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The Constitution and Limited Government

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The following is adapted from a speech delivered at a Hillsdale College National Leadership Seminar on May 24, 2011, in Dallas, Texas.

Two cases that are currently making their way to the Supreme Court may well in the short term decide the constitutional issue of the reach and extent of the federal government. At stake, in other words, is the future of limited government. And together, these two cases present an exceedingly odd situation. In the case of the Arizona illegal alien law, the federal government is suing a state for constitutional violations; and in the case of the Patient Protection and Affordable Care Act—that is, Obamacare—more than half the states are suing the federal government, contesting the Act's constitutionality. It is indeed a litigious season.

But the Supreme Court's decisions in these two cases may not be the last word, because both of them present eminently *political* issues that will have to be decided ultimately by the American people.

The administrative state, of course, always seeks to extend its reach and magnify its power. This is an intrinsic feature of a system where administration and regulation replace politics as the ordinary means of making policy. If there are to be limits to the reach of the burgeoning administrative state, they will be political limits imposed by the people in the ordinary course of partisan politics. The advent of the administrative state poses the greatest challenge to limited government, because it elevates the welfare of the community—whether real or imagined—over the rights and liberties of individuals. The task today is to confine the federal government to its delegated powers. The minions of the administrative state seek to destroy constitutional boundaries in their desire to replace politics with administration. This is tantamount to denying that legitimate government derives from the consent of the governed, or that limited government rests on the sovereignty of the people.

One of the proofs offered in the Declaration of Independence that King George was attempting to establish an "absolute Tyranny" over the American colonies was the fact that "He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance." Obamacare certainly fits the description of the activities denounced in the Declaration. The number of regulations and the horde of administrators necessary to execute the scheme are staggering. We have only to think here of the Independent Payment Advisory Board. It is a commission of 15 members appointed by the President, charged with the task of reducing Medicare spending. This commission has rule-making power which carries the force of law. The Senate, it is true, will have the power to override its decisions—but only with a three-fifths majority. There are no procedures that allow citizens or doctors to appeal the Board's decisions. The administrative state—here in the guise of providing health care for all—will surely reduce the people under a kind of tyranny that will insinuate itself into all aspects of American life, destroying liberty by stages until liberty itself becomes only a distant memory.

The advent and extraordinary success of the Tea Party movement, with its emphasis on restoring limited government, has made this a propitious time to rethink what the Framers meant by limited government and how they understood the relationship between limited government and the protection of rights and liberties. It is rare to see a people acting spontaneously in a political cause. The Tea Party movement must be regarded as a testament to the independent spirit—the freedom-loving spirit—of the American people.

How did the Framers understand limited government? In the first place, limited government was not for the Framers identical with small government, as the Tea Party sometimes tends to believe. The identification of limited government with small government was the position of the Anti-

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Federalists who *opposed* the ratification of the Constitution. Limited government, for the Anti-Federalists, meant government that was too weak to threaten the rights and liberties of the people. Small government was, therefore, both the necessary and sufficient condition of political freedom. Consequently, the Anti-Federalists preferred a purely confederal form of government in which the states assumed priority.

The Federalists, on the other hand, regarded confederal government as an attempt to do the impossible: to create a sovereignty within a sovereignty. Conflicting claims to sovereignty would be debilitating and would render the government of the whole ineffective—as was surely the case under our first constitution, the Articles of Confederation.

The Framers of the Constitution settled upon a novel design for government, one that Madison said was "partly national, partly federal." For some purposes, Madison explained, we will be one people; for others, we will be multiple peoples. With respect to the national features—those things that concern the nation as a whole—the federal government will have sovereignty—complete and plenary power to accomplish the objects entrusted to its care in the Constitution. Those objects are principally found in Article I, Section 8 of the Constitution. National defense, for example, is exclusively delegated to the federal government. And since the exigencies that face nations in foreign affairs are unpredictable and innumerable, the federal government must have sovereignty to fulfill this delegated trust. And if that trust is to be fulfilled, the federal government must also be accorded the necessary means to achieve that end. If this entails large government—and today it surely does—then large government must be compatible with limited government. Similar reasoning applies to all the objects delegated to the care of the federal government.

The Declaration of Independence provided the authoritative statement of America's political principles. For the first time, government was said to derive its legitimacy—its just powers—from "the consent of the governed." This was a turning point in world-historical consciousness: no longer would it be possible to argue that sovereignty belonged to governments or kings—even if kings claimed appointment by divine right.

In order to form just government, the people delegate a portion of their sovereignty to government to be exercised for their benefit. The fact that only a portion of sovereignty is ceded by the people is the *origin* of the idea of limited government. The people delegate only some of their sovereignty to government, and what is not granted is retained by the people—the people, for example, always reserve (and can never cede) the ultimate expression of sovereignty, the right of revolution. The Declaration describes this right as "the Right of the People to alter or to abolish" government when it becomes destructive of its proper ends—namely, the protection of the safety and happiness of the people. This right of revolution, as understood by the Founders, was the right that secures every other right, because it serves as a constant reminder of the sovereignty of the people.

The Anti-Federalists never understood these revolutionary implications; they seemed to believe still that governments, not the people, were the ultimate repositories of sovereignty, and that the only way to secure the rights and liberties of the people was to weaken the power of government—as if freedom existed only in the exceptions to government power. But as Madison wrote, "Energy in government is essential to that security against external and internal danger and to that prompt and salutary execution of the laws which enter into the very definition of good government."

What limits the federal government is not a limit on its power to act, but the limited range of objects entrusted to its care—the enumerated powers of government. The powers not delegated to the federal government nor forbidden to the states in the Constitution (e.g., *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts) are reserved

to the states. These are the police powers, which are generally described as the power to regulate the health, safety, welfare and morals of the citizens of the states.

In cases of conflict, the supremacy clause of the Constitution gives preference to the federal Constitution and laws made in pursuance of the Constitution. The supremacy clause was described by Madison as an essential improvement over the Articles of Confederation. Where there is no final authority to arbitrate disputes between the federal government and the states in this "compound Republic," government will be paralyzed. Madison confessed, however, that the exact boundary between the powers of the federal government and the state governments will be impossible to determine in advance. The precise lines of demarcation will have to be worked out in practice. The Supreme Court—and through the supremacy clause, the state courts—will have to determine conflicts on a case by case basis.

An illustration of the difficulties of drawing clear lines between federal and state authority in our "compound Republic" is the Arizona illegal immigration bill, passed in April 2010. The law allowed police officers to verify the immigration status of any person after a valid stop or arrest if there "is a reasonable suspicion that the person is unlawfully present in the United States." Everyone remembers the hysteria that was unleashed when the bill passed. The President called the law irresponsible, saying that it threatened "basic notions of fairness." Others said the provision of the bill relying on "reasonable suspicion" would mandate racial profiling; and some of the more hysterical commentators even insisted that the law was tantamount to genocide. The Assistant Secretary of State felt compelled to apologize to members of a Chinese delegation visiting the United States for this egregious assault upon human rights. One can only imagine the bemused looks on the faces of the Chinese delegation.

The President ordered the Justice Department to intervene. And to the surprise of many, the Justice Department's lawsuit did not seek to enjoin the law based on racial profiling or equal protection or due process, arguing instead that the law conflicted with the federal government's exclusive power to regulate immigration. Perhaps someone had explained to the Attorney General that "reasonable suspicion" has been a part of our due process jurisprudence for many years. It means that a police officer can question on suspicion that is less than probable cause; reasonable suspicion, of course, must be something more than a hunch or a guess or an intuition—it must be based on articulable facts. In addition, the Supreme Court in 1975 ruled that ethnicity could be one of the factors determining reasonable suspicion. The Arizona law, in contrast, disallowed any use of ethnicity in determining whether a person could be asked about his immigration status.

In *United States v. Arizona*, the Federal District Court judge enjoined the operation of the law because it intruded upon the federal government's exclusive power to regulate immigration and control foreign policy. On appeal from the District Court, one piece of evidence adduced by the Ninth Circuit Court of Appeals that the Arizona law was an unconstitutional impingement upon the federal government's exclusive power to conduct foreign policy was the fact that the President of Mexico and the heads of several other Latin American countries had expressed severe criticisms of the bill both in the press and in *amici* briefs! Rarely do we encounter such humor in court opinions, however unintended the humor might be.

The Constitution, of course, does not specifically grant control over immigration to the federal government. Instead Congress has power to "establish a uniform Rule of Naturalization." Control over naturalization, however, seems to imply control over immigration—so uniform rules governing immigration would seem, by necessary implication, to fall within the scope of federal power. The real question here—although it was

not addressed by the District Court or the Court of Appeals—was what power, if any, devolves upon state governments when the federal government fails to carry out its obligations. The District Court had candidly noted that the Arizona law was passed "against a backdrop of rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns." In the face of federal inaction or manifest indifference, does Arizona have the reserved power—indeed the obligation—to secure the safety of its citizens? The President's recent remarks that the border has been secured and that it is now time to think of providing a path to citizenship for illegal aliens is, in reality, a statement of declared indifference to the people of the State of Arizona and to all the border states similarly situated. Surely those states have the constitutional right, sustained by their police powers, to protect themselves through laws that are as unobtrusive as the Arizona law. But in the District Court's judgment, the Arizona law invoked "an inference of preemption" because it placed an "impermissible burden" on federal "resources and priorities" and inevitably "will result in the harassment of aliens." The burden on federal resources stems from the fact that there will be an increased number of requests to verify immigration status. This increased burden will in turn force the immigration services to reallocate resources away from other priorities. Such is the logic of the District Court.

These reasons seem trivial when compared to the real and pressing dangers that Arizona faces as a result of federal inaction and indifference. Surely this is not what the Framers had in mind when they crafted the supremacy clause, while at the same time reserving to the states the essential responsibility of protecting the safety and welfare of their citizens. Madison wrote in *The Federalist* that "the powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and prosperity of the State." This extensive power reserved to the states should weigh heavily on preemption decisions. In this light, the Arizona law seems to have been a clear exercise of the state's police powers, and any burden imposed on the federal government to have been incidental and insignificant.

Obamacare is another issue that tests our understanding of the Constitution and the role of limited government. In federal courts, the Obama administration has defended the bill as a legitimate exercise of Congress' power to regulate commerce. At issue here is the individual mandate that forces individuals to purchase health care insurance and carries a penalty for failure to do so. Congress has the power to regulate commerce; but does it, as here, have the power to *create* commerce—i.e., to force individuals to engage in interstate commerce by purchasing health care insurance from private providers? Another way to look at the issue would be to ask whether, under the commerce clause, Congress has the power to regulate inactivity, i.e., the refusal to buy insurance. This would indeed be a novel extension of commerce clause jurisprudence and utterly impossible to square with any notion of commerce that was held by the framers of the Constitution.

In addition to the commerce clause argument, the Obama administration maintains that the individual mandate is authorized by Congress' power to tax and spend for the general welfare. Congress' power here is extensive. Over the years, the Court has generally deferred to Congress in determining what constitutes the general welfare. This is proper, since Congress represents the nation and what promotes the general welfare is essentially a political question. If Congress determines that a universal health care system serves the general welfare, then the courts will not interfere. The power to "lay and collect Taxes," however, has been subject to judicial scrutiny. While Congress may tax for the purpose of raising revenue, it may not use the power of taxation for

the express purpose of regulation. A tax that is merely a subterfuge for regulating activities will not be allowed, although a tax that only incidentally regulates behavior will pass constitutional muster as long as the principal purpose is raising revenues.

Madison argued that the general welfare clause was actually a *limitation* on the federal government. Taxes could be imposed and money spent *only* for the general welfare—meaning the welfare of the whole of the American people. It is true that Alexander Hamilton had a more extensive view of the general welfare clause, but throughout much of our history Madison's view prevailed. Today, however, the idea that the general welfare clause was ever intended as a limit on the reach of government has been destroyed by the progressive architects of the welfare state.

In any case, if the individual mandate is to be defended under the general welfare clause, what the plain language of the bill calls a penalty must be regarded as a tax for the express purpose of raising revenue. If the penalty can be sold as a tax, the Obama administration argues, then Obamacare is authorized by the general welfare clause. In the Florida District Court case, the Justice Department made the wholly tendentious—not to say absurd—argument that since the IRS was charged with administering the individual mandate and collecting the penalties, this was sufficient to convert a penalty into a tax. But as Florida District Court Judge Roger Vinson remarked: "Besides the fact that President Obama confidently assured the American people that there would be no new taxes to support the medical insurance scheme, no amount of administrative indirection should be allowed to convert a penalty into a tax for raising revenue. This is not a revenue raising measure and therefore cannot be justified under the general welfare clause."

But here is a somber thought: If, instead of using the individual mandate, Congress had relied on its general revenue-raising powers, under current Supreme Court doctrine, it is almost certain that Obamacare would be constitutional. It would be an example of Congress spending money for the general welfare.

In conclusion, the only certain method of defeating universal health care and other cases of federal overreach—as it appears that the American public desires to do—is political opposition. A political party dedicated to genuinely limited government—not small government—is an urgent political task. Whether the Tea Party is up to this task remains to be seen—but it is probably our best hope. The Tea Party will have to learn, however, that the task today is not to weaken the power of government—it is to confine the government to the exercise of its delegated powers and to restore to its full vigor the partly national, partly federal form of government that was the legacy of the Founders. ■