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Going Rogue

The conservative health care lawsuits aren't actually conservative.

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As everyone knows, the health care reform lawsuits that are currently making their way to the Supreme Court are being shepherded and applauded by conservatives. But how conservative is the judicial philosophy behind the suits? The answer turns out to be complicated. In fact, once the lawsuits end up at the Court, they will likely expose ideological fissures in the conservative legal movement that may unsettle those on both the right and the left.

To understand why, consider what these lawsuits are actually about. Although the judges in Virginia and Florida who struck down health care reform didn't say so explicitly, they were really making a claim about the liberty of contract—namely, the idea, as Randy Barnett of Georgetown Law School and other leading libertarian critics of the health care mandate have repeatedly argued, that people can't be forced to buy healthy products they don't want, such as broccoli, asparagus, or gym memberships. As Charles Fried of Harvard Law School suggested in recent Senate testimony, the broccoli objection, while not frivolous, has nothing to do with Congress's power to regulate interstate commerce, the ostensible grounds on which these lawsuits have been fought. Rather, it's about our personal liberty, guaranteed by the Fifth and Fourteenth Amendments.

This libertarian vision goes back to 1905 and the Court's infamous ruling in *Lochner* v. *New York*, which struck down New York's maximum-hour law for bakers on the grounds that it violated the "liberty of contract" of both the bakers and their employers. *Lochner* became the basis for the Court's rejection of much New Deal legislation—until 1937, when the justices repudiated the ruling, and the entire line of cases it had created, declaring that "the Constitution does not speak of freedom of contract."

It's no surprise that the *Lochner* vision has been denounced as the root of all constitutional evil by Democrats like President Obama. But it has also been denounced by nearly every conservative Supreme Court nominee in recent memory, from Robert Bork to Antonin Scalia and John Roberts. In a 1984 debate with the libertarian scholar Richard Epstein at the Cato Institute, Scalia, then an appellate judge, denounced Epstein's Lochnerian call for the courts to overturn economic regulations. "The reversal of a half-century of judicial restraint in the economic realm," Scalia said, would be a "threat to constitutional democracy." In his 2005 confirmation hearings, Roberts said, "You go to a case like the *Lochner* case, you can read that opinion today, and it's quite clear that they're not interpreting the law; they're making the law." Justice Clarence Thomas has also indicated that he opposes *Lochner*.

Why have legal conservatives been so hostile to *Lochner*, a ruling that aligned quite neatly with the goals of economic conservatism? Bork pointed to the answer in his 1997 book, *The Tempting of America*. "Who says *Roe*," he argued, "must say *Lochner* and [Dred] *Scott*." Modern judicial conservatism was so fixated on opposing the invention of

rights that don't appear explicitly in the text of the Constitution—symbolized by the pro-slavery decision in *Dred Scott* but above all by the pro-choice decision in *Roe* v. *Wade*—that it could not countenance anything that smacked of legislating from the bench. That included *Lochner*, a ruling Bork characterized as "the quintessence of judicial usurpation of power."

Unexpectedly, the justice most likely to accept a health care challenge rooted in libertarian principles is the Court's most moderate conservative, Anthony Kennedy. Of the five conservatives, he is the only justice who has voted to uphold *Roe*, and he could well conclude that the right to personal autonomy he has located in the penumbras of the Constitution is broad enough to protect not only a right to abortion but also a right not to buy health insurance. "Liberty presumes an autonomy of self," Kennedy wrote in striking down sodomy laws in 2003. In fact, it's possible to imagine Kennedy voting to recognize a right to gay marriage and voting to strike down the health care mandate in the same Supreme Court term, all in the name of the same free-floating right to personal autonomy.

To be sure, although Kennedy has voted to strike down five federal laws since 2006, more than any other conservative justice, he might pause before embracing a radically activist libertarian vision that would call into question not only health care reform but also a range of government actions whose constitutionality has long been taken for granted—from minimum-wage and maximum-hour laws to decisions of the Occupational Safety and Health Administration to applications of the Endangered Species Act and Clean Water Act.

In the end, it's hard to bet on Kennedy voting to strike down health care reform or to resurrect *Lochner*. But, whether or not the health care mandate is overturned, the case exposes the degree to which the legal positions of today's right and left are both more complicated and less consistent than we imagine them to be. The only way to strike down the health care mandate honestly is to drift perilously close to the logic behind not just *Lochner* but also *Roe* and recent lower-court decisions recognizing gay marriage. That should make conservatives, on and off the Court, think twice.

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