



Protestors hold signs during an anti-health care reform rally August 14, 2009 in San Francisco, California. (Getty Images)

In opposing Obamacare, we were serious the whole time

By **Ilya Shapiro** – Special to CNN

April 2, 2012

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“Can you create commerce in order to regulate it?” With those words, Justice Anthony Kennedy sent the legal establishment reeling.

Was the Supreme Court really taking seriously the preposterous claims of the Tea Party-inspired hacks who were suing the federal government? Was there really a

chance that five justices, acting as would-be partisan hacks themselves, would throw out President Obama's signature achievement? Could Obamacare, **which name everyone is now allowed to use because the administration itself has adopted it**, really fall on some technicality about mandating economic activity rather than regulating it when it occurs?

In a word, yes.

Those of us who have been challenging the constitutionality of the individual health insurance mandate have been serious the whole time. We thought we had put to rest the slurs about our cases being frivolous or political sour grapes when multiple federal judges denied the government's motions to dismiss them. Or when those same judges struck down the individual mandate. Or when an appellate court, including a judge appointed by President Clinton, affirmed one of those rulings.

When 26 states (and two more in separate lawsuits) argue that the constitutional power to regulate interstate commerce - which the Court has interpreted to include the regulation of local economic activity that has a substantial effect on interstate commerce - does not give the federal government the power to force people to buy stuff, maybe there's a legitimate point of debate.

Is it not valid to ask where federal power ends, as it must under the Constitution's grant of enumerated and therefore limited powers? What legal principle can courts apply to sanction economic mandates with respect to healthcare but not in other areas?

At the very least, when the Supreme Court granted an historic six hours of oral argument over three days - akin to *Brown v. Board of Education* or *Roe v. Wade* - surely the government's supporters in the media and academy recognized that there was something to what we were saying.

Yet on the eve of the arguments, nationally renowned commentators like Linda Greenhouse and Dahlia Lithwick breezily predicted an easy victory for the government. And **85% of academics and journalists polled by the American Bar Association said the law would be upheld**. (Never mind the question of why we need proof that elite liberals overwhelmingly support the elite liberal view.)

After all, holding otherwise would take us back to the dark times when children could work in stores and the government couldn't tell farmers how to go about their business. We all know that only Justice Clarence Thomas would endorse those kinds of hunger games.

And so, despite the plaintiffs' methodical progress and impressive lawyering - led by Paul Clement, possibly the nation's best advocate - the punditocracy still managed to be caught off-guard when four justices expressed skepticism about the government's position. (Thomas was characteristically silent but can indeed be expected to support the structural limits on federal power.)

CNN's own Jeffrey Toobin called it a "train wreck" for the administration, a reaction emblematic of the apoplexy with which the chattering classes reacted to last week's hearings. There had to be some explanation - beyond the obviously implausible idea that the challengers' claims had any merit - and indeed two narratives emerged: (1) the government's lawyer, Solicitor General Donald Verrilli, turned in a horrible performance, and (2) the justices were playing politics.

Neither of these excuses is convincing. While it's true that Verrilli wasn't at his best - the experienced super-lawyer seemed to strain under a decidedly non-frivolous weight - he ably conveyed the carefully crafted legal positions that the government has advanced all along.

And while it's also true that all the anti-Obamacare votes will come from justices appointed by Republican presidents, that doesn't mean those justices are acting from partisan motives (any more than the pro-Obamacare justices are). Indeed, unlike any previous "controversial" case, here **72% of the American people** - including 56% of Democrats and 54% of those who think the law is a good thing - think the individual mandate is unconstitutional.

No, the reason that the government had a bad week is that its position is weak. It has become abundantly clear that the reason that the solicitor general failed to articulate a principled limit to his theory of federal power - despite knowing that this would be the primary question he would face - is that there isn't one.

No matter how much **Yale's Akhil Amar** and **Northwestern's Andrew Koppelman** protest, we must recognize the validity of an interpretive theory that gives judges the power to enforce the Constitution's structure. Features such as federalism and the separation of powers are there not as some abstract exercise in applied political theory but to protect individual liberty. Before we even get to the Bill of Rights, which was a hotly debated afterthought, or the political checks on power, we have a constitutional design that denies the federal government the sort of plenary "police" power that states enjoy.

That's why the infamous "broccoli hypothetical" is so telling: Economists say that diet and exercise have a greater effect on taxpayer spending on healthcare than rates of ownership of insurance, so if anything healthy-food and gym-membership mandates have *greater* constitutional warrant than what we're dealing with now.

By the same token, Congress's ability to concoct lots of well-intentioned national reform schemes doesn't give it unfettered means to pursue those noble ends. It is a theory that would allow such unchecked federal power every time Congress acts under a self-declared "national problem" that cannot survive serious constitutional scrutiny.

Returning to Justice Kennedy, "here the government is saying that the Federal Government has a duty to tell the individual citizen that it must act, and that is different from what we have in previous cases, and that changes the relationship of the Federal Government to the individual in a very fundamental way."

The views expressed in this article are solely those of Ilya Shapiro.