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Cry the Beloved Country: Why the Supreme Court Should Leave Obamacare Alone

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I believe that the Supreme Court will uphold the individual mandate that is at the core of Obamacare by a vote of 6-3. Based on no legal theory whatsoever, I expect Chief Justice Roberts and perennial swing vote Justice Kennedy to vote with the liberal wing to uphold the act of Congress.

OK, maybe expect is a strong word. Hope would be better. But it's not about the law, it's about the Court itself.

Spending last week in our nation's capital, I listened to the astonishing vitriol of members of Congress and other publicly spirited Americans expressing their outrage at a law that would, to summarize their argument, bring the full weight of tyranny to our shores and mark the end of freedom in America. In the view of the assembled masses, should the Supreme Court fail to act -- or the people in some other form fail to rise up -- ours will be the generation who will have to explain to our grandchildren why we let freedom and liberty, our most hallowed values, die on our watch.

Lost in the arguments of conservatives and right-wing activists was the fact that the individual mandate -- the essential element that would bring tyranny to our homes -- was initially raised as the preferred strategy for health care reform by the right. Dating back to 1989, the Heritage Foundation articulated the view that an individual mandate to purchase health insurance -- rather than government provided health care or an employer mandate proposed by Democrats -- should be a central element of health care reform:

Society does feel a moral obligation to insure that its citizens do not suffer from the unavailability of health care. But on the other hand, each household has the obligation, to the extent it is able, to avoid placing demands on society by protecting itself... A mandate on households certainly would force those with adequate means to obtain insurance protection.

Three years later, the Heritage Consumer Choice Health Plan went further:

Require all households to purchase at least a basic package of insurance, unless they are covered by Medicaid, Medicare, or other government health programs.

All Heads of households would be required by law to obtain at least a basic health plan specified by Congress...

The private insurance market would be reformed to make a standard basic package available to all at an acceptable price.

The moral rationale for the individual mandate was stated succinctly at the time by Heritage Foundation Senior Fellow Robert E. Moffitt:

Absent a specific mandate for at least catastrophic health insurance coverage, some persons, even with the availability of tax credits to offset their costs, will deliberately take advantage of their fellow citizens by not protecting themselves or their families, with the full knowledge that if they do incur a catastrophic illness that financially devastates them, we will, after all is said and done, take care of them and pay all of the bills. They will be correct in this assessment...

An individual mandate for insurance, then, is not simply to assure other people protection from the ravages of a serious illness, however socially desirable that may be; it is also to protect ourselves. Such self-protection is justified within the context of individual freedom; the precedent for this view can be traced to none other than John Stuart Mill.

What has changed, of course, is not the logic of the Heritage Foundation's argument, but the politics. The individual mandate -- a public policy that was central to Republican health care reform alternatives to Hillarycare -- became anathema to the right by the time it was finally embraced by Democrats as an alternative to the left's preferred single-payer or employer mandate approaches. A Cato Institute attack in 1994 on the Republican embrace of the individual mandate foreshadowed the current attacks on Obamacare, and illustrates the drift to the right in Republican policymaking in the Tea Party era:

The most troubling aspect of the Nickles-Stearns [Republican health care reform] legislation, as introduced on November 20 [1993], is the mandate that it imposes on all Americans to purchase a standard package of health insurance benefits. By endorsing the concept of compulsory universal insurance coverage, Nickles-Stearns undermines the traditional principles of personal liberty and individual responsibility that provide essential bulwarks against allintrusive governmental control of health care.

This month, conservative jurist J. Harvie Wilkinson published *Cosmic Constitutional Theory*. Wilkinson, a federal appeals court judge often mentioned as a Republican Supreme Court nominee, mirrored Kennedy and the crits in his March 11, 2012 op-ed arguing in his opening paragraph that liberals and conservatives alike have conspired to undermine the role of law and the courts in our society.

Both liberals and conservatives have the American Constitution in the cross hairs. They assault the Constitution in their different ways, each with damaging effects on our nation. Conservatives attack the courts on one hand and seek to have them advance their activist agenda on the other. Liberals, when it suits them, embrace rights that have not been enumerated in the Constitution and cry for restraint only when their pet bills come under fire. The result is a national jurisprudence whetted by political appetite, with our democratic values as the victims.

Wilkinson essentially argues for leaving political decisions to those elected to make political decisions, and suggests that the grand legal theories -- from the jurisprudence of original intent on the right to living constitutionalism on the left -- are simply covers for justifying the use of the judicial branch as a tool to achieve political goals.

For many, the swift and party-line action of the Supreme Court in *Bush v. Gore* deeply damaged faith in the Court as a reasoned arbiter of our political system. But that was a unique circumstance. This week's argument, as Judge Wilkinson makes clear, is specifically about whether a politically motivated majority on the court will act to directly overturn an act of Congress simply because they want to, and because they can.

During the second day of arguments, Justice Antonin Scalia suggested to Solicitor General Donald Verrilli that allowing the individual mandate would lead to a world where Congress could compel Americans to buy broccoli. Scalia's question would have been more insightful had it not simply mimicked conservative talking points circulating the prior the weekend making the argument that to let the individual mandate stand would lead to a world where the government would make us buy broccoli and GM cars. Hearing Justice Scalia use an argument from conservative talking points illustrated Wilkinson's argument that the high court may have reduced itself to just another player in our ongoing political wars, and placed at risk its cherished role as the last refuge of integrity.

The history of the individual mandate is what makes this circumstance so defining. The individual mandate began as a conservative doctrine, embraced early on by conservative Senators who today attack the same policy with no sense of shame or irony. Far from being the hallmark of tyranny, the individual mandate under Obamacare marks the success of the Republican Party in pushing Democrats to the right, to the embrace of market solutions over the employer mandates or single payer options.

This case is not about tyranny. It is not about broccoli. In a sense it is not even about the Commerce Clause. At the end of the day, it is about whether those on the Court are prepared to step back from the abyss that Wilkinson describes, and leave the making of laws -- and our political debates -- to

Congress and the president. By the third day, the arguments went beyond the constitutionality of the individual mandate to overturning the entire act of Congress, as specifically argued by former Solicitor General Paul Clement, representing the 26 states challenging the law.

There were no cries of tyranny from the right when the Heritage Foundation first proposed the individual mandate, and those cries today are nothing more than one more manifestation of our political wars -- wars in which those on the Supreme Court engage at their -- and our -- peril. Paul Clement's argument that they entire law should be shunted aside by the Court demonstrated how far the Court has drifted toward becoming just one more tool of the political combattants.

Chief Justice Roberts and Justice Kennedy -- the most likely swing votes -- hold in their hands the question of public faith and confidence in the Supreme Court. I believe that they will each ultimately choose to validate that faith. And I hope they will validate that faith, because even more than health care, our society needs a Supreme Court that we can all have faith in.