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Justice Roberts' America

Less than a week after the Roberts Court issued its decision in *National Federation of Independent Business v Sebelius*, Jeffrey Toobin, writing in *The New Yorker*, compared the first part of Chief Justice John Roberts's opinion, in which he found that the Commerce Clause did not authorize Congress to enact the "individual mandate" section of the Affordable Care Act (ACA) that requires all individuals to buy health insurance, with an Ayn Rand screed, noting that the pivotal sections of the argument were long on libertarian rhetoric but short on citations of authority. Roberts held (although "held" might be stating it too strongly) that the Commerce Clause does not authorize Congress to regulate the *inactivity* of individuals — the "act" of not buying health insurance — even if that inactivity impacts interstate commerce. Rather, the Clause only authorizes congressional regulation where there is some activity of a commercial nature there to be regulated. Injecting a dose of libertarian and individualist thinking more typically associated with the [Lochner](#)-era's [substantive due process](#) jurisprudence into Commerce Clause reasoning, Roberts argued that the inactivity of *not* buying insurance is tantamount to doing nothing, and doing nothing cannot be characterized as commercial activity even if it has a commercial impact.

Should inactivity, as opposed to activity, suffice to trigger congressional powers under the Commerce Clause, the result would be a slippery slope: if inactivity suffices for constitutional purposes, it is hard to imagine what does not suffice. Therefore, it is hard to establish the limits of Congress's power to regulate individual behavior. At the end of this slippery slope, as Justice Antonin Scalia also complained, Congress could presumably require us to buy broccoli in order to improve our diets, or to buy cars so as to save the auto industry or to pitch in and grow wheat in our back yards for resale so as to bring down the price of bread during a famine. Indeed, our individual lives could be regulated by Congress from "cradle to grave," Roberts complained — the bare fact of our existence, after all, has some impact on commerce. If Roberts's argument is taken to be authoritative, there are now limits on the Commerce Clause that protect our individual liberty not to do the sorts of commercial activities that might otherwise trigger the regulatory powers of the federal government -- although, importantly, this is not true of the state governments, whose police powers have no such limits.

Toobin correctly notes that this pivotal move in Roberts's Commerce Clause argument — that Congress cannot regulate inactivity simply by virtue of its impact on interstate commerce — was made without reference to any authority. Justice Ruth Bader Ginsburg, dissenting from this part of Roberts's decision, makes the same observation: although Roberts may be correct that the ACA is the first congressional act to ground its Commerce Clause authority in inactivity rather than activity, he cites no authority for the proposition that this is fatal to its constitutionality under the Commerce Clause. Neither Roberts nor Scalia provide precedent or argument for this claim, beyond their intuitions regarding the slippery slopes of cars, wheat and broccoli. That is likely because there is no such authority to cite. As Toobin and countless other commentators have suggested, there simply is no precedential authority for the claim that inactivity that impacts interstate commerce cannot be regulated, on the sole ground that it is inactivity rather than activity. From whence, then, comes this distinction between activity and inactivity? Why,

Ginsburg asks in her dissent, is it so important to Roberts and Scalia that an individual's conduct must be capable of being characterized as activity, rather than inactivity, in order for its effects on commerce to justify congressional power? Why are we creating a cocoon around individual inactivity to protect it against the specter of federal legislators? Ginsburg leaves the question unanswered.

But it is not unanswerable. I believe that what Ginsburg fails to note, and what other commentators likewise have missed, is precisely what Toobin mentions off-handedly in his piece: it is dystopic imagery, not precedent or argument, that drives this conviction that the Commerce Clause does not authorize the regulation of inactivity. If the government had its way, the "hale and hearty" individual's *inactivity* could trigger the federal government's nannyistic meddling with his life, and could do so from "cradle to grave." It could — and therefore presumably would — require him to buy broccoli "to improve [his] diets," to buy a car "to save Detroit," to grow wheat to drive up the price of endangered farms or whatever else the government gets in its collective head to require people to do in pursuit of its intrusive ends. The Randian individual who wants nothing so much as the freedom to choose not to participate in these collectivist projects would not be allowed his passive-aggressive atomism should the government's argument prevail. The opinions of both Roberts and Scalia turn repeatedly to this imagery of healthy individuals up against unduly paternalist legislators who are obsessed with the country's collective diet, driving habits and health. Given these self-evidently horrific images, there is little *need* for legalism, precedent or authority — the slippery slope speaks for itself. The Commerce Clause prong of the decision, then, rests at bottom on a vision, or as Roberts puts it at one point, on a view of our "Constitutional order" (in another telling passage, on the "Constitution's spirit"). The decision may be dictated by the rule of law, but it is not a "rule of law" that requires precedent, a law of rules, internal consistency or integrity. Rather, it is a rule of law that is bound to a particular interpretation of our constitutional order that protects the individual's isolationist inclinations over the federal government's unquenchable collectivist regulatory thirst.

Given the rhetoric, and the force with which it is articulated, there is little that is puzzling about the details. It is not so puzzling, for example, that Roberts does not "explain" why he places weight on the distinction between activity and inactivity. The image of the government having the right to regulate every aspect of our lives solely because we are sitting in a chair doing nothing is compelling enough to trigger the Court's impulse to protect us against such a devouring source of centralized power. It is even less puzzling why Roberts is so untroubled by the "collective action" problem that prompted Congress to pass the mandate in the first place, and fails to grapple with it as marking a meaningful distinction between the mandate and his parade of horrors. According to the government's argument, given community pricing and the requirement that insurers provide services to those with pre-existing conditions, without a mandate requiring healthy individuals to purchase insurance, such individuals will choose not to insure unless and until they become sick. This will drive up the price of care and premiums, both for them and the rest of us. Against the backdrop of the Court's rhetoric, this hardly counsels for the constitutionality of the ACA. Rather, the dragooning of the "inactive individual" as a conscripted soldier against a "collective action" problem that besets the masses *is* the constitutional horror. That there is a "collective action problem" here ironically underscores the constitutional infirmity with its solution.

So the rhetoric in this section is powerful; so powerful as to take the argumentative place of precedent. But does it matter? Are Roberts and Scalia's Randian constitutional musings of any consequence? The mandate was, after all, upheld as a fully constitutional tax by the same Court and in the same case, under Congress's taxing power. Roberts's rhetorical excoriation of the mandate for its attempt to dragoon the inactive individual into collective action against his will is, technically, *dicta*; because the mandate is upheld on other grounds, the Court's discovery of this limit to the reach of the Commerce Clause is not logically necessary to the outcome. The entire discussion may also be inconsequential for a second reason: there are few instances in which Congress seeks to regulate inactivity by "mandating" the purchase of a product. Counsel for both sides were hard pressed to come up with any additional examples, or even hypotheticals, beyond the ACA's mandate itself. As several commentators have noted, the restrictions suggested by their *dicta* on the reach of the Commerce Clause might be more than compensated by the expansive reading of the taxing power endorsed by Roberts and the four liberal Justices in the Court's holding: if a regulatory end that targets inactivity cannot be sustained through the Commerce Clause, perhaps it can be sustained as a tax, even if it is not called that (at least if there are penalties attached for the non-complying inactivity, and if the penalties are collected by the Internal Revenue Service). Perhaps, then, given the overriding narrative — that this conservative Court ultimately upheld the constitutionality of a major new social welfare initiative — the liberal handwringing over Roberts's and Scalia's essays on Commerce Clause jurisprudence are misguided. Their anti-welfarist libertarian musings are just of no consequence.

Nevertheless, even if it is "just rhetoric," rhetoric from high sources matters. The rhetoric in the Commerce Clause section of Roberts's opinion in this case in particular matters hugely, and for two reasons.

First, Roberts's finding, albeit in *dicta*, that individuals must be free to not participate in the nation's attempt to provide health coverage for the working poor obliquely suggests the contours of a newly recognized individual right: a right to be free of federal regulation of one's inactivity, even where that inactivity negatively impacts societal and commercial ends. Because the federal government has no *power* to regulate such individual inactivity, the individual has the *right* to his inactivity free of the specter of undue federal regulation, even if that inactivity proves deleterious to nationally defined social efforts to resolve society-wide economic problems. That new "right to inactivity", in short, neatly exemplifies what I believe to be an emerging rights paradigm on the conservative right, both on and off the Court, which I have elsewhere called "exit rights": the rights of individuals to exit the webs of mutual obligation and shared responsibility that collectively constitute civil society. Exit rights are rights, in effect, to exit the changing and shifting obligations of the social compact. *Federation of Business v Sebelius* explicitly articulates the grounds for such rights, even without naming them: the Constitution defines a government of limited and enumerated powers and individual citizens must not be subjected to centralized overbearing authority. Given those premises, the federal government has no power, in the guise of regulating commerce, to order the participation of hale and hearty individuals in federally conceived and funded social welfare programs. The individual has a right, then, where the government has no power to command otherwise, to not obtain health insurance for himself, even if doing so is irrational, doing otherwise would contribute to the collective health of the polity and his refusal to do so raises the cost of health coverage for all. Stated positively and

more generally, the individual has the right to "exit" a collective attempt to resolve a civic problem through the democratic levers of civil society.

The right to exit obliquely recognized here is not unlike other recently conceived (or dreamt of) libertarian rights. It is structurally similar, for example, to the express right the Court created from the Second Amendment in their decisions in *District of Columbia v. Heller* and *McDonald v. Chicago*: an individual right to defend oneself with lethal force, and to thereby withdraw from, or exit, the collective, civic delegation to police forces of the work of protecting us all from social violence. The Court declared in those cases that the individual has a "right" to provide his own protection against the violence of others, and to use lethal force if need be against intruders. Thus, by virtue of those decisions, the individual now has the right to "exit" from those parts of the Hobbesian and Lockean social compact by which we delegate to police forces both the power and the responsibility to protect us. By virtue of this decision in *Federation of Business v. Sebelius*, the individual also has the right to exit the compact by which we collectively defray the health related costs of ourselves and co-citizens through insurance programs. Along similar lines, libertarian, religious and social conservative parents' groups over the last few decades have fervently struggled to articulate a right of parents to withdraw from the shared civic project of public education and educate their children at home. That effort has had considerable success, both with lower federal courts and with state legislatures.

These new rights — a right to lethal self defense and to own the means to carry it out, a right not to buy insurance where doing so would resolve a collective health care crisis and a right to "home school" free of all state regulation — collectively suggest the imagining of a new rights paradigm. They are not just liberal rights of self-expression. They are radically and, I believe, deeply tragic anti-collectivist rights to exit core parts of the civic compact, usually by inactivity — not buying insurance, not sending one's children to school, not surrendering the means of one's own self protection to a police force — that undermines, sometimes near fatally, the civic attempt to solve collective problems collectively through the project of government. The children in public schools suffer when the parents of over two million children claim a right to "homeschool," thereby justifying diminished resources for education and sacrificing parental and communal good will. All of us, including the police, are endangered by the proliferation of weaponry among citizens when half the country is armed. And the insured, as well as uninsured, are impoverished by the refusal of the healthy to participate in an insurance mandate that would reduce costs for all.

These exit rights, unlike liberal rights of self-expression and autonomy, are protective not of individuals' inclinations toward expression and political participation, but rather of individuals' inclinations toward isolation and atomism. This protection exacts an often extreme cost from not only particular collectivist ends, but to the idea of governance itself. The rhetoric in this opinion, even if *dicta*, matters because it explicitly gives these rights the imprimatur of constitutionality, as envisioned by the highest Court of the land. As Ronald Dworkin noted nearly half a century ago, the conception or understanding of individual rights that is embraced by the Supreme Court at any particular moment — whether they be civil rights of nondiscrimination, political rights of democratic participation, liberal rights of free speech, assembly, autonomy, or reproductive freedoms, or, as here, what I call "exit rights" that insulate atomistic individuals from collectivist projects, including the projects of co-insurance, public

education or state-provided police protection — can reshape a country in profound and enduring ways.

Second, charged political rhetoric from Supreme Court justices, even in *dicta*, matters, because that *dicta* purports to authoritatively state, on the basis of the Constitution, *who we are* and *what we can and cannot do* as a nation. The Court's answer to this question of national identity particularly matters where, as here, its answer, ostensibly driven by the dictates of the Constitution in turn drafted by the metaphorical "We the People," is so radically at odds with the vision implied by the actual will of the people as expressed through the representative branches of government. In this case, that incompatibility is manifest: the mandate, enacted by a democratically elected branch, after a presidential and congressional campaign that focused squarely on the issue for many months, expresses quite clearly the people's conviction that free riders in health insurance markets can and should be made to contribute to the cost of their own care, while the Court expresses quite clearly its view that no such mandate should be issued.

Roberts held that this law of the people, a law that had the audacity to require that individuals obtain health insurance so as to help defray general health care costs, violated the letter and spirit of the Constitution. According to this opinion, the will to do that — the will to enact such a law, demanding the mutual shouldering of costs — was at odds with who we constitutionally *are*, and when that happens, democratic deliberation and its product must fall to the imperative demands of our adjudicated constitutional identity. *Who we are*, as adjudged by this authoritative judicial rendering, is a country that cannot or will not collectively regulate the health industry, so as to protect the weaker among us, *even should we want to* and *even should we decide to do just that*. *Who we are*, according to the constitutional order envisioned by Roberts, is a country that must protect the atomistic contrarian decisions of the hale and hearty, even though they did not prevail at the ballot box, and even though, to borrow the artful language of Ginsburg's powerful dissent, we thereby sacrifice the health of the working people whose labor supports us all. It is important to note, however, that we the people did not author this particular self-portrait.