evening meal was held in a Revolutionary War era pub and featured the patriarch of the family farm delivering, as Patrick Henry, the famous “Give me liberty or give me death” speech.29

PART II. LIBERTY AND SUPREME COURT CASES – LAWRENCE V. TEXAS, PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA V. CASEY, GRISWOLD V. CONNECTICUT, UNITED STATES V. WINDSOR, AND OBERGEFELL V. HODGES

Are there Supreme Court cases offering precedents for the finding of such liberty or liberty rights? Even before United States v. Windsor, when Justice Kennedy’s revisited his analysis in Lawrence v. Texas, there was Lawrence, and particularly Griswold v. Connecticut and Planned Parenthood of Southeastern Pennsylvania v. Casey, all of which offered language and analysis which might be used to find liberty or a liberty right could not be violated.30

(1) In Lawrence, Justice Kennedy, writing for the majority, held a Texas statute, prohibiting same-sex, sodomy unconstitutional because it

... The Government was invited, at oral argument, to suggest what federal controls over private conduct (other than those explicitly prohibited by the Bill of Rights or other constitutional controls) could not be justified as necessary and proper for carrying out a general regulatory scheme. It was unable to name any. . . .

... U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Dorocak, supra, note 7, at n.67 and accompanying text. (citing Brad Joondeph, et al., Our Pending National Debate: Is Healthcare Reform Constitutional?, 62 Mercer L. Rev. 605, 617 (2011) (Professor Randy Barnett had suggested that the limited powers argument could more easily find a receptive audience, particularly on the Court, stating, “I think there may be five votes for the proposition that economic mandates are simply not within the limited and enumerated powers of Congress.”).


violated liberty.31 Justice Kennedy quoted from Justice Stevens’s dissent in the predecessor case, Bowers v. Hardwick, which had upheld a similar statute.32 Justice Stevens stated in part, “[I]ndividual decisions . . . concerning the intimacies of their physical relationship . . . are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.”33 Justice Kennedy also wrote in his introductory language in Lawrence, “Liberty protects a person from unwarranted government intrusion . . . liberty presumes an autonomy of self . . . The instant case involves liberty . . . .”34

(2) Justice Kennedy also quoted from Casey in Lawrence, “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”35

Certainly, medical and medical insurance decisions, including whether to purchase medical insurance or not, are among these most intimate personal choices central to liberty.

Professor Barnett has written of Casey “[I]n a portion of the joint opinion commonly attributed to Justice Kennedy, the Court shifted the focus from privacy to liberty and even relied on the Ninth Amendment to do so.”36 It appears that Professor Barnett is concluding that there is reliance on the Ninth Amendment, which he has favored in his research,37 although Casey apparently only obliquely refers to that amendment in the opinion of the Court.”38

(3) On the other hand, in Griswold v. Connecticut, in his concurring opinion, Justice Goldberg cited the Ninth Amendment, and wrote, quoting Justice Brandeis, “The makers of our Constitution . . . conferred as

31 Lawrence, 539 U.S. 558 (2003).
34 Id. at 562.
35 Id. at 574 (citing Casey, 505 U.S. at 851).
36 Randy E. Barnett, Scrutiny Land, 106 Mich. L. Rev. 1479, 1493 (2008) (citing Casey, 505 U.S. at 848; and Linda Greenhouse, Adjudging a Moral Harm to Women from Abortions, N.Y. Times, Apr. 20, 2007 (identifying the discussion of liberty in Casey as the “portion of the opinion usually attributed to Justice Kennedy”)).
37 Barnett, supra note 27, at 31.
38 505 U.S. at 847.
against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized Man.39

(4) In United States v. Windsor and Obergefell v. Hodges, the two Supreme Court cases involving same-sex marriage, Justice Kennedy appears to have continued his liberty or liberty rights analysis.40 This analysis, it seems, might also be utilized to argue that Obamacare and similar legislation is unconstitutional.

(a) In Windsor, Justice Kennedy, writing for the majority holding unconstitutional DOMA’s definition of marriage as between a man and a woman, stated as follows.

The power which the Constitution grants it also restrain. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.41

Writing midway between Lawrence and Windsor, Professor Barnett argued that a new analysis had emerged, distinct from the traditional due process and equal protection analyses, both raised by Justice Alito in his Windsor dissent.

In other words, Lawrence did not purport to assess the degree to which the statutory prohibition might have met a legitimate state purpose. Instead, it rejected an open-ended conception of the police power of the states and found that the particular purpose of the statute was illegitimate or improper. This is analogous to finding a federal statute unconstitutional because, however effective it might be, its purpose is not among the enumerated powers in Article I, Section 8.42

I thought Windsor spoke most clearly to the unconstitutionality of Obamacare just as the Windsor same-sex couple could not be forced to marry opposite gender partners to enjoy the estate tax marital deduction, I believe that individuals should not be forced to purchase health insurance to avoid a tax.

39 381 U.S. 479, 494 (Goldberg, J., concurring) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).
41 Windsor, 133 S. Ct. at 2695.
42 Barnett, supra note 36, at 1495.
(b) Subsequently, in Obergefell v. Hodges, again writing for the majority, Justice Kennedy held state prohibitions on same-sex marriages unconstitutional.

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty.43

(5) In my most recent manuscript, to be published in the Willamette Law Review, I argue that an attempt to revoke tax exempt status of churches opposed to same-sex marriage could be resisted by the churches, if the IRS ever raised such a challenge and in light of private parties likely lacking standing.44 The churches could argue the First Amendment Free Exercise Clause, the Religious Freedom Restoration Act, and liberty rights.45 I ask, why not liberty for all?

(6) Burwell v. Hobby Lobby Stores, Inc. (as well as possibly other cases) likely shows that Obamacare might be challenged for constitutional violations, although Hobby Lobby is based on the Religious Freedom Restoration Act rather than the First Amendment Free Exercise Clause.46

PART III. TRADITIONAL DUE PROCESS AND EQUAL PROTECTION ANALYSIS OF OBAMACARE

41 135 S. Ct. at 2593, 2604.
42 John R. Dorocak, How Might a Church’s Tax-Exempt Status (and Other Advantages) (1) Be Revoked Procedurally for Opposition to Same-Sex Marriage and (2) Be Defended Possibly as Free Exercise of Religion?, 53 Willamette L. Rev., No. 2 (forthcoming).
43 Id.
44 Id.
45 134 S. Ct. 2751 (2014).
In this forum at this time, I do not believe that I can do justice to traditional due process and equal protection analysis, with which many are undoubtedly familiar. However, there is an aspect of substantive due process to which it might be illuminating to give some attention. Professor Randy Barnett has criticized traditional due process and equal protection analysis.47 Yet, Mr. Timothy Sandefur has defended substantive due process by returning to its possible origin in the Supreme Court case of Calder v. Bull.48

Mr. Daniel J. Crooks, III, has written, “[W]indsor is best understood as a Lawrence-brand “liberty” case distinct from the Court’s traditional equal protection and due process precedents.”49 Mr. Crooks has also written, “The Court’s substantive due process jurisprudence is esoteric and yet equally incomprehensible to even the keenest minds in the legal academy.”50

As I review in my article in Connecticut Public Interest Law Journal, Justice Alito dissenting in Windsor summarized the traditional jurisprudence of substantive due process and equal protection and the three tiers of scrutiny of equal protection (and possibly the two tiers of scrutiny of substantive due process).51

Mr. Timothy Sandefur has argued, based at least partly on Calder v. Bull, concerning substantive due process, “[T]he Constitution imposes implicit limits on the laws the legislature can enact, and the content of those limits can be understood only by considering what the Constitution was written to accomplish and what government may not justly do . . . .”52 Mr. Sandefur quotes from Justice Samuel Chase in Calder v. Bull, “There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power . . . to take away that security for personal liberty . . . for the protection whereof the government was established.”53

Mr. Sandefur has written elsewhere, when describing the contrast between liberal and conservative originalists, “Understanding the Constitution requires reference to more permanent principles than mere long-standing social convention.”54

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47 Barnett, supra note 36.
51 Sandefur, supra note 48, at 321.
52 Id. at 321 (quoting Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798)).
53 Id., supra note 49, at 229.
The reference to more permanent principles by Mr. Sandefur, and not tradition, may echo for some, what Professor Randy Barnett has called a difference between original meaning and original intent, respectively.\textsuperscript{55} Professor Barnett has written elsewhere, “Lawrence did not purport to assess the degree to which the statutory prohibition might have met a legitimate state purpose. . . . This is analogous to finding a federal statute unconstitutional because, however effective it might be, its purpose is not among the enumerated powers in Article I, Section 8.”\textsuperscript{56}

CONCLUSION

When I began this journey in the summer of 2012, trying to understand the legality and constitutionality of a tax imposed by Obamacare, I did not really know where my inquiry might lead. As others in the tax field, I began with the thought in mind that the supposed “tax” imposed by Obamacare did not look like other taxes.\textsuperscript{57} Mainly from a tax perspective, I thought that the Supreme Court would hold Obamacare unconstitutional on some ground. Then, I thought Governor Romney might deny President Obama a second term and the implementation of Obamacare.

Justice Scalia said in the dissent in \textit{NFIB v. Sebelius}: (1) that the federal government could provide a tax credit for purchasing health insurance but not a tax for not purchasing such insurance and (2) that, if Justice Ginsberg were correct, the federal government was a government of problem-solving powers not limited or enumerated powers.\textsuperscript{58} Chief Justice Roberts wrote in the majority opinion that, yes, the federal government could impose a tax for failure to install energy-efficient windows.\textsuperscript{59}

With Republicans on their way to repeal and replace Obamacare with apparently little concern for a constitutional basis for national healthcare, this may be one of a few lone voices in the wilderness. Still, Republicans’ initial repeal and replacement of Obamacare, The American Health Care Act, does offer essentially the repeal of the individual mandate, by removing the tax for failure to purchase health insurance, and a premium surcharge on an individual for entering the health insurance market later (presumably when more in need of health insurance).\textsuperscript{60} The latter is a feature Justice Scalia


\textsuperscript{56} Barnett, \textit{supra} note 36, at 1495.

\textsuperscript{57} See Held, \textit{supra} note 11; Sandefur, \textit{supra} note 11.

\textsuperscript{58} 567 U.S. at 659.

\textsuperscript{59} Id. at 569.

\textsuperscript{60} Amy Goldstein, Mike Debonis, & Kelsey Snell, \textit{House GOP Unveils Plan to Replace Obamacare}, Wash. Post Mar. 7, 2017 available at http://pqasb.pqarchive.com/washingtonpost/doc/1874597238.html?FMT=FT&FMTS=ABS:FT&date=Mar+7%2C+2017&author=Goldstein%2C+Amy%7C%7C%7C%7C%7C%7C%7C%7C%7CDeBonis%2C
Tax Constitutional Questions in Obamacare Continued

echoed in his NFIB dissent. The thought is that the Founders would have believed that Justice Scalia in this instance was closer to their original meaning. We’ll leave the discussion of original meaning and original intent to others for now and until other days.

Thank you for your attention and this opportunity to present my views. Of course, the issue here is broader than the Obamacare context. Essentially, there is the conundrum posed by Benjamin Franklin, do U.S. citizens want big government’s promise of security or do they want liberty? NFIB does not exist in a vacuum. In the same time frame it was being decided, the Supreme Court also decided Citizens United, Windsor, Obergefell, and other cases. I have come to believe that it can be argued Obamacare and DOMA could make ordinary pragmatic Americans more self-conscious of liberty, if we could only move past the security issue, and thus, I have been attempting to reach a wider audience with this message.

Thank you for this opportunity to discuss a topic, liberty, which has become quite dear to me lately and maybe not surprisingly.

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61 567 U.S. at 654.
62 Barnett, supra note 47.
63 Id.
64 See, Benjamin Franklin, Memoirs of The Life and Writings of Benjamin Franklin, 270 (H. Cohlburn, 1818) (“They who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety.”)