CONNECTICUT PUBLIC INTEREST LAW JOURNAL

VOLUME 14 FALL-WINTER 2014 NUMBER 1

Why is Obamacare Constitutional While DOMA was Not? How Libertarian is the Constitution?

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I. INTRODUCTION

In June, 2013, in *United States v. Windsor*,[1] the United States Supreme Court, in a 5-4 decision, written by Justice Anthony Kennedy, held that the Defense of Marriage Act (hereinafter "DOMA")[2] was unconstitutional in defining marriage as between a man and woman. DOMA was unconstitutional because it excluded same-sex partners from thousands of benefits accorded to married individuals under federal law, particularly the federal tax laws.[3] In addition, in June, 2012, in *National Federation of Independent Business v. Sebelius* (hereinafter "NFIB") the Supreme Court, in another 5-4 decision, this time written by Chief Justice John Roberts,

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[1] United States v. Windsor, 570 U.S. ___, 133 S. Ct. 2675, 2675(2013).

[2] Defense of Marriage Act (DOMA), 110 Stat. 2419 (1996) (amending Dictionary Act, 1 U.S.C. § 7).

[3] *Windsor*, 133 S. Ct. at 2693.

upheld, among other things, the so-called "individual mandate" of the Patient Protection and Affordable Care Act (hereinafter "Obamacare").[4] This raises the question, why is Obamacare constitutional while DOMA is not?

Some have suggested Justice Kennedy in Windsor is continuing a libertarian revolution which he advanced in *Lawrence v. Texas*.[5] Professor Randy Barnett has written, "Lawrence is potentially revolutionary not only because it advances a right to privacy in favor of liberty but also for another closely related reason: In the majority's opinion, there is not sa "fundamental right rebutting the presumption of constitutionality".[6] This author previously sought to use Justice Kennedy's majority opinions in *Lawrence* and *Citizens United v. FEC*, before *Windsor* was decided, to analyze whether or not Obamacare might be unconstitutional.[7] Now that *Windsor* has been decided and analyzed,[8] the focus of this article is whether or not Obamacare is unconstitutional under Justice Kennedy's purportedly libertarian analyses. Or, in other words, how libertarian is the Constitution?

Both the *Windsor* and *NFIB* cases involved tax questions, bringing tax professors and tax practitioners into contact with constitutional questions, which those in the tax field might prefer to avoid.[9] In *Windsor*, the Court held that Thea Spyer's estate was entitled to a marital deduction for property passing to her same-sex spouse and executrix, Edith Windsor, and that the estate was owed a refund of $363,053.00 of estate taxes.[10] In *NFIB*, Chief Justice Roberts wrote as follows, "The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax.

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[4] National Federation of Independent Business v. Sebelius, 567 U.S. ___, 132 S. Ct. 2566, 2566(2012) (hereinafter "NFIB").

[5] Lawrence v. Texas, 539 U.S. 598 (2003).

[6] Randy E. Barnett, *Is the Constitution Libertarian?* 2008–2009 CATO SUP. CT. REV. 9 (2008–09).

[7] John R. Dorocak, *Tax Constitutional Questions in "Obamacare": National Federal of Independent Business v. Sebelius in light of Citizens United v. Federal Election Commission and Speiser v. Randall: Conditioning a Tax Benefit on the Nonexercise of a Constitutional Right*, 11 U.N.H. L.REV. 189 (2013)

[8] *See e.g.*, John R. Dorocak, *Is the Constitution Only Libertarian and Not Socially Conservative? U.S. v. Windsor and the Unconstitutionality of DOMA's Definition of Marriage to Exclude Same-Sex Couples-Requiem for a Heavyweight?* 24 GEO. MASON U. C.R. L.J (2014).

[9] Professor Erik N. Jensen has stated, "[T]hat 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.'" Professor Jensen has also emphasized "The tax academy's traditional insistence on the connection with the real world of practice" and the often separation of tax and constitutional questions. John R. Dorocak, *Same-Sex Couples and the Tax Law: Tax Filing Status for Lesbians and Others*, 33 OHIO N.U. L. REV. 19, 20 at n. 4 (2007) and accompanying text citing Erik N. Jensen, *Critical Theory and the Loneliness of the Tax Prof*, 76 N.C. L. REV. 1753, 1766 n.17 (1998) (citing Edward McCaffery, Statement on Taxation and the Family Conference at Lewis and Clark Northwestern School of Law (Oct. 6, 1995) (quoted in Rebecca S. Rudnide, *Taxation and the Family*, 69 Tax Notes 421 (1995)).

[10] *Windsor*, 133 S. Ct. at 2682.

Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness."[11]

The focus of this article is how *Windsor* and *NFIB* are similar and yet professedly different. Justice Kennedy stated the holding that DOMA was unconstitutional in *Windsor* as follows:

> And though Congress has great authority to design laws to fit its own concept of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.
>
> What has been explained to this point should more than suffice to establish that the principal purpose and necessary effect of this law [DOMA] are to demean those persons who are in a lawful, same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.[12]

Justice Kennedy also explained in *Windsor* that there was an equal protection violation in the DOMA legislation, fusing the equal protection and due process analyses.

> The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. .... [T]he equal protection guarantee of the Fourteenth Amendment makes the Fifth Amendment [Due Process] right all the more specific and all the better understood and preserved.[13]

As already stated, Chief Justice Roberts writing for the majority in *NFIB* held that the Affordable Care Act's mandate "to pay a financial penalty for not obtaining health insurance" was constitutional, because it is not the role of the Courts to assess the wisdom or the fairness of a constitutionally permitted tax.[14]

Justice Kennedy, in stating the *Windsor* Court holding, began, "The power the Constitution grants it also restrains."[15] Following this statement, Justice Kennedy wrote that DOMA is unconstitutional. Justice Kennedy's analysis begs the questions, "Is Obamacare constitutional?", or "Has the Constitution restrained Congress, possibly because of liberty rights of U.S. citizens, who desire not to be forced to buy health insurance in order to

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[11] *NFIB*, 132 S. Ct. at 2600.
[12] *Windsor*, 133 S. Ct. at 2695.
[13] *Id.*
[14] *NFIB*, 132 S. Ct. at 2600.
[15] *Windsor*, 133 S. Ct. at 2695.

avoid paying a tax?" Granted, Thea Spyer and Edith Windsor did not want to be forced to marry an opposite gender partner to obtain the tax benefit of the estate tax marital deduction. Although Chief Justice Roberts' analysis is that the individual mandate of Obamacare is a tax, there seems to be a remaining question as to whether Congress, in passing such a law, violated liberty protected by the Due Process Clause of the Fifth Amendment. Or, in other words, how do Obamacare's mandate and DOMA's definition of marriage compare?

II. LIBERTY RIGHTS IN CONSTITUTIONAL CASES

A. *Utilizing Justice Kennedy's Analysis in Windsor, Citizens United, and Lawrence*

In order for any court, Supreme Court included, to hold Obamacare unconstitutional as a violation of liberty using the analysis set forth in *Windsor*, that court should look to other constitutional case precedents involving liberty. Some have suggested that Justice Kennedy, in writing the majority opinion in *Lawrence*—a case in which the U.S. Supreme Court held unconstitutional a Texas statute criminalizing same-sex sodomy—and now in *Windsor*, has initiated a libertarian revolution in interpreting the U.S. Constitution.[16] If Obamacare's constitutionality is going to be determined using a liberty rights analysis, it seems that *Lawrence* and *Windsor*, as well as some of their antecedents, should be examined for discussions of liberty.

When Justice Kennedy used his *Lawrence* analysis in *Windsor* it was the first time in the ten years since the *Lawrence* holding that this analysis was used. Professor Randy E. Barnett, midway between the two cases,

summarized Justice Kennedy's approach in *Lawrence* and the history of that approach.

> Although it represents an entirely different approach to the Due Process Clause, the majority in *Lawrence* did not directly question the method of *Glucksberg*; they merely ignored it. Since *Lawrence* was decided, its method has not made another appearance in a Supreme Court case, despite

[16] *See, e.g.*, Barnett, *supra* note 6; Randy E. Barnett, *Grading Justice Kennedy: A Reply to Professor Carpenter*, 89 MINN. L. REV. 1582 (2005); Randy E. Barnett, *The Presumption of Liberty and the Public Interest: Medical Marijuana and Fundamental Rights*, 22 WASH. U. J.L. & POL'Y 29 (2006); Randy E. Barnett, *Is the Constitution Libertarian?* 2008–2009 CATO SUP. CT. REV. 9 (2008–09); Randy E. Barnett, *Does the Constitution Protect Economic Liberty*, 25 HARV. J.L. & PUB. POL'Y. 5 (2012); Dorocak *supra* note 8. *But see* Dale Carpenter, *Is Lawrence Libertarian?* 88 MINN. L. REV. 1140 (2004). *See also, e.g.*, Randy E. Barnett, *The Moral Foundations of Modern Libertarianism in* VARIETIES OF CONSERVATISM IN AMERICA, 51–74, (Peter Berkowitz ed. Stanford, Cal.: Hoover Institute Press 2004) stating, "A libertarian's natural rights approach seeks, and largely succeeds in identifying, a law that is common to all: prohibiting murder, rape, incest, etc."

> the fact that Justice Kennedy and the four justices who joined in his opinion are still sitting. ... Nevertheless *Lawrence* points the way to an alternative to the modern doctrine of fundamental rights: protection of "a presumption of liberty."[17]

Utilizing the doctrine of constitutional conditions resuscitated by *Citizens United* Obamacare might be unconstitutional for violating liberty rights.[18] The court stated in *Citizens United* that, "It is rudimentary that the State cannot exact as the price of the special advantages [of the corporate form] the forfeiture of First Amendment rights."[19] In *Speiser v. Randall*, another case discussing constitutionality of a tax, the Supreme Court held that the State of California could not condition a real property tax exemption for a veteran on the non-exercise of First Amendment of free speech, restricted by a loyalty oath required for the tax exemption.[20] Other Supreme Court formulations of *Speiser* have more broadly stated "That the government may not deny a benefit to a person because of the exercise of a constitutional right."[21]

Under the *Citizens United* and *Speiser* approach legislation which conditions the exercise of a liberty right on the exercise of a constitutional right is unconstitutional.[22] The right to be "let alone" is Justice Goldberg's formulation when he concurred in *Griswold v. Connecticut*;[23] like the right not to be forced to buy health insurance to avoid a tax. The individual must refrain from exercising such a liberty right in order to obtain some benefit, such as avoiding the Obamacare tax penalty. In *Windsor*, same-sex couples had to refrain from exercising their right to marry in order to obtain a possible marital tax deduction. In *Lawrence*, same-sex couples could not engage in same-sex sex in order to obtain freedom from incarceration. Under the Obamacare individual mandate, an individual must forfeit the liberty to not purchase health insurance, in order to obtain the benefit of avoiding a tax. Now, with the appearance of Justice Kennedy's *Windsor* majority opinion, subsequent to Justice Kennedy's majority opinions in *Citizens United* and *Lawrence*, the analysis advanced in this present article would seek to more directly posit that the right to

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[17] Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1495 (2008).

[18] *See* Dorocak, *supra*, note 7.

[19] Citizens United v. FEC, 558 U.S. 310, (2010) (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting and citing Speiser v. Randall, 357 U.S. 513 (1958)).

[20] *Speiser*, 357 U.S. at 518–19.

[21] Regan v. Taxation with Representation of Wash., 461 U.S. 540, 552 (1983) (citing Speiser v. Randall, 357 U.S. 513, 518–19 (1958)). John R. Dorocak and Lloyd E. Peake, *Political Activity of Tax-Exempt Churches, Particularly after Citizens United v. Federal Election Commission and California's Proposition 8 Ban on Same-Sex Marriage: Render Unto Caesar What is Caesar's*, 9 U.N.C. FIRST AMEND. L. REV. 448 (2011) at nn. 41, 102 and accompanying text.

[22] *See e.g.* Dorocak, *supra* note 7, at IV. A.

[23] Griswold v. Connecticut, 381 U.S. 479, 488 (Goldberg, J., concurring).

liberty embedded in the Fifth Amendment is violated by Obamacare, in the same way that right to liberty was violated by DOMA, using Justice Kennedy's analysis in *Windsor* and *Lawrence*.

B. Lawrence, Casey, and Griswold

Justice Kennedy's opinion in *Windsor* cites *Lawrence* in two places, once in part III for the fact that it is "the State's interest in defining and regulating the marital relation, subject to constitutional guarantees",[24] and once in part IV for the proposition of DOMA's "Differentiation [in treating same-sex marriages] demeans the couple, whose moral and sexual choices the Constitution protects ...."[25] Justice Kennedy echoes *Lawrence* again when he begins the final portion of his opinion in *Windsor*, "... Congress cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment."[26]

In writing in *Lawrence*, Justice Kennedy quoted and cited previous Supreme Court cases discussing liberty. In reaching the holding in *Lawrence*, and overruling *Bowers v. Hardwick* (upholding the constitutionality of a Georgia statute banning sodomy), Justice Kennedy quoted from Justice Stevens' dissent in *Bowers*.

> Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce off-spring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried persons as well as married persons.[27]

In his introductory language in *Lawrence*, Justice Kennedy discussed liberty, "Liberty protects a person from unwarranted government intrusion ... liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct. The instant case involves the liberty of the person both in its spatial and its more transcendent dimensions."[28]

In the later portions of his *Lawrence* opinion, Justice Kennedy looked to Supreme Court precedents on liberty. Concerning the task of the Court in *Lawrence*, Justice Kennedy quoted from *Planned Parenthood of Southeastern Pa. v. Casey*, "Our obligation is to define the liberty of all,

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[24] *Windsor*, 133 S. Ct. at 2692.

[25] *Id.* at 2694.

[26] *Id.* at 2695.

[27] *Lawrence*, 539 U.S. at 578 (2003) (citing Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

[28] *Id.* at 571.

not to mandate our own moral code."[29] Justice Kennedy explained that "two principal cases" since *Bowers* led to the *Lawrence* Court's reversal of *Bowers*. Besides *Casey*, Justice Kennedy also explained that in *Romer v. Evans*, "We concluded that the provision ["an Amendment to Colorado's Constitution which named ... homosexuals ... and deprived them under state anti-discrimination law"] was born 'of animosity toward the class of persons affected' and further that it had no rational relation to a legitimate government purpose."[30]

Justice Kennedy found other language in *Casey* applicable to his analysis and quoted it in *Lawrence*.

> These matters, involving the most intimate personal choices the person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's concept of existence, meaning, of the universe, and as the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the state.[31]

Such language is also applicable to the facts of *Windsor* and possibly to *NFIB*.

Professor Barnett sees, in Justice Kennedy's reliance on *Casey* in *Lawrence*, that Justice Kennedy used his own language from the prior *Casey* case to shift to a liberty analysis and protect unenumerated liberty rights based upon the Ninth Amendment.

> In *Planned Parenthood of Southeastern Pa. v. Casey*, in 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: "Neither the Bill of Rights nor the specific practices of the States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the tier of liberty which the Fourteenth Amendment protects.[32]

Justice Kennedy likely was harkening to Justice Goldberg's concurring opinion in *Griswold*, which cited liberty rights and the Ninth Amendment

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[29] *Id.* (citing Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992)).

[30] *Id.* at 574 (citing Romer v. Evans, 517 U.S. 620, 634 (1996)).

[31] *Id.* (citing *Planned Parenthood*, 505 U.S at 851).

[32] Barnett, *supra* note 17, at 1493 (citing *Planned Parenthood of Se. Pa.*, 505 U.S. at 848 and Linda Greenhouse, *Adjudging a Moral Harm to Women From Abortions*, THE NEW YORK TIMES (Apr., 2007), http://perma.cc/DU7G-S8FK (identifying the discussion of liberty in *Casey* as the "portion of the opinion usually attributed to Justice Kennedy")).

itself.[33] Justice Goldberg also quoted from Justice Brandeis' dissenting opinion in *Olmstead v. United States* and his own opinion in *Bates v. Little Rock.*

> The protection guaranteed by the (Fourth and Fifth) Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness .... They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things .... They conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men.[34]

> In a long series of cases this Court has held that where fundamental liberties are involved, they may not be abridged by the State simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."[35]

C. *Applying Lawrence and Windsor to Obamacare– Is Animosity Necessary?*

The language in *Lawrence*, *Windsor*, *Casey*, and *Griswold* regarding liberty suggests that Obamacare is unconstitutional as a violation of liberty. After examining the application of that language to the Obamacare legislation, this article will raise the question on whether there is some further showing required under Justice Kennedy's analysis in *Lawrence* and *Windsor*. Such an additional showing might be that there is no rational basis for the legislation, that there is animosity underlying the legislation, or that there is some governmental interest, as under the traditional due process and equal protection analyses.

Justice Kennedy's most general language on liberty rights in *Windsor* is as follows, "The power the Constitution grants it also restrains. And though Congress has great authority to design laws that fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment."[36] Obamacare could violate liberty in requiring either the purchase of health insurance or the payment of a tax in the same way that DOMA violated liberty by requiring

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[33] *Griswold*, 381 U.S. at 488 (Goldberg, J., concurring).

[34] *Id.* at 494 (Goldberg, J., concurring) (quoting Olmstead v. United States, 277 U.S. 438, 478 (Brandeis, J., dissenting)).

[35] *Id.* at 497 (quoting Bates v. Little Rock, 361 U.S. 516, 524 (1960) (Goldberg, J., concurring)).

[36] *Windsor*, 133 S. Ct. 2675, 2695 (2013).

either a heterosexual marriage or the payment of an estate tax[37]. In addition, in *Lawrence* the court stated, "[l]iberty protects the person from unwarranted government intrusions."[38] The court also stated that "[t]he issue is whether the majority may use the power of the State to enforce these views on the whole society [...]. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'"[39]

Further, *Casey* has language that would take on an extended meaning when applied to Obamacare, "These matters, involving the most intimate personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are essential to the protection by the Fourteenth Amendment."[40] Choices about health care, health, and life itself are central to liberty.

However, *Windsor*, *Casey*, and possibly *Lawrence*, also raise the question, when applied to legislation such as Obamacare, whether legislation is always unconstitutional if it violates liberty, or if it must also fail to meet traditional judicial tests? On the other hand, some have read *Lawrence*, and presumably *Windsor*, to hold that once the liberty right is violated, there is not an additional analysis. Professor Randy Barnett has stated as follows.

> 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 the open-ended conception of the police power of the states and found that the particular 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.[41]

However, as previously mentioned, Justice Kennedy stated in *Lawrence* that *Romer* was one of two principal cases since *Bowers* because it was borne of "animosity toward a class of persons affected."[42] Again, in *Windsor*, Kennedy similarly states, "The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the state, by marriage laws, sought to protect in personhood and dignity."[43] Thus, some have suggested that such a finding of animosity is required before Justice Kennedy's analysis in *Windsor* and

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[37] *Id.*

[38] *Lawrence*, 539 U.S. at 562 (citing *Planned Parenthood v. Casey*, 505 U.S. at 850 .

[39] *Lawrence*, 539 U.S. at 571.

[40] *Planned Parenthood*, 505 U.S. at 851 (cited in *Lawrence*, 539 U.S. at 574).

[41] Barnett, *supra* note 17, at 1495.

[42] *Lawrence*, 539 U.S. at 574 (citing *Romer* 517 U.Sat 634).

[43] *Windsor*, 133 S. Ct. at 2696.

Lawrence, considering liberty rights, could be applied.[44]

It appears that in seeking to apply Justice Kennedy's analysis in *Lawrence* and *Windsor* to Obamacare, should address the question, whether some traditional additional judicial finding is necessary before the analysis can be applied to protect liberty rights. Such an inquiry raises the issue as to whether any of the traditional analyses of substantive due process and equal protection would apply. Professor Barnett, cited above, seems to be of the opinion that there is no need "to assess the degree to which the statutory prohibition may have met the legitimate state purpose."[45] Seemingly, Justices Alito and Scalia dissenting in *Windsor* believe that the traditional analyses should still apply.[46] The next section of this article will discuss the traditional analyses of due process and equal protection and how they might affect an attempt to apply the reasoning of *Lawrence* and *Windsor* to hold Obamacare unconstitutional. Of course, it might also be that in *Lawrence* and *Windsor* there was animosity, but the analysis of those cases could apply without a finding of animosity, as argued by Professor Barnett.

III. TRADITIONAL DUE PROCESS AND EQUAL PROTECTION ANALYSES AND *LAWRENCE* AND *WINDSOR* REGARDING OBAMACARE

As suggested above, Professor Barnett has advocated for some time, that the traditional constitutional analyses regarding substantive due process and equal protection be abandoned.[47] *Windsor* and *Lawrence*, as well as *Romer*, may seem to turn on a court finding "animosity toward the class of persons affected."[48] In *Windsor*, Justice Kennedy wrote the majority opinion that "DOMA cannot survive under these principles" where "a law is motivated by an improper animus or purpose."[49] This analysis of animus or animosity in the legislation toward "a politically unpopular group" raises the question of whether or not such a finding is a prerequisite to using the analysis. There have been various attempts, on the one hand, to generalize Justice Kennedy's reasoning in *Lawrence* and now *Windsor*,[50] on the other hand, the two cases could be read as

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[44] *See, e.g.*, Susannah W. Pollvogt, *Windsor, Animus, and the Future of Marriage Equality*, 113 COLUM. L. REV. SIDEBAR 204 (2013), Jeremiah A. Ho, *Weather Permitting: Incrementalism, Animus, and the Art of Forecasting Marriage Equality after U.S. v. Windsor*, 62 CLEV. ST. L. REV. 1 (2014), Linda C. McClain, *From Romer v. Evans to United States v. Windsor: Law as a Vehicle for Moral Disapproval in Amendment 2 and the Defense of Marriage Act*, 20 DUKE J. GENDER L. & POL'Y 351 (2013).

[45] Barnett, *supra* note 16 at 1495, 1499 inter alia.

[46] *Windsor*, 133 S. Ct. at II.A. (Scalia, J., dissenting) and II. (Alito, J., dissenting).

[47] *See* Barnett, *supra* note 16.

[48] *Romer*, 517 U.S. at 634.

[49] *Windsor*, 133 S.Ct at 2693.

[50] *See, e.g.*, Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speaking Its Name*, 117 HARV. L. REV. 1893, 1902–16 (2004). *See also, e.g.*, Randy E. Barnett, *Annual Be Kenneth Lecture: Is the Constitution Libertarian?* 2009 CATO. SUP. CT. REV. 9–33; Justice

possessing the requisite animosity towards homosexuals to render the legislation unconstitutional. As mentioned, the legal literature has trended the opposite direction, seeking to generalize Justice Kennedy's reasoning.

Still, if there is an animus requirement to Justice Kennedy's *Lawrence/Windsor* analysis, what group would Obamacare display an animus or animosity towards? The thought that there might be some animosity in the Obamacare legislation against certain groups might not be that farfetched given, for example, the IRS's approach to discriminate against Tea Party and other groups seeking tax exempt status, according to a Treasury Department Inspector General for Tax Administration report.[51]

One Tea Party group, Tea Party Patriots, stated on its website that its three guiding principles are "Constitutionally Limited Government or your Person Freedom...", Free Market Economics or Economic Freedom...", and "Fiscal Responsibility or... a Debt Free Future..."[52] Elsewhere, the Tea Party has been described as a movement of activist groups (including the Tea Party Patriots) which advocate reducing the U.S. National debt and the federal budget by reducing U.S. Government spending and taxes.[53]

Obamacare, among other things, (1) increases taxes, (2) adds to government debt, and (3) expands government. Jonathan Gruber, an economics professor at MIT, often call the architect of Obamacare,[54] likely provided evidence of an animus in the legislation when he explained that the legislation succeeded in Congress because of a "lack of transparency" and "the stupidity of the American voter."[55] In *Windsor*, the Supreme Court found animus because the federal law denied, for same-sex couples, the dignity and status of marriage conferred by the state.[56] In *Roemer v. Evans*, the Supreme Court found animus where state voters denied to

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Kennedy's Libertarian Revolution: Warren v. Texas 2002–2003 CATO. SUP. CT. REV. 21–41; *Grading Justice Kennedy: A Reply to Professor Carpenter*, 89 MINN. L. REV. 1582–1590 (2005); *The Presumption of Liberty and the Public Interest; Medical Marijuana and Fundamental Rights*, 22 WASH. U. J.L.& POL'Y. 29–45 (2006); *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L.& PUB. POL'Y. 5–12 (2012). But see Dale Carpenter, *Symposium: Gay Rights After Lawrence v. Texas: Article: Is Lawrence Libertarian?*, 88 MINN. L.REV. 1140 (2004). *See*, Dorocak, *Is the Constitution Only Libertarian and Not Socially Conservative? supra* note 8. A LexisNexis search for "Lawrence v. Texas" in law reviews turned up 996 articles (last checked Aug. 22, 2014). A LexisNexis search for "United States v. Windsor" in law reviews turned up 996 articles (last checked Aug. 22, 2014).

[51] *See, e.g.*, Juliet Eilperin, *IRS Targeted Groups Critical of the Government*, WASH. POST (May 12, 2013), http://perma.cc/PW9Z-LLLD.

[52] *Our Core Principles*, TEA PARTY PATRIOTS (last visited Dec. 19, 2014), http://perma.cc/AQ38-HUNF.

[53] *See Top 20 most influential people in the Tea Party movement: 10-1*, THE TELEGRAPH, (Last visited Jan. 5, 2015) http://perma.cc/Y8Q8-YFZE.

[54] *See, e.g., id.*; *See* Daniel Liljenquist, *Obamacare was a Rude Awakening for Americans*, DESERET MORNING NEWS (Nov. 20, 2014) *available at* http://perma.cc/EWY8-CEML.

[55] Simon Carswell, *Obamacare Passage Relies on Stupidity of Voters, Says Economist Who Shaped Law; Republicans Seized on MIT Professor's Comments Rejected by White House*, THE IRISH TIMES, (Nov. 19, 2014), http://perma.cc/Q7WY-SK46.

[56] *Windsor*, 133 S. Ct. 2675 (2013).

same-sex individuals a right to claim discrimination based on sexual orientation.[57] Obamacare may deny to Tea Party members effectively free speech and representative government in that the legislation apparently was passed by subterfuge to deceive American voters per Professor Gruber.

Professor Gruber's comments may play a role in the Supreme Court's adjudication in *King v. Burwell,* the Fourth Circuit held that the taxpayers in states without an exchange under Obamacare were still eligible for the premium tax credit to use to offset the cost of health insurance purchased through the exchange.[58] The *King* appellate court is in conflict with *Halbig v. Burwell*, holding that no premium tax credit can be available in states without a state exchange. [59]

> [H]is comments are damaging to.... the government's arguments about the absurdity of believing that the law meant to prevent subsidies from flowing through the federal exchanges. But in one of his many videos, Gruber clearly states what the government says is absurd is actually the outcome intended by those who signed off on the law. The federal government wanted all 50 states to establish exchanges.[60]

At least one commentator believes the likelihood that the premium tax credits would not be available in states without a state exchange, under a statutory analysis, will motivate Congress to act before such statutory analysis by the Supreme Court, and, presumably before any re-examination of the constitutionality of the Obamacare legislation.[61]

Professor Gruber, on a panel at the University of Pennsylvania on October 17, 2013, said that the Obamacare legislation was written in "a tortured way" so that the CBO (Congressional Budget Office) did not refer to the individual mandate as "taxes."[62] On the other hand, Americans for Tax Reform counted five tax hikes for the middle class in the Obamacare legislation.[63] Mr. Gruber himself admitted taxes would be raised on those with incomes of $200,000 or more.[64] The Brookings Institute analysis of

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[57] *Roemer v. Evans*, 517 U.S. 620, 634 (1996).

[58] *King v.Burwell*, 759 F.3d 358, 378 (4th Cir. 2014), cert. granted, 135 S.Ct. 475 (Nov. 7, 2014) (No. 14–114).

[59] *Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir., 2014).

[60] Benjamin Domenech, *Washington: The Gruber Truther Problem*, HEARTLAND (Nov. 19, 2014) http://perma.cc/LQ92-Y8JC.

[61] Randy E. Barnett, *How to Kill Obamacare; Supreme Court is more likely to act if Republicans have an alternate bill ready,* USA TODAY, (Dec. 5, 2014) http://perma.cc/3LQX-5C3Z.

[62] Simon Carswell, *supra* note 55.

[63] John Kartch, *Obamacare's Top Five Middle-Class Tax Hikes* (April 15, 2014) available at http://perma.cc/3EVB-7XXD; *see also The 6 Biggest Whoppers in Professor Gruber's Comic Book*, INVESTOR'S BUSINESS DAILY at A12 (Dec. 2, 2014) *available at* http://perma.cc/QUU7-FP4B.

[64] Simon Carswell, *supra* note 55.

Obamacare found that the health care program would redistribute costs to those in the top 80% of incomes and would increase incomes 6% on the average for those in the bottom 20% and 7% on the average for those in the bottom 10%.[65]

The GAO (Government Accounting Office) found that the legislation added significantly to the long-term deficit.[66] The Senate budget committee found that Obamacare will add $131 billion to the federal deficit over the next 10 years.[67]

Furthermore, Federal Register pages of regulations for implementing Obamacare total in the thousands, which add to the size of government.[68]

Given the evidence that the government, at least as the IRS, has discriminated against the Tea Party and the negative effect Obamacare would have on the group and its goals, a court could possibly infer that Obamacare has an animus toward the Tea Party.

How Justice Kennedy uses equal protection and due process analysis, either traditionally or in a fusion of the two, impacts the classification of the groups most negatively impacted by Obamacare. Traditional equal protection analysis would seek to find a suspect category. Thus it seems Justice Kennedy's analysis in *Lawrence* and *Windsor* might lead back to an examination of traditional due process and traditional equal protection analyses, as was performed by Justice Scalia dissenting in *Lawrence* and *Windsor* and Justice Alito dissenting in *Windsor*.[69] Or, Justice Kennedy's analysis could lead to a new approach where no additional showing by the aggrieved citizen is required, but the government must show that even unenumerated liberty rights are not prohibited or unreasonably regulated.[70]

A. Traditional Substantive Due Process and Equal Protection—Justice Alito in Windsor

There are many explanations of the Supreme Court's analyses of substantive due process and equal protection. In *Windsor* Justice Alito's dissent summarized the Court's doctrine of substantive due process. Justice Alito first explained, "But it is well established that any

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[65] Thomas B. Edsall, *Is Obamacare Destroying the Democratic Party?*, N.Y. TIMES (Dec. 3, 2014) http://perma.cc/25S4-P8WB.

[66] Simon Carswell, supra note 55.

[67] Loren Long, *Stunning New Report Finds Obamacare Adds $131 billion to Deficit,* AMERICANS FOR TAX REFORM (Oct. 24, 2014) *available at* http://perma.cc/4FRA-DSH8.

[68] Glenn Kessler, *How many pages of regulations for 'Obamacare '?* THE WASHINGTON POST (May 15, 2013) *available at* http://perma.cc/R44A-7AFU.

[69] *Lawrence*, 539 U.S at 592–94, 599–602 (Scalia, J., dissenting); *Windsor*, 133 S. Ct. at 2704–11 (Scalia, J., dissenting), 2714–19 (Alito, J., dissenting).

[70] *See*, e.g., Randy E. Barnett, *The Golden Mean Between Kurt & Dan: A Moderate Reading of the Ninth Amendment*, 56 DRAKE L. REV. 897 (2008); *Symposium: The Future of Unenumerated Rights: Part Two of Three: Article: Who's Afraid of Unenumerated Rights*, 9 U. PA. J. CONST. L. 1 (2006).

'substantive' component to the Due Process Clause protects only 'those fundamental rights and liberties which are objectively, 'deeply rooted in this Nation's history and tradition,' [...]. [a]s well as 'implicit in the concept of ordered liberty' [...].'"[71] Justice Alito then explains the three tiers of scrutiny as applicable to an equal protection analysis in *Windsor*, which appear to be applicable to a substantive due process analysis. For classifications (e.g., based on "skin color") under equal protection which are subject to strict scrutiny and for fundamental rights which are found under substantive due process, legislation must be "'narrowly tailored' to achieve a 'compelling' government interest".[72] Justice Alito explains equal protection intermediate scrutiny (e.g., for classifications based on "gender" in some instances) as involving "those characteristics subject to so-called intermediate scrutiny-*i.e.,* those classifications that must be ''substantially related'' to the achievement of 'government objective[s]'".[73] Third, Justice Alito explains regarding equal protection, "Finally, so-called rational basis review applies to classifications (e.g., "not inherently suspect") based on 'distinguishing characteristics relevant to interests the state has the authority to implement.'"[74]

Justice Alito's explanation of the three tiers of scrutiny for equal protection applies, at least the first and last tiers, apparently also to substantive due process. Perhaps the leading substantive due process case is *Washington v. Glucksberg*.[75] Professor Randy E. Barnett has described what he calls the "Glucksberg Two Step" concerning substantive due process.[76] Professor Barnett describes the Two Step as a court (1) analyzing whether a fundamental right is present and then (2) requiring a compelling governmental purpose, if such right is present, for legislation to be constitutional. On the other hand, only a rational basis is required for legislation to be constitutional, if the right is not defined as fundamental by the Court.[77]

Thus, as suggested, the question arises with Justice Kennedy's analysis in *Lawrence* and *Windsor*, whether the animus or animosity found present in those cases is required, somewhat akin to a suspect classification for equal protection traditional analysis or a fundamental right for substantive

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[60] *Windsor*, 133 S. Ct at 2693 (Alito, J., dissenting) at II *citing* Wash. v. Glucksberg, 521 U.S. 702, 720–21 (1997); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); *Glucksberg* at 721 *quoting* Palco v. Connecticut 302 U.S. 319, 325–326 (1937).

[72] *Id.* (citing Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 720 (2007) and Cleburn v. Cleveland Living Center, Inc., 473 U.S. 432, 440, 452–53 (Stevens, J., concurring) (1985)).

[73] *Id.* (citing United States v. Virginia, 518 U.S. 515, 524, 567 (Scalia, J., dissenting) (1996); *Cleburn*, 473 U.S. 432, 440.)

[74] *Id.* (citing *Cleburn*, 473 U.S. 432, 441; Adarand Constructors, Inc. v. Pana, 515 U.S. 200, 218 (1995) (internal quotation marks omitted).)

[75] *Glucksberg*, 521 U.S. 702.

[76] Barnett, *supra* note 17.

[77] *Id.*

due process traditional analysis. The suggestion here is, although animosity was present per the Court in both *Lawrence* and *Windsor*, such a finding should not be necessary to protect liberty rights or courts will face an analysis similar to the Glucksberg Two Step.

B. Substantive Due Process – Critique and Defense

The Court's substantive due process analysis is unclear. Among others, Mr. Daniel J. Crooks, III, has written as follows.

> The Court's substantive due process jurisprudence is esoteric and yet equally incomprehensible to even the keenest minds in the legal academy [...].
>
> [...] What is substantive process? When does it apply? If it does apply, which line of cases does one apply: the "deeply rooted in this Nation's history and tradition" test used in Glucksberg or the "liberty" test applied in Lawrence? [...] [T]he best way to find answers to these questions is to understand the nature of the questions themselves and to grasp the theory's tumultuous history from 1887 to 2013.[78]

Mr. Crooks then traces history of the substantive component of the due process clause from *Mugler v. Kansas* until *Windsor*.[79] Mr. Crooks concludes, "... *Windsor* is best understood as a *Lawrence*-brand liberty case distinct from the Court's traditional equal protection and due process precedents."[80]

Mr. Timothy Sandefur in his article, "In Defense of Substantive Due Process, or The Promise of Lawful Rule", states, "... [T]he Constitution imposes, implicit limits on the laws the legislature can enact, and the content of those implicit limits can be understood only by considering what the Constitution was written to accomplish and what government may not justly do...."[81] For this conclusion Mr. Sandefur draws directly on Justice Samuel Chase's opinion in *Calder v. Bull*, "Even where there was no 'express [] restrain[t] on the lawmakers, [t]he nature, and ends of legislative power will limit the exercise of [that power].'"[82] Mr. Sandefur quotes a lengthy portion of Justice Chase's opinion which appears to describe substantive due process's requirement of a proper governmental

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[78] Daniel J. Crooks, III, *Toward "Liberty": How the Marriage of Substantive Due Process and Equal Protection in* Lawrence *and* Windsor *Sets the Stage for the Inevitable Loving of Our Time*, 8 CHARLESTON L. REV. 223, 229, 234 (Winter 2013–2014).

[79] *Id.* at, *inter alia*, 234–35 ("*Mugler* is the case that, according to the Court in *Casey*, ushered in the oft-lambasted era of economic substantive due process") (citing, among others, Mugler v. Kansas, 123 U.S. 623 (1867) and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992)).

[80] *Id.* at 285.

[81] Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL'Y., 283, 321 (2012).

[82] *Id.* (citing Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798)).

purpose for legislative action.

> The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, [i.e., the purposes] will decide what are the proper objects of [government authority]. ... There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact; cannot be considered a rightful exercise of legislative authority. *The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded.*[83]

Which leads Mr. Sandefur to conclude as follows:

> When interpreting these terms, courts properly refer to outside sources for definitions and for explanations of how habeas corpus and other devices operate. In the same way, the Constitution's text implicitly incorporates the classical liberal political philosophy of the late eighteenth century by implication from textual references to "liberty," "property," and "other" rights. The Preamble declares unambiguously that "liberty" is a "blessing." And in the Due Process Clause, the Constitution incorporates a promise that government will treat individuals in a lawful, non-arbitrary manner. These terms are properly interpreted by reference to other documents and experiences in the classical liberal tradition and American historical experience. The Constitution's text, in short, indicates that it has a specific normative direction and that it incorporates substantive political values. A judge interpreting the Constitution may not be able to avoid ideological biases in every case, but as a deputy indirectly chosen by the people to interpret and apply its text, a judge is faithful to her task when she makes her judgments guided by principles found both explicitly and implicitly in the instrument itself.[84]

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[83] *Id.* (emphasis added by Sandefur).
[84] *Id.* at 349–50.

Mr. Sandefur has written elsewhere, "Understanding the Constitution requires reference to more permanent principles than mere long-standing social convention" when describing the contrast between liberal and conservative originalists.[85] The reference to more permanent principles, and not just tradition, may echo for some what Professor Randy Barnett has called the difference between original meaning and original intent, respectively[86].

C. *Substantive Due Process—An Alternative—Professor Barnett*

To avoid limited protection of liberty rights— under either traditional substantive due process or equal protection analysis—the Court should adopt Professor Barnett's approach to expand Justice Kennedy's *Lawrence* and *Windsor* analysis to other cases, for example, *NFIB*. Professor Barnett has criticized the *Glucksberg* approach, that a right must be found to be fundamental before the government must have a compelling state interest to affect that right.[87] Professor Barnett has also criticized the apparent requirement of *Glucksberg* that a right must be "carefully defined".[88] For example, Professor Barnett has pointed out that in *Bowers*, the right at issue was differently defined by the majority and the dissent. In *Bowers*, the majority defined the right asserted as "a fundamental right [of] homosexuals to engage in sodomy." In contrast, the dissent defined the right as "the right to decide for themselves whether to engage in particular forms of consensual sexual activity."[89] Professor Barnett has explained an alternative approach:

> As I have elsewhere proposed, the original meaning of the Ninth Amendment, together with that of the Privileges or Immunities Clause of the Fourteenth Amendment, supports the conclusion that the Constitution does protect the right to liberty, as the Court hints in *Lawrence*. . ..
>
> But the judicial protection of liberty simply requires that the government must justify as necessary and proper its exercise of its powers to (1) prohibit wrongful and (2) regulate rightful acts. . ..
>
> Implicit in the Ninth Amendment, and the Privileges or Immunities Clause of the Fourteenth, is the principle that the people retain their natural rights when they surrender to the government the executive power to enforce their rights. A

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[85] Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J.L. & PUB. POL'Y 489, 497 (2004).

[86] *See, e.g.*, Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620–30 (1999).

[87] *See e.g.*, Barnett, *supra* note 17, at 1489–90.

[88] *Id.*

[89] *Id.* at 1489 (*citing* Bowers v. Hardwick, 478 U.S. at 190 and 199 (Blackmun, J., dissenting)).

> conception of the police power that is consistent with this principle has the following components: (1) a prohibition of an act is proper when the act violates the rights of others (e.g., murder, rape, robbery, theft, trespass)—because such an act wrongfully violates the rights of another person, it is not properly called a "liberty"; (2) a regulation of liberty is proper when it is necessary to protect the rights of others from the risk of violation – for example, health and safety laws; and (3) to establish that a regulation of liberty is "necessary" would require the government to show some degree of fit between means and ends and that the measure is not for restricting the exercise of liberties of which the legislature disapproves.[90]

Furthermore, Professor Barnett has explained the limits in *Lawrence* on the state police power and how such limits would apply to a federal statute.

> 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 states and found that the particular purpose of the statute was an illegitimate or improper. This is analogous to finding a federal statute unconstitutional because, however effective it might be, its purposes is not among the enumerated powers in Article I, Section 8.[91]

D. Harmonizing Constitutional Interpretations in NFIB: The "Holistic" Constitution?

Professor Barnett's comparison of *Lawrence's* restriction on the police power to the limited scope of federal powers may invoke in some memory of Justice Scalia's dissents in not only *Lawrence* but more recently *NFIB* and *Windsor*. However, Justice Scalia would have found the Obamacare provisions in *NFIB* beyond the enumerated powers of the federal government[92] but the state regulations of same-sex sex and same-sex marriage in *Lawrence* and *Windsor* within the state's police power.[93] Justice Scalia summarized his position in his dissent in *Windsor*, in which he stated that he would have upheld the federal DOMA legislation as follows.

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[90] *Id.* at 1498–99.

[91] *Id.* at 1495.

[92] NFIB v. Sebelius, 132 S. Ct. 2566, 2647 (2012).

[93] United States v. Windsor, 133 S. Ct. 2675, 2707 (2013) (Scalia, J., dissenting) *citing* Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J. dissenting).

> As I observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms. See *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting)[...]. It is enough to say that the Constitution neither requires nor forbids our society to approve of same-sex marriage, as much as it neither requires nor forbids our society to approve of no fault divorce, polygamy, or the consumption of alcohol.[94]

Thus, whereas those seeking a holding that Obamacare is unconstitutional might welcome Justice Scalia's forceful dissent in *NFIB* that Obamacare was beyond the enumerated powers of the Constitution, they might be troubled by Justice Scalia's dissents in *Windsor* and *Lawrence* that the statutes therein were constitutional. Justice Kennedy would apparently hold all three statutes unconstitutional.[95] Even Professor Barnett may have apparently waivered and accepted that Obamacare is constitutional if it is described as a tax.[96]

Others, for example tax practitioners and professors, may not accept, as Justice Scalia did not that the federal government can dictate that energy efficient windows be installed or a tax paid. Chief Justice Roberts stated in *NFIB*, "Suppose Congress enacted a statute providing that every taxpayer who owns a house without energy efficient windows must pay $50 to the IRS .... No one would doubt that this law imposed a tax and was within Congress's power to tax."[97] Justice Scalia responded,

> The dissent [objecting to the decision that the Obamacare legislation was beyond the Commerce Clause] dismisses the conclusion that the power to compel entry into the health insurance market would include the power to compel entry into the new-car or broccoli markets ... [U]nder the theory of Justice Ginsburg's dissent, moving against those inactivities ["the failure of some of the public to purchase American cars" and "the failure of some to eat broccoli"] will also come within the Federal government's unenumerated problem-solving powers.[98]

Justice Scalia would conclude that the failure to buy energy efficient windows would come within what he viewed as the nonexistent problem-

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[94] *Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting).

[95] Justice Kennedy, of course, authored the majority opinions in *Lawrence* and *Windsor* and agreed with the dissenters in *NFIB v. Sebelius*.

[96] Randy E. Barnett, *No Small Feat: Who Won the HealthCare Case (and Why Did So Many Law Professors Miss the Boat)?* 65 FLA. L. REV. 1331, 1337 (2013) (arguing that Chief Justice Roberts did not hold the individual mandate constitutional but rather interpreted the law as offering and option to pay a tax or buy insurance).

[97] *Sebelius*, 132 S. Ct. at 2597–98 (2012).

[98] *Id.* at 2650 (Scalia, J., dissenting)

solving power, which is beyond the federal government's enumerated powers. In fact, in another portion of his dissent, Justice Scalia suggested that Obamacare could be constitutional if the federal government offered a tax credit for purchasing health insurance, similar to the tax credits which have been available for the purchase of, for example, energy efficient windows or cars. Although Justice Scalia directly responds to Justice Ginsburg, he only indirectly responds to the Chief Justice.[99] Tax practitioners and tax professors would likely respond that there is precedent for a tax credit for windows and cars in tax law, but a tax for not installing windows would be novel or unique, except for the Obamacare tax.[100] There are other examples of taxes which were unique and novel at their introduction, for example, (1) the estate tax (and lack of an estate tax marital deduction) for same-sex couples who do not marry opposite gender spouses (contrary to the holding in *Windsor*) or (2) property tax (and lack of a property tax exemption) for failure to swear a loyalty oath (contrary to the holding in *Speiser*).

This apparent inconsistency of the unconstitutionality of the federal statute DOMA in *Windsor* and of the Texas statute in *Lawrence*, on the one hand, and the constitutionality of Obamacare, on the other hand, raises the questions, at least for some, as to whether the Constitution is libertarian and not socially conservative and just how libertarian is the Constitution.[101] Even putting aside consistency,[102] it might be asked, which particular path of constitutional reasoning might lead to the most freedom and liberty, a concept value by the Founders[103] and arising again in popular parlance in suggestions, such as for amendments to the Constitution?[104] In any event, it would seem that, in the seamless web of the law, a conclusion might be more rightly sustained if alternative constitutional analyses of an issue reach that same conclusion. That is, (1) if a *Lawrence* and *Windsor* analysis based upon liberty rights, (2) Professor Barnett's and Justice

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[99] *Id.* at 2650 (Scalia, J., dissenting) ("Article I contains no whatever-it-takes-to-solve-a-national-problem power." Id. at 2647: "With the present statute, by contrast, there are many ways other than this unprecedented Individual Mandate by which the regulatory scheme's goals of reducing insurance premiums and ensuring the profitability of insurers could be achieved. For instance, those who did not purchase insurance could be subjected to a surcharge when they do enter the health insurance system. Or they could be denied a full income tax credit given to those who do purchase the insurance.")

[100] *See* IRS Form 5695 Residential Energy Credits (2013) and instructions (referring to the use of enegry efficinent windows on homes) *available at* http://perma.cc/63PM-8FA2.

[101] Dorocak, *supra* note 8.

[102] Emerson is often attributed the quote, "Consistency is the hobgoblin of the small minded." Or, as a law professor of the author stated in a Socratic colloquy with a student, "You don't have to be consistent, just intelligent."

[103] "[T]hat all men ... are endowed by their Creator, with certain unalienable rights; that among these are life, liberty and pursuit of happiness..." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) and "We the People of the United States, in order to ... secure the Blessings of Liberty to ourselves and our posterity ...." U.S. CONST. pmbl.

[104] Mark R. Levin, *The Liberty Amendments: Restoring the American Republic* (Threshold Editions, 2013); *See* Randy E. Barnett, *The Case for the Repeal Amendment*, 78 TENN. L. REV. 813 (2011).

Scalia's analysis of limited federal power, and (3) the decision in *NFIB* concerning the commerce clause all lead to the same conclusion that Obamacare is unconstitutional, so should an analysis that Obamacare is uncosntituional for imposing a tax upon individuals who do not purchase required insurance.

Currently in a search for some consistency, Professor Barnett has suggested that all constitutional rights, enumerated and unenumerated, be subject to the same analysis.

> Freedom of speech was considered with Madison and others to be a natural right. How do we protect this enumerated right? Essentially, we do so by putting the burden on the government to justify its laws as necessary and proper when a law affects the liberty of speech. We do not say that the government may never prohibit speech, and we do not say that the government may never regulate the exercise of the right to speak. Instead, we say that it if it is going to prohibit speech, the government has to show that the speech is in some sense wrongful—that the speech in some sense violates the rights of other people. ...
>
> Short of prohibition, speech and assembly may be regulated by what First Amendment jurisprudence calls time, place, and manner regulations. ...
>
> If we were to take essentially the same approach to all liberties that we now use to approach the First Amendment's natural right of freedom of speech, we would employ the same analysis of prohibition and regulations of liberty.[105]

When the constitutionality of Obamacare is examined under the various constitutional analyses of liberty rights, enumerated powers, the commerce clause, and the taxing power, it is apparently only the taxing power which might uphold the constitutionality of the legislation. Furthermore, although the taxing power might appear to uphold the constitutionality of Obamacare per Chief Justice Roberts' opinion in *NFIB*, [106] that power does not uphold said constitutionality per Mr. Sandefur's analysis in the next section of this article.

Certainly the Supreme Court appears to be reexamining some of its precedent, with Justice Kennedy's revitalizing *Lawrence* in *Windsor* and with his use of the doctrine of constitutional conditions, from *Speiser*, in

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[105] Randy E. Barnett, *The Golden Mean between Kurt & Dan, A Moderate Reading of the Ninth Amendment*, 56 DRAKE L. REV. 897, 902–03 (2008).

[106] *Sebelius*, 132 S. Ct. 2600.

Citizens United.[107] Thus, it may be appropriate to reexamine Chief Justice Roberts' reasoning concerning the taxing power in his majority opinion in *NFIB*. In fact, in *Citizens United*, Justice Kennedy had gone back to Justice Scalia's dissent in a prior case, *Austin*, rather than to Chief Justice Roberts' opinion in *Wisconsin Right to Life*.[108] Once again, it may be possible to move beyond the Chief Justice's opinion and reach a conclusion, possibly on the unconstitutionality of Obamacare which would seemingly be reached by various constitutional analyses in harmony with one another.

The next section of this article will briefly examine some recent efforts to re-examine the taxing power holding of *NFIB*, in order to determine if Obamacare might be found unconstitutional under the taxing power, as well as most under other analyses. In fact, Mr. Timothy Sandefur, whose articles are cited in the next section of this article, concerning the constitutionality of Obamacare as a tax, has suggested that the constitution be read in a "holistic" manner.[109] That is, it would seem, under any of the constitutional analyses herein involved—liberty rights, enumerated powers, commerce clause, taxing power—the same conclusion should likely be reached; i.e., in this instance that Obamacare is unconstitutional.

IV. RECENT FURTHER ANALYSES OF THE CONSTITUTION'S TAXING POWER IN *NFIB* AND THE CONSTITUIONALITY OF OBAMACARE UNDER THAT POWER

Mr. Timothy Sandefur of the Pacific Legal Foundation has authored an article on the constitutionality of Obamacare as a tax with a self-explanatory title, "So It's a Tax, Now What?: Some of the Problems Remaining after NFIB v. Sebelius".[110] In the article, Mr. Sandefur concludes that Obamacare is unconstitutional as a tax because (1) it is a direct tax not apportioned as required by the Constitution, (2) it is a tax not uniform throughout the United States as required by the Constitution, and (3) it is a tax which did not originate in the House of Representatives as required by the Constitution.[111] Despite how interesting the arguments may be about the constitutionality of Obamacare under the direct tax, uniformity, and origination clauses, perhaps more telling is the fact that both the majority (at least in the person of the Chief Justice Roberts, author of the majority opinion) and the dissenters (Justices Scalia, Thomas, Alito

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[107] *See Windsor* 133 S. Ct.; *Citizens United* 558 U.S. 310. *See* John R. Dorocak & Lloyd E. Peake, *Political Activity of Tax Exempt Churches, Particularly After Citizens United v. Federal Election Commission and California's Proposition 8 Ban on Same-Sex Marriage: Render Unto Caesar What is Caesar's*, 9 U.N.C. FIRST AMEND. L.REV. 448, nn. 102, 103 and accompanying text (2011).

[108] Dorocak & Peake, *supra* note 107, 49–51 and accompanying text.

[109] Timothy Sandefur, *So It's a Tax, Now What?: Some of the Problems remaining after NFIB v. Sebelius*, 17 TEX. REV. L. & POL. 203 (2013). *See also* Shapiro, infra note 98.

[110] *Id.*

[111] *Id.*

and Kennedy) agreed that Obamacare could not be constitutional under the Commerce Clause. There has been some disagreement as to whether the Commerce Clause discussion in *NFIB* is dicta or a holding.[112] However, Mr. Sandefur quotes from Chief Justice Roberts' majority opinion as follows, "It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question.. . .Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction."[113]

Despite Chief Justice Roberts' majority opinion holding that the individual mandate of Obamacare is constitutional as a tax, it is a unique tax.[114] If Obamacare imposes a tax, that tax must meet the constitutional requirements of a tax. Justice Roberts wrote, "Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution."[115] Given Chief Justice Roberts' admonition that even an anomalous PPACA tax must pass the constitutional standards for a tax, for the purpose of this article it may well be worth briefly reviewing the chief arguments regarding the constitutionality of the Obamacare tax as a direct tax, a uniform tax, and a tax which originated in the Senate to determine whether or not, under other constitutional theories, Obamacare is unconstitutional. If Obamacare is also unconstitutional as a tax, in the event that the Supreme Court reviews the unconstitutionality question in the future, it would seem such legislation should harmoniously be unconstitutional, in a holistic Constitution, under the Commerce Clause, under the unenumerated powers doctrine, as violating liberty rights, and as a tax. Such a conclusion, given Justice Kennedy's reasoning in *Windsor* and *Lawrence*, and, to some extent, in *Citizens United*, would likely advance liberty and liberty rights. Some commentators have suggested that alternative constitutional analyses or theories are merely similar to alternative arguments or theories of a case (and thus could be conflicting). Mr. Sandefur argued, on the other hand, that the Constitution is "holistic," implying similar conclusions from alternative analyses or theories.[116]

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[112] *See* Sandefur, *supra* note 109, at nn. 38–39.

[113] *Id.* at n.41 (citing NFIB v. Sebelius, 132 S. Ct. 2566, 2600–01 (2012)).

[114] *Id.* at n.145 (citing Maximilian Held, *Goforth and Sin [Tax] No More: Important Tax Provisions, and Their Hazards, in the Patient Protection and Affordable Care Act*, 46 GONZ. L. REV. 717, 731–732 (2011) and stating "(attempting to catalog the PPACA tax and concluding that 'such an anomalous example of taxation cannot be found in any Supreme Court decision.')").

[115] *Id.* at n.65 (citing NFIB, 132 S. Ct at 2598).

[116] *See, e.g.*, Sandefur, supra note 109. *See also*, Michael H. Shapiro, *Argument Selection in Constitutional Law: Choosing and Reconstructing Conceptual Systems*, 18 S. CAL. L. REV. . & SOC. JUST. 209, 243–244 and n.51 (2009).

> ... Comparing converging arguments is an advocative and juridical necessity whenever we encounter more than one argument in support of a given result. Cumulation of converging arguments often enhances the persuasiveness of a lawyer's advocacy and of a judge's defense of her decision. "If all these

A. Obamacare is a Direct Tax Not Apportioned Among the States and is Therefore Unconstitutional

The PPACA (Patient Protection Affordable Care Act, or Obamacare) tax is a direct tax which is unapportioned and therefore is unconstitutional. As Mr. Sandefur explains,

> In Bromley itself, the Court relied on Pollock to distinguish true excise from "taxes which fall upon the owner merely because he is owner, regardless of the use or disposition made of his property," which "may be taken to be direct [taxes]." Of these two categories, the PPACA tax falls squarely in the latter. A person is subject to it regardless how he uses or disposes of his property. He can satisfy the tax by paying it or buying insurance, but that is only the payment of the tax, not a use of property, which is then subject to an excise. Of the two types of tax described in Bromley, the PPACA seems much more like a direct than an indirect tax.[117]

The U.S. Constitution at Article I, section 9, clause 4 prohibits direct taxes which are not apportioned.[118] The issue then becomes what is a direct tax. The *NFIB* majority held that the PPACA or Obamacare tax was

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distinct perspectives lead to the same outcome, it must be right," or so it might be thought. (footnote omitted).

Shapiro cites and quotes Cass R. Sunstein, *The Supreme Court 1995 Term-Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 20–21, as follows:

> Thus judges who have different accounts of what the Equal Protection Clause is all about can agree on a wide range of specific cases. There can be little doubt, for example, that the Justices who joined the Court's opinion in Romer v. Evans [517 U.S. 620 (1996)] did so from different theoretical perspectives. Agreements on particulars and on unambitious opinions are the ordinary stuff of constitutional law; it is rare for judges to invoke first principles. Avoidance of such principles helps enable diverse people to live together – thus creating a kind of modus vivendi – and also shows a form of reciprocity or mutual respect .... All I am suggesting is that when theoretical disagreements are intense and hard to mediate, the Justices can make progress by putting those disagreements to one side and converging on an outcome and a relatively modest rationale on its behalf.

Id. at n.51 Shapiro continues as follows.

> One "minimalist" doctrine is that of constitutional avoidance, which I do not specifically discuss; the emphasis here is on selection among constitutional arguments already fairly presented. *See generally* Harris v. United States, 536 U.S. 545, 555 (2002) (stating that "under that [constitutional avoidance] doctrine, when "a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter" (citing United States v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909))). This also tends to reduce polarization, although this is not always a good thing.

Id.

[117] *Id.* at 220 (citing Bromley v. McCaughn, 280 U.S. 124, 137, 136 (1929)).

[118] U.S. CONST. art. I, § 9, cl. 4.

not a direct tax and therefore need not be apportioned. The majority opinion regarded "not obtaining health insurance" as a use of property which could be taxed as an excise.[119] The dissenters in *NFIB* agreed with Mr. Sandefur that the majority opinion definition of an indirect tax is much too broad:

> As the *NFIB* dissenters observed, "if every person comes within the Commerce Clause power of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited government power is at an end."... So, too, if every person is engaged in a taxable activity by the simple reason he earns an income and fails to buy a specific product, then it would seem that all exactions or duties imposed by the government can be categorized as excises.[120]

Mr. Sandefur points out that *Pollock v. Farmers Loan & Trust Co.* held that an income tax was a direct tax which must be apportioned.[121] *Pollock* led to the Sixteenth Amendment which allowed for an income tax as a direct unapportioned tax.[122] Mr. Sandefur criticizes *Hylton v. United States*, upon which the *NFIB* majority relied, as badly reasoned and involving an excise tax. The apparent reasoning of the *Hylton* court, per the *Pollock* court, was that a tax on carriages was a direct tax, but it was a direct tax which could not be apportioned, and, therefore, the tax was not a direct tax.[123] Finally, Justice Scalia criticized the majority opinion's discussion of the direct tax issue since the issue had not been briefed and argued and since the issue was complex and required much more contemplation.[124]

B. Obamacare is a Tax Not Uniform Throughout the United States and is Therefore Unconstitutional

Mr. Sandefur also argues that, assuming that the PPACA tax is not a direct tax and need not be apportioned, the PPACA tax is not uniform throughout the United States, as required by U.S. Constitution, Article I, section 8, clause 1.[125] In *Knowlton v. Moore*, where an inheritance tax was imposed based on relationship or absence of relationship, the U.S. Supreme Court upheld a challenge based on the Uniformity Clause and held that the clause required geographic uniformity: "Congress cannot tax

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[119] *Sebelius*, 132 S. Ct. at 2599.
[120] Sandefur, *supra* note 81, at n.94 (citing Sebelius at 2648 (footnote omitted)).
[121] *Id.* at 218 (citing Pollock v. Farmers Loan & Trust Co., 158 U.S. 601, 623-28 (1895)).
[122] *Id.*
[123] *Id.* at 217–218.
[124] *Sebelius*, 132 S. Ct. at 2655 (Scalia, J., dissenting).
[125] U.S. CONST. art. I, § 8, cl. 1.

a subject in one place differently than a tax on the same subject in another place, because the point of the uniformity requirement was 'to prevent [states] from being called upon to contribute more than was deemed their due share of burden.'"[126] Mr. Sandefur explains two reasons why the PPACA violates the Uniformity Clause.

> The first reason is that the tax imposed for not having insurance can be discharged not only by purchasing a policy or paying an amount of money, but also by enrolling in Medicaid—but Medicaid eligibility differs by state and states are even (theoretically) free to opt out of the Medicaid expansion. ...
>
> But the second way in which the PPACA tax lacks uniformity is more significant. That statute provides that someone who cannot afford coverage is not necessarily exempted, but may still be required to pay an amount determined by a formula that is based on "the annual premium for the lowest cost bronze plan available in the individual market through the Exchange in the State in the rating area in which the individual resides." ... In other words, it is somewhat inaccurate to say that the PPACA taxes persons who do not buy health insurance, Rather, it imposes a tax on persons who do not buy affordable insurance, where affordability is statutorily determined by reference the state boundaries."[127]

C. *Obamacare is a Tax Not Originating in the House and is Therefore Unconstitutional*

Thirdly, per Mr. Sandefur, the PPACA tax violates a constitutional requirement in U.S. Constitution. Article I, section 7, clause 1 which states that bills for raising revenue must originate in the House of Representatives.[128] Mr. Sandefur explains, "The PPACA originated in the Senate. On November 19, 2009, Senator Harry Reid submitted an

> "Amendment" to a bill that the House had passed the previous month. H.B. 3590. That bill, the "Service Members' Ownership Act of 2009", provided incentives for veterans to buy houses. .... Although this "strike and replace" procedure sometimes called "cut and amend" - is not uncommon, the Court has never determined whether Congress can use this

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[126] Sandefur, *supra* note 109, at 221 (citing Knowlton v. Moore, 178 U.S. 41, 83, 84, 88–89 (1900)).

[127] *Id.* at 222–223 (footnotes omitted).

[128] *Id.* at 228 (citing U.S. CONST., art I, § 7, cl. 1).

trick to get around the Origination Clause's mandate.[129]

Mr. Sandefur added, "The Government has argued that while the PPACA is a tax, it is not a Bill for raising revenue" subject to the Origination Clause.[130] "Is the PPACA tax a penalty or assessment exempt from the Origination Clause, or is it a bill for raising revenue which must comply with the Origination Clause?" asks Mr. Sandefur. The answer is, "According to the NFIB Court's 'savings construction' it must be the latter."[131] Mr. Sandefur continues, "More importantly, all previous cases in which the Court has ruled the Origination Clause inapplicable to 'penalty assessments' have involved assessments that are meant to enforce compliance with a statute that rests on some kind of authority other than the Article I, Section One power to 'weigh and collect taxes.'"[132]

V. CONCLUSION

Despite the Supreme Court's holding in *NFIB*, that the individual mandate of Obamacare was constitutional as a tax, Obamacare's tax may be unconstitutional under the Direct Tax Clause, the Uniformity Clause, and the Origination Clause of the U.S. Constitution. The conclusion, that Obamacare's tax and individual mandate are unconstitutional even as a tax, may seem far afield from the unconstitutionality of Obamacare as violating liberty rights, the focus of this article. However, the Obamacare legislation may now appear unconstitutional under various constitutional analyses, including as a denial of liberty rights, as a tax, as an exercise of the Commerce Clause, and as an exercise beyond the enumerated powers. Such a conclusion indicates that the various constitutional analyses are in harmony, or that the Constitution is holistic. And, more specifically, a conclusion, that the Obamacare legislation is unconstitutional under a liberty rights analysis as advanced by Justice Kennedy in *Windsor* and *Lawrence*, which suggests that the the Consitution is not only holistic but libertarian.

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[129] *Id.* at 229 (footnotes omitted).

[130] *Id.* at 232 and n. 185 (citing a Motion to Dismiss, Sissel v. U.S. Dep't of Health & Human Servs, No. 1:10-cv-01263 (D.D.C. Oct. 25, 2012)).

[131] *Id.* (citing NFIB, 132 S. Ct at 2593 (footnotes omitted)).

[132] Timothy Sandefur, *So It's a Tax, Now What?: Some of the Problems remaining after NFIB v. Sebelius*, 17 TEX. REV. L. & POL. 203, 336 (2013) (citing U.S. v. Ashburn, 884 F.2d 901, 904 (6th Cir. 1989)). It is the author's understanding that Professor Randy Barnett believes that the Origination Clause argument has merit. Randy Barnett, *New Obamacare Challenge: The Origination Clause available at* http://perma.cc/8PZJ-AD2K (last checked Aug. 14, 2014). During the Reagan Era, there was apparently a similar question about the Tax Reform Act of 1986. *See* Michael A. Stern, *And Now For Something Completely Different, available at* http://perma.cc/8GMD-XDTE (last checked Aug. 14, 2014) (referring to the Volokh Conspiracy blog discussion of The Obamacare legislation and the origination clause and concluding that the legislation was unconstitutional under the clause.).