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ObamaCare: The Supreme Court As a Constitutional Death Panel

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The fate of ObamaCare likely has been decided. But no one outside of the Supreme Court will know the result for another three months. Such is the secrecy which attends rulings by America's highest judicial panel.

Last week the Supreme Court completed three days of oral argument on the constitutionality of the health care "reform" passed two years ago. Typically the Court takes a preliminary vote on the following Friday and assigns opinion-writing duties. But decisions on controversial cases typically are not released until late June.

If the Court takes its responsibilities seriously it will strike down the legislation. ObamaCare represents extraordinary federal over-reach, a bid to legislate well beyond Congress' constitutional powers. If the Constitution remains relevant to the operation of the American government, the Court must strike down the individual mandate to purchase insurance.

Health care "reform" has been an important political objective at least since Harry Truman's presidency. However, the misnamed Patient Protection and Affordable Care Act would actually reduce patient options and increase medical costs.

Indeed, the promise to expand insurance to cover more procedures for more people while lowering costs and cutting the federal deficit was pure fantasy. American medicine is so expensive because of third party payment, that is, roughly 90 percent of health care expenses initially are paid by someone other than the patient. One could imagine the impact of a similar system on auto sales, grocery shopping, or most any other market. Demand and prices would jump, followed by rationing in an attempt to contain costs. Yet ObamaCare actually expands third party payment, exacerbating existing cost problems.

But whether PPACA was wise is not the question before the Supreme Court. Many people apparently believe jurists are to act as super-legislators, voting for or against a law

based on whether it is good policy. Thus people protested in front of the Supreme Court building as if it was the Capitol or White House.

It's not just average citizens who misunderstood the constitutional challenge. I debated the issue for the Federalist Society at law schools across America and law students—who will become attorneys filing constitutional challenges as well as judges ruling on such claims—commonly cited flaws in the current system or detailed personal health care problems. These were arguments for reform, but for constitutional reform. The Constitution empowers government and protects individuals. Any legislation, even involving so important an issue as health care, must conform to the nation's governing law.

After last week's oral arguments some liberal commentators who should know better seemed outraged that the Court took the legal challenge seriously. They reiterated the usual policy arguments for the legislation while ignoring the more basic constitutional issues.

For instance, *New York Times* columnist Paul Krugman complained that "the justices most hostile to the law don't understand, or choose not to understand, how insurance works." However, he doesn't appear to understand, or choose to understand, constitutional law. The issue is whether the Constitution grants the power asserted, not whether the legislation is good insurance policy.

Washington Post columnist E.J. Dionne, Jr. criticized a conservative court that "sees no limits on its power, no need to defer to those elected to make our laws." Yet almost by definition liberal jurists do not treat their power as limited and defer to elected officials. During the 1960s the Supreme Court gloried in its opportunity to act as a continuing constitutional convention, creating new doctrines with wild abandon.

Unfortunately, this approach renders every liberty insecure. The Constitution consciously puts certain powers beyond the reach of even elected officials. If the Supreme Court effectively suspends or amends the Constitution by majority vote for whatever reason, there is no defensible rule of law.

One can imagine a future Dionne Court in action. Yes, the First Amendment protects free speech. But elected officials had good reasons for suppressing a particular newspaper or broadcaster. Yes, the Fourth Amendment bars unreasonable searches. But the elected executive had good reasons for invading the suspect's home. Yes, the Constitution only gives Congress limited, enumerated powers. But legislators had good reasons for acting without restraint.

In short, if the federal government's power is unlimited and unconstrained in one area, it is unlimited and unconstrained in every area. If the high court abdicates its responsibility to maintain constitutional limits on government power in one case, it can do the same in every case. Jurists, with lifetime appointments, would turn into true super-legislators, rewriting the nation's basic law to fit their personal preferences.

Most people are aware that the Bill of Rights was intended to safeguard individual liberty against government power. In fact, many early advocates of limited government viewed the Bill of Rights as unnecessary, perhaps even dangerous, surplusage since by its terms the Constitution restricted the power of the national government. The latter's very structure was supposed to safeguard individual liberty. Opponents of the Bill of Rights feared that it would imply powers which did not exist.

The Constitution maintained a federal structure, with sovereign states as well as the national government. What now is typically called the federal government was divided into three branches: executive, legislative, and judicial.

States possessed plenary "police" powers. Although they remain constrained by their respective constitutions, and more recently by the Bill of Rights as applied by the 14th Amendment (passed after the Civil War), states otherwise have essentially unlimited power to tax and regulate. Which is why then-Massachusetts Gov. Mitt Romney could push into law a state requirement to buy health insurance.

In a conflict between states and the national government, the latter reigned supreme, but it possessed only limited, enumerated powers. Congress could act only when authorized by Article 1, Section 8, which lists the powers of the legislative branch. None of them suggests that the national government can force Americans to purchase a private product, in this case health insurance.

Then-House Speaker Nancy Pelosi (D-CA) responded "are you kidding" when asked about Congress' authority. Then-Majority Whip James Clyburn (D-SC) admitted that "There's nothing in the Constitution that says that the federal government has anything to do with most of the stuff we do." In their view Washington enjoys unlimited power. The Constitution is but a quaint ornament for display.

Some ObamaCare backers cited Section 8's reference to the "general welfare," but that actually is a limitation on congressional action. The other express powers were to be exercised only for the public interest, not narrow private interests. Far from authorizing Congress to do anything, this provision further restricted legislative authority.

Similar is the claim that the PPACA was authorized by the "Necessary and Proper" clause, which augments Congress's explicit constitutional powers to achieve an otherwise constitutional end. However, legal "necessity" involves more than politicians finding it to be politically convenient. "Proper" requires that the measure be consistent with the letter and spirit of the Constitution. Attempting to regulate inaction—or "mental activity, i.e. decision-making" in the words of one federal judge—is actually claiming a far-reaching and entirely new power. Doing violence to Constitution's structure of limited government certainly is not proper.

The Obama administration made a half-hearted attempt to argue that it was only imposing a tax—the penalty for failing to buy insurance. However, the president said it was not a tax, Congress termed it a penalty and did not include it in a section of new

taxes or count it in an estimate of expected revenue, and the penalty operates different than any other tax, since it cannot be enforced other than by withholding a tax refund. Virtually every judge who considered the issue dismissed this argument.

The legislation expressly claimed to be regulating interstate commerce, as authorized under Article 1, Section 8. But the Framers intended this provision to promote economic freedom by overriding individual state restrictions on trade among the several states. Moreover, "commerce" meant goods and services crossing state borders. Originally insurance wasn't even thought to be "commerce." Purely local activity was recognized as lying beyond federal regulation. The Founders never imagined this provision would empower Washington to regulate every American simply because they were alive.

Over the years the Supreme Court has loosened this restraint on national power, allowing the "Commerce Clause" to become a catchall claim for federal authority to do most anything. After all, most any activity can be categorized as involving or affecting "interstate commerce." Taken to its logical extreme the Commerce Clause would obliterate all limits on congressional power, turning a government with only limited, enumerated powers into a government with unlimited, plenary police powers. If so, the Founders need not have bothered stating anything in Article 1, Section 8 other than that Congress could regulate interstate commerce.

Of course, that would be a ludicrous interpretation. Which is why in recent years the high court has explicitly stepped back twice from the abyss of granting Washington unlimited authority through the Commerce Clause.

In 1995 the majority ruled in United States v. Lopez that the Commerce Clause did not allow Congress to ban possession of a gun in a school zone since there was no commerce. Accept the government's case, observed the majority, and "we are hard pressed to posit any activity by an individual that Congress is without power to regulate." The justices explained that they refused to "pile inference upon inference" and thus "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states."

This ruling was buttressed by United States v. Morrison, decided in 2000, when the Court overturned a penalty against gender-related violence since there was no "economic activity." One could argue that when aggregated, the non-economic activity affected interstate commerce, but the Court affirmed that this connection was not sufficiently direct. The justices admitted in Lopez that "some of our prior cases have taken long steps down that road" to turning the Commerce power into a general police power, "but we decline here to proceed."

This is why during oral argument the conservative justices asked about broccoli and burial insurance, which apparently confused leftish commentators. Krugman declared that "health insurance is nothing like broccoli." E.J. Dionne complained about "weird hypotheticals … which have nothing to do with an uninsured person getting expensive treatment that others have to pay for."

If the government can require you to buy medical insurance because your failure to act can be construed as affecting interstate commerce, is there anything that Washington cannot do? Your failure to eat broccoli, or exercise, harms your health, raising medical costs and insurance premiums for everyone else. Your death while indigent imposes burial costs on others. Your failure to buy an automobile helped ease General Motors into bankruptcy. Your failure to ride a bus harms the national mass transit system. Your failure to purchase Lehman Brothers securities helped push that company into bankruptcy and hurt all of Wall Street. Your decision to have sex creates children, transmits diseases, reduces time at work, and otherwise affects interstate commerce.

If no line can be drawn, then the power being advocated is unlimited. In fact, the power to regulate inaction is far greater than to regulate action. In the latter case the government is targeting something specific and discrete; individuals can avoid government control by no longer so acting. But while you sit and read this article you are not doing a multitude of things, all of which, if aggregated with the nonaction of others, could be considered to affect interstate commerce. There literally is no limit to what government could do under this doctrine.

Warned the 11th Circuit Court of Appeals in one of the cases which went to the Supreme Court: "the individual mandate is breathtaking in its expansive scope. It regulates those who have not entered the health care market at all. It regulates those who have entered the health care market, but have not entered the insurance market (and have no intention of doing so). It is overinclusive in when it regulates: it conflates those who presently consume health care with those who will not consume health care for many years into the future. The government's position amounts to an argument that the mere fact of an individual's existence substantially affects interstate commerce, and therefore Congress may regulate them at every point of their life. This theory affords no limiting principles in which to confine Congress's enumerated power."

Paul Krugman, E.J. Dionne, and others may like the idea of the national government having unlimited authority. But that is not what the Constitution provides. Thus, if the justices take seriously their oath to uphold the Constitution, they must void the individual mandate.

Whether the rest of the legislation should stand or fall is a complicated issue involving what is called "severability." Congress has authority to regulate insurance companies active in the marketplace, but without the mandate legislators would never have passed the bill. The bill was a complicated package dependent on the insurance mandate.

Some supporters of ObamaCare warn that Congress could turn to a single-payer or other nationalized health care system if the Court overturns the law. Why would exercising federal power in this way be constitutional if forcing people to buy insurance is not, asked Krugman? Because form matters in the law. In New York vs. United States (1992) the Supreme Court explained: "The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions:

It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."

So legislators could create a government health care system if PPACA falls. But they likely wouldn't do so, since Americans would reject the restrictions on patient choice that would inevitably accompany state control. Still, this would be a more honest approach than ObamaCare, which manipulated the system to make it appear much less expensive than it will turn out to be. Overturning PPACA would clear the decks and allow more realistic reform focused on reducing third party payment and expanding patient control.

Of course, everyone in Washington is worried about the political ramifications of the Court's decision. President Obama may lose politically however the justices rule. If the Court upholds ObamaCare, the president risks the wrath of a popular majority which continues to oppose the legislation. If the justices void the measure, President Obama's signature legal accomplishment will be destroyed and his preference for big government remedies will be highlighted.

But this case is about far more than one presidential election or one health reform bill. It concerns the protection of every American's liberty.

Is the power of the national government still limited? It is in the interest of all Americans that the Supreme Court answers yes.