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TAXATION WITHOUT LIMITATION: THE PROHIBITED PRETEXT DOCTRINE V. THE SEBELIUS THEORY

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INTRODUCTION

In the words of Justice Joseph Story "[t]he Constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers."[1] The idea of organizing a central government with limited power "in [o]rder to form a more perfect Union"[2] between sovereign states, was radical for the day.[3] Historically, governments had been centralized and unchecked, subject only to those limitations they saw fit to place upon themselves.[4] In contrast, the national government of the United States is granted only those powers enumerated in the Constitution, with all other powers "reserved to the States respectively, or to the people."[5]

It is undisputed that the power of the Federal government has vastly expanded in the last century.[6] Whether you believe this expansive role to be good or bad, there is one overarching

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1. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 641 (Thomas M. Cooley ed., 4th ed. Boston, Little, Brown & Co. 1873).

2. U.S. CONST. pmbl.

3. 1 STORY, *supra* note 1, at 205.

4. *Id.*

5. U.S. CONST. amend. X; 1 STORY, *supra* note 1, at 206.

6. Randall G. Holcombe, *The Growth of the Federal Government in the 1920s*, 16 CATO. J 175, 175 (1996).

and oft debated question: Where must the constitutional line be drawn in order to preserve the notion of a government of limited and enumerated powers?

BACKGROUND

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act ("ACA").[7] The ACA "aims to increase the number of Americans covered by health insurance and decrease the cost of health care."[8] Following its passage, twenty-six states challenged various provisions of the ACA.[9] This Article focuses on one of those provisions, the so-called "individual mandate," which requires that "minimum essential" health care insurance be purchased and maintained by most Americans.[10] Those failing to purchase and maintain minimum health insurance coverage are required to make a "shared responsibility payment" to the Federal government.[11]

The Government posed two primary theories upon which it claimed authority to enact the individual mandate.[12] First, failure to purchase health insurance affects interstate commerce and is therefore subject to federal regulation under the Commerce Clause.[13] Second, even if Commerce Clause authority was lacking, the broad power of taxation independently rendered the individual mandate constitutional.[14] The Supreme Court took up the case in 2012 and a divided Court ruled the individual mandate constitutional, holding that the individual mandate is unsustainable under the Commerce

7. Patient Protection and Affordable Care Act, Pub. L. No. 111-48, 124 Stat. 119 (2010).

8. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2580 (2012).

9. *Id.; see also States' Positions in the Affordable Care Act Case at the Supreme Court*, HENRY J. KAISER FAM. FOUND. (2012), http://kff.org/health-reform/state-indicator/state-positions-on-aca-case/.

10. 26 U.S.C.A § 5000A(a) (West 2010).

11. 26 U.S.C.A § 5000A(b)(1) (West 2010).

12. *Sebelius*, 132 S. Ct. at 2584.

13. *Id.*

14. *Id.*

Clause[15] but, nevertheless, is constitutional under the Taxing Power.[16]

This Article explores the majority decision regarding the individual mandate. Specifically, the question is asked: Can the Taxing Power render constitutional an act, that if not framed as a tax, is beyond the scope of the Federal government's enumerated powers?

CONGRESS LACKS POWER TO "COMPEL" COMMERCE

The Constitution provides that Congress shall have power to "regulate commerce . . . among the several States."[17] Over the years, Commerce Clause authority has evolved to be extremely broad.[18] In *Sebelius*, the Federal Government argued that failure to purchase health insurance creates a substantial detrimental effect on interstate commerce by shifting to others the health care costs of those who cannot afford health insurance.[19] Therefore, regulating health insurance by means of the individual mandate is valid under the Commerce Clause.[20] The Court pointed out, however, that the Commerce Clause historically has encompassed only existing commercial activity.[21] In contrast, the ACA "compels individuals to *become* active in commerce by purchasing a product."[22] In the end, the Court stated that the "Framers gave Congress the power to *regulate* commerce, not to *compel* it, and for over 200 years both our decisions and Congress's actions have reflected this understanding. There is no reason to depart from that

15. *Id.* at 2593.
16. *Id.* at 2600.
17. U.S. CONST. art. I, § 8, cl. 3.
18. *See* United States v. Darby, 312 U.S. 100, 118-19 (1940) (holding that Commerce Clause power not only grants federal regulatory power over commerce between the states, but extends that power to activity deemed to have a substantial effect on interstate commerce, even if the activity is confined within a single state).
19. *Sebelius*, 132 S. Ct. at 2585.
20. *Id.*
21. *Id.* at 2586.
22. *Id*. at 2587.

understanding now."[23] Rejecting the Government's Commerce Clause theory, the Court ruled that the "*individual mandate forces individuals into commerce* precisely because they elected to refrain from commercial activity," therefore, the "law cannot be sustained under" the Commerce Clause.[24]

STIPULATED: THE INDIVIDUAL MANDATE IS A TAX

Having ruled the individual mandate beyond the scope of the Commerce Clause,[25] the Court then turned to the Government's Taxing Power argument. Interestingly, the primary debate between the majority and the dissent centered on whether the individual mandate was, in reality, a penalty or a tax.[26] While the point is certainly debatable, this Article accepts the majority ruling that the individual mandate can reasonably be interpreted as a tax.

ANALYSIS

THE FORGOTTEN "PROHIBITED PRETEXT DOCTRINE"

We now arrive at the question to which this Article is dedicated. Specifically, can powers otherwise beyond the scope of the Constitution be rendered constitutional solely by framing them as a tax? A review of various well-known Supreme Court cases reveals that this question is not a novel one. Over the years, the Court has heard a number of cases in which it examined federal laws to determine if the national government had overstepped its authority through the purported use of the Taxing Power. Several prominent cases establish the fundamental principle that "attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers

23. *Id.* at 2589.
24. *Id.* at 2591 (emphasis added).
25. *Id.* at 2593.
26. *Id.* at 2594; *see also id.*, at 2650-51 (Scalia, J. dissenting).

which are granted"[27] and if Congress passes a law seeking to do so, it is the Court's "painful duty"[28] to declare that such a law is "invalid and cannot be enforced."[29] Moving forward, this established rule of law is referred to as the "Prohibited Pretext Doctrine".

Origins of the Prohibited Pretext Doctrine

The Prohibited Pretext Doctrine's foundation was laid out in *McCulloch v. Maryland*.[30] In that case, the Supreme Court held that the power to organize the Bank of the United States, though not expressly granted, was an "incidental power[]"[31] within the scope of the Constitution. However, the Court acknowledged that the government remained one of limited powers, and "its limits are not to be transcended."[32] Regarding Congress' implied powers, the Court stated "[l]et 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 consistent with the letter and spirit of the constitution."[33]

Further Development of the Prohibited Pretext Doctrine

A century after *McCulloch*, the Supreme Court developed the Prohibited Pretext Doctrine further. In *Bailey v. Drexel Furniture Co.*, the Court examined the constitutionality of the Child Labor Tax Law.[34] The law assessed a large tax on any business that employed children under a certain age.[35] The law was challenged on the grounds that it was actually a regulation

27. United States v. Butler, 297 U.S. 1, 68 (1936).
28. McCulloch v. Maryland, 17 U.S. 316, 423 (1819).
29. Linder v. United States, 268 U.S. 5, 17 (1926).
30. 17 U.S. 316.
31. *Id.* at 420-21.
32. *Id.* at 421.
33. *Id.* (emphasis added).
34. 259 U.S. 20, 34 (1922).
35. *Id.* at 34-35.

of child labor, a power considered, at the time, to reside exclusively with the States.[36] The Federal Government defended the law as "a mere excise tax levied by the Congress of the United States under its broad power of taxation."[37] The Supreme Court struck down the law stating that "the provisions of the so-called taxing act" were dedicated "solely to the achievement of some other purpose" not otherwise within the power of the Federal Government. [38]

Explicit Pronouncement of the Prohibited Pretext Doctrine

In *United States v. Butler*, the Court considered the constitutionality of a tax imposed by the Agricultural Adjustment Act of 1933 ("AAA").[39] Due to the severe economic difficulties of the Great Depression, the AAA sought to increase the market price of farm commodities.[40] The AAA aimed to accomplish this by persuading individual farmers to refrain from planting certain crops, thereby lowering production.[41] Farmers who voluntarily agreed to refrain from planting were paid "rental or benefit payments" derived from a tax on processors of that commodity.[42] The tax was challenged and ultimately ruled unconstitutional because it sought to "regulate and control agricultural production"[43] (again, a power deemed beyond the scope of the Commerce Clause in 1936) by utilizing a tax as a "means to an unconstitutional end."[44] The *Butler* Court stated that it was "an established principle that the attainment of a prohibited end may not be accomplished under *the pretext of the exertion of powers which are granted*."[45] More specifically, the

36. *Id.* at 36.
37. *Id.*
38. *Id.* at 43.
39. 297 U.S. 1, 53 (1935).
40. *Id.* at 53-54.
41. *Id.* at 54-55.
42. *Id.*
43. *Id.* at 68.
44. *Id.*
45. *Id.* (emphasis added).

Court ruled that the Federal Government may not "indirectly accomplish those [prohibited] ends by *taxing* . . . ."[46]

It is important to note that in striking down the law, the *Butler* Court simultaneously recognized the expansive scope of the Taxing Power.[47] Settling a debate dating back to the time of Alexander Hamilton and James Madison, the Court adopted Hamilton's view that the ability to tax is "a power separate and distinct" from the other powers enumerated in the Constitution.[48] However, as recognized in *Butler*, this expansive view is not at odds with the Prohibited Pretext Doctrine. Indeed, modern scholars accept *Butler*, when viewed in its entirety, as establishing that Congress has power to tax "for any purpose that it believe[s] serve[s] the general welfare, *so long as Congress [does] not violate another constitutional provision*" in doing so.[49] To summarize, although the power of taxation is expansive under *Butler*, Congress may not ignore the effect of a taxing provision, if the effect is the attainment of a prohibited end.

The Prohibited Pretext Doctrine Remains Valid Law

It is, of course, true that the laws invalidated in *Drexel Furniture* and *Butler* would very likely be upheld in modern courts. However, it is not because the Prohibited Pretext Doctrine has been rejected or overruled. Rather, it is because the Commerce Clause has evolved to extend to Congress certain powers deemed prohibited at the time the *Drexel Furniture* and *Butler* rulings were handed down. In other words, under modern Commerce Clause interpretation, Congress would not be using the Taxing Power as a pretext to accomplish a

46. *Id.* at 74 (emphasis added).

47. Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 91 (2001).

48. *Butler*, 297 U.S. at 65.

49. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, 280 (Wolters Kluwer Law & Business, 4th ed. 2011); "In light of the narrowing of Congress's commerce power, some have urged similar restrictions on Congress's spending power and even an overruling of *United States v. Butler's* expansive interpretation of [the taxing and spending clauses]." *Id.*

prohibited end, because regulation of labor and agriculture are now considered within the scope of the Commerce Clause. As a consequence of the expansive modern interpretation of the Commerce Clause, violations of the Prohibited Pretext Doctrine became exceedingly rare in the post-*Lochner* era. Nevertheless, the constitutional principle has neither died nor been overruled, but appears to have been forgotten or overlooked.

In an oblique reference to the Prohibited Pretext Doctrine, the Court states, "Congress's ability to use its taxing power to influence conduct is not without limits. A few of our cases policed these limits aggressively, invalidating *punitive exactions* obviously designed to regulate behavior otherwise regarded at the time as beyond federal authority."[50] In making this statement the Court cites to *Butler* and *Drexel Furniture*. However, the Court immediately dismisses both cases, stating, "[W]e have declined to closely examine the regulatory motive or effect of revenue-raising measures."[51] Unfortunately, these statements do more to blur the analysis than to clarify it.

By stating that past cases invalidated *punitive exactions*, the implication is that the Court invalidated the taxes in *Butler* and *Drexel Furniture* solely because they were, in reality, penalties and not taxes. While this implication is quite useful to the majority in the instant case (after all, the primary debate regarding the individual mandate was whether the exaction called for was a tax or a penalty), it is simply not true. The *Butler* opinion, for example, contains no argument that the exaction called for by the AAA was so punitive as to be a penalty. Nevertheless, the *Butler* Court invalidated the AAA *tax*, stating that Congress had "under the pretext of exercising the taxing power, in reality accomplishe[d] prohibited ends."[52]

While it is true that *Drexel Furniture* was a case that analyzed whether a so-called "tax" was in reality a penalty, the

50. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2599 (2012)(emphasis added).

51. *Id.*

52. United States v. Butler, 297 U.S. 1, 77 (1936).

case did not overrule the Prohibited Pretext Doctrine. To the contrary, *Drexel Furniture* established, among other things, that arbitrary labeling is one of various "pretexts" that may not be employed by Congress in an effort to "adopt measures which are prohibited by the Constitution."[53]

Some might argue that Supreme Court cases following *Butler* effectively overrule the Prohibited Pretext Doctrine. The Court implies as much when it cites to *United States v. Kahriger*.[54] A brief historical examination of the cases collected in *Kahriger* reveals, however, that this is not so. As an initial matter, four of the six cases collected in *Kahriger* pre-date *Butler's* explicit pronouncement of the Prohibited Pretext Doctrine[55] and, therefore, cannot reasonably be viewed as overruling it.

The remaining two collected cases are also unhelpful. In *Sonzinsky v. United States*, the Supreme Court examined the constitutionality of an excise tax levied on firearms dealers.[56] The Court ruled that the excise tax was "within the national taxing power" because it "operate[d] as a tax" and was "*not attended by an offensive regulation*."[57] This language does not overrule the Prohibited Pretext Doctrine; to the contrary, it validates it. In essence, the *Sonzinsky* Court is saying that because the levy could reasonably be viewed as a tax, *and* because the taxing measure was not accompanied by an offensive regulation (i.e. no pretext), the law was an appropriate use of the Taxing Power.[58]

The final case, *United States v. Sanchez*, involved a tax on anyone who "imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away

53. Bailey v. Drexel Furniture Co., 259 U.S. 20, 40 (1922) (quoting McCulloch v. Maryland, 17 U.S. 316, 423 (1819)).

54. 345 U.S. 22 (1953).

55. *Id*. at 27-31 (The four cases referred to are: Veazie Bank v. Fenno, 75 U.S. 533 (1869); McCray v. United States, 195 U.S. 27 (1903); United States v. Doremus, 249 U.S.86 (1918); Nigro v. United States, 276 U.S. 332 (1927)).

56. 300 U.S. 506, 511 (1937).

57. *Id.* at 514. (emphasis added).

58. *Id.*

mari[j]uana."[59] The Court upheld the tax.[60] However, one must remember that this ruling came *after* the seminal 1942 case of *Wickard v. Filburn* in which the Court adopted the expansive post-*Lochner* Commerce Clause interpretation.[61] Therefore, the Court could not invalidate the tax for inappropriately regulating marijuana.[62] In other words, following *Wickard*, growing or dealing in marijuana was certainly within the scope of the Commerce Clause, and therefore a tax on this activity would not be a violation of the Prohibited Pretext Doctrine.

While it is true that "more recently [courts] have declined to closely examine the regulatory motive or effect of revenue-raising measures,"[63] it is not because the Prohibited Pretext Doctrine is bad law or has been overruled. Rather, it is because, until *Sebelius*, there were few activities in the post-*Lochner* era deemed beyond the scope of the Commerce Clause.[64]

THE PROHIBITED PRETEXT DOCTRINE AND THE INDIVIDUAL MANDATE

In *Sebelius*, the Supreme Court states that the "individual mandate forces individuals into commerce" and, therefore, cannot be sustained by the Commerce Clause.[65] Additionally, the Court states, "[t]he Framers gave Congress the power to *regulate* commerce, not to c*ompel* it."[66] The Court's language on this issue is quite explicit; Congress does not have the power to compel its

59. 340 U.S. 42, 43 (1950).

60. *Id.* at 45.

61. 317 U.S. 111, 124, 128-29 (1942).

62. *Sanchez*, 340 U.S. at 44-45.

63. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2599 (2012).

64. *Id.* at 2585-86 (The author does not suggest that a tax is only valid if the activity being taxed falls within the scope of the Commerce Clause. The salient point is that Congress may not use the taxing power as a *pretext* to accomplish, otherwise prohibited ends. As detailed in § IV following, the majority expressly states that Congress may not compel commerce. Nevertheless, the court's ruling allows Congress to compel commerce under the pretext that the compulsion be ignored so long as it is accomplished by way of taxation).

65. *Id.* at 2591.

66. *Id.* at 2589.

citizens to buy a product.[67] If the Federal Government had such power, said the Court, "many of the provisions [of] the Constitution would be superfluous."[68] However, the majority goes on to say that the "Government does not claim that the taxing power allows Congress to" force people to buy health insurance.[69] Instead, it asks the Court to interpret the mandate as doing nothing more than "imposing a tax on those who do not buy that product."[70] As previously noted, the Supreme Court rejected this very argument nearly ninety years ago in *Drexel Furniture*.[71]

The similarities between *Drexel Furniture* and *Sebelius* are quite striking. In both cases the government endeavored to impose its will upon the people through its Taxing Power.[72] In both cases, the Court recognized that the true purpose of the tax was to compel certain activity.[73] In both cases, the Court ruled that the power sought by the government was beyond the Commerce Clause.[74] Yet, the Court struck down the law in *Drexel Furniture*, but upheld the individual mandate in *Sebelius*.[75] How can this be? The answer lies in the Court's creation of a new and potentially far reaching doctrine, referred to here as the "Sebelius Theory." Specifically, the Sebelius Theory allows the Court to "interpret the mandate as imposing a tax, *if it would otherwise violate the Constitution*."[76]

As such, the Sebelius Theory turns the Prohibited Pretext Doctrine on its head. Instead of *barring* the indirect exercise of prohibited powers through the pretext of a power granted, the Sebelius Theory explicitly *allows* the exercise of prohibited powers by pretext, so long as the pretext employed is to frame

67. *See id.*
68. *Id.* at 2586.
69. *Id.* at 2593.
70. *Id.* at 2573.
71. Bailey v. Drexel Furniture Co., 259 U.S. 20, 43-44 (1922).
72. *Id.* at 36; *Sebelius*, 132 S. Ct. at 2580, 2599.
73. *Drexel Furniture*, 259 U.S. at 39-40; *Sebelius*, 132 S. Ct. at 2594, 2596.
74. *Drexel Furniture*, 259 U.S. at 38; *Sebelius*, 132 S. Ct. at 2591.
75. *Drexel Furniture*, 259 U.S. at 44; *Sebelius*, 132 S. Ct. at 2608.
76. *Sebelius*, 132 S. Ct. at 2594 (emphasis added).

the applicable law as a tax. Stated differently, the Sebelius Theory effectively removes the requirement established in *Butler*, that to be valid, a tax must not violate another constitutional provision. In its place, the Sebelius Theory grants Congress the ability to simply ignore violations of constitutional provisions so long as the associated law can reasonably be interpreted as a tax.

Prophetically, the *Drexel Furniture* Court stated that if a proposition, such as the one espoused in the Sebelius Theory, were accepted "all that Congress would need to do, hereafter, . . . would be to enact a detailed measure . . . and enforce it by a so-called tax . . . *[t]o give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.*"[77]

The *Drexel Furniture* prophecy is fulfilled in *Sebelius*. Under the Sebelius Theory, it is nearly impossible to identify any legislation that would be unconstitutional, if framed as a tax. For example, suppose Congress passed a law mandating that every person attend a particular religious service at least once per month. Failure to do so would result in the imposition of a tax. Is there any doubt that such a law is a violation of the First Amendment? However, under the Sebelius Theory, the Government would argue "that the taxing power [does not allow] Congress to [compel church attendance]. Instead, the Government asks [the court] to read the mandate not as ordering individual **[ ]** [church attendance], but rather as imposing a tax on those who do not [attend church]."[78] Is the mandate any less compulsory because it is framed as a tax? Does the "tax" designation cure the statute's violation of constitutional principles? Is it reasonable to disregard the underlying purpose or effect of the law simply because the exaction is a tax? In *Sebelius*, the majority appears to have answered each of these questions in the affirmative.

Herein lies the fatal flaw of the Sebelius Theory, for this

77. *Drexel Furniture*, 259 U.S. at 38 (emphasis added).
78. *Sebelius*, 132 S. Ct. at 2593.

method of analysis can be applied to any imaginable legislative enactment. Suppose Congress passed a law imposing a tax on homeowners for failure to finance their home through the Federal National Mortgage Association.[79] Consider a tax imposed for not maintaining a healthy body weight or for not purchasing an electric car. Suppose the government imposed a tax on abortion procedures or passed a tax on families who had more than two children. What if Congress mandated that every citizen surrender all firearms, or be subject to a tax? Some might argue that Congress would never enact such extreme laws. While that may be true, it would not be the Constitution holding Congress back. After all, under the Sebelius Theory, each of the hypothetical laws would be viewed as nothing more than the imposition of a tax, and therefore not a violation of Constitutional limits. Using the Court's own words, the unavoidable result of applying the Sebelius Theory is to fundamentally change "the relation between the citizen and the Federal Government" granting the latter the power in all things to "compel citizens to act as the Government would have them act."[80]

Additionally, some might rebut this analysis by pointing out that a few of the hypothesized laws touch on Bill of Rights issues, and are therefore distinguishable from the individual mandate. One must remember, however, that under the Sebelius Theory the law would "be read to do [nothing] more than impose a tax" in order to sustain it.[81] The *Sebelius* ruling is devoid of any language exempting Bill of Rights issues from application of the newly formed cannon of legislative interpretation established in the Sebelius Theory. To the contrary, as mentioned previously, the Sebelius Theory unequivocally allows Congress to ignore violations of constitutional principles so long as taxation is the means of

79. The Federal National Mortgage Associations, commonly known as Fannie Mae, is a government-backed enterprise that purchases mortgages from lenders, pools them together, and sells the pools to investors.

80. *Sebelius*, 132 S. Ct. at 2589.

81. *Id.* at 2598.

accomplishing the otherwise prohibited end.

In effect, the Sebelius Theory establishes the Taxing Power as a saving clause to virtually any legislation that would otherwise be considered unconstitutional. To accept such a theory is to accept the proposition that the Taxing Power is virtually limitless and can potentially trump all other protections in the Constitution, whether express or implied. To accept such a theory is to accept that there is but one check on Congressional power: that laws be framed as a tax if they otherwise violate the Constitution.

CONCLUSION

The purpose of this Article is not to pass judgment on the wisdom or effectiveness of the ACA. Providing solutions to the nation's health care challenges is certainly an important endeavor. Rather, the purpose of this Article is to point out the dangers the new Sebelius Theory poses to the liberties and protections that are hallmarks of our union of sovereign, but united, states.

Few would dispute that passage of the ACA was one of the most partisan and bitter political battles in recent legislative history. The *Sebelius* ruling is likewise the focus of a wide spectrum of passionate and differing opinions. Some constitutional scholars have heralded the Supreme Court's ruling as a brilliant stroke of judicial statesmanship, akin to that found in *Marbury v. Madison*.[82] Others have pointed out the disturbing aspects of the ruling, especially those related to the seemingly contradictory holdings regarding the individual mandate.[83] Be it brilliant, disturbing, or something in between, the *Sebelius* ruling is now part of our judicial history.

Does the ruling expand the Federal Government's already expansive power of taxation? Will the Sebelius Theory be

82. Bradley Joondeph, *A Marbury for our Time*, SCOTUSBLOG (June 29, 2012), http://www.scotusblog.com/2012/06/a-marbury-for-our-time/.

83. Erwin Chemerinsky, *A Surprise?*, SCOTUSBLOG (June 29, 2012), http://www.scotusblog.com/2012/06/a-surprise/.

invoked as precedent to enact laws related to other controversial topics such as gun control, abortion, climate change, and same sex marriage? If so, how far will the Court go in extending the Sebelius Theory to validate otherwise prohibited governmental action? Only time will tell.

The overarching question is this: In a nation where the power of the Federal Government seems to be ever expanding, where must one draw the line if the idea of a Federal Government of limited and enumerated powers is to endure? In reflecting upon this old and important question, the words of the honorable Chief Justice John Marshall provide profound insight:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.[84]

I submit that Congress exceeded its Constitutional bounds in passing the ACA, and the Supreme Court erred by ignoring the Prohibited Pretext Doctrine and creating an unconstitutional standard in the Sebelius Theory. For the first time in over eighty years the Court should have invoked the Prohibited Pretext Doctrine, for the *Sebelius* ruling itself acknowledges that through the ACA the government seeks attainment of an explicitly prohibited end—that of compelling its citizens into commerce—through the pretextual use of the Taxing Power. Allowing the Federal Government to do so inappropriately usurps a power reserved to the various states or the people.

84. Marbury v. Madison, 5 U.S. 137, 176-77 (1803).