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The Role of Partisanship in the Health Care Reform Challenge

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JURIST Guest Columnist **Trevor Burrus**, a legal associate for the **Cato Institute**, argues that despite claims by critics of the Supreme Court, "partisanship" is nothing more than an epithet with little descriptive content and will not be the driving factor behind the final decision on the Affordable Care Act...

The large interest shown by the public in the three days of **oral arguments** devoted to the constitutional challenge to the **Affordable Care Act** (ACA) should be heartening to any fan of the US Constitution. Americans of all stripes listened to the arguments, learned the precedents and constitutional clauses the arguments relied on and engaged with the rich history and philosophy surrounding the Constitution. I doubt Roscoe Filburn, of **Wickard v. Filburn** fame, would ever have expected his name to be bandied about by so many people 70 years after his case was decided.

On the second day of argument, in which the Court **took up the question of the "individual mandate,"** the conservative justices each showed extreme skepticism that the commerce power gives Congress the ability to force people to purchase insurance. Some academics and commentators had gone so far to predict that the argument for the constitutionality of the individual mandate was so easy that even conservative stalwarts like Justice Antonin Scalia would kowtow to the government's arguments. This was rapidly proven to be untrue. Justice Scalia in particular assailed the solicitor general with questions that demonstrated he understood the finely tuned arguments and subtle distinctions of the challengers.

The general anti-ACA tenor of the arguments has opponents of the act cautiously optimistic that the Supreme Court might actually strike down all or part of it. An argument that once had more skeptics than

believers now may have more believers than skeptics, and five of those believers might be on the Supreme Court.

Supporters of the ACA are already upset that the Court was antagonistic to the government's arguments in favor of the mandate. In a number of opinion pieces, the groundwork is already being laid for a fusillade of attacks on a "partisan" and "activist" conservative Court in the event that the ACA is struck down in whole or in part. The general theme of these editorials is the same as it was when the legal attack on the law was initiated — "there's nothing to see here, there are no viable legal arguments against the law and only an ideologically motivated, hyper-partisan Tea Party Republican or Libertarian would strike it down."

If the law is struck down, it will almost assuredly be on a 5-4 vote. As predicted by many, none of the liberal justices seemed inclined to rule any part of the law unconstitutional, yet this presumptive unanimity of the four liberal justices rarely elicits catcalls of partisanship. When the four conservative justices — sans Justice Anthony Kennedy — move in predictable lockstep, it is often sneeringly cited as a product of partisanship rather than a principled constitutional analysis. Such an attitude, if held by someone from either political side, is simply too self serving to be worthy of respect.

The liberal justices are not partisan. They have principles and values that are different from the conservative justices and different from my own. Those principles and values are earnestly held and, moreover, they are within the realm of acceptable, reasonable discourse. For similar reasons, the conservative justices are not partisan. Partisan is an epithet with little descriptive content. It is lobbed back-and-forth between those who disagree on principle and values but would like to believe that their opponents' views are based on something less honorable.

Such ideas of partisanship can infect our brains with self-congratulatory praise and lead us down mistaken lines of thought. It is striking that a coterie of lawyers, law professors and legal commentators — people who should have learned in law school that the hallmark of a good lawyer is the ability understand the arguments of your opponents — regarded, and still regard, the arguments against the individual mandate as barely deserving of scorn. Law professors in particular should remember that a law school exam that does not argue and correctly analyze both sides of the debate usually deserves no more than a C. Many professors deserve a C or less for their

inability to engage with and understand the arguments of the mandate's challengers. The American people, however, are not as disconnected from the Constitution's text, history and structure. Polls have shown the percentage of people who believe the mandate is unconstitutional ranges from the upper-50s to the lower-70s. Unsurprisingly, most Americans have a markedly different view of the Constitution than law professors, and they seem to understand that there are limits to what Congress can do.

When US Solicitor General Donald Verrilli was asked by Justice Samuel Alito to "express your limiting principle as succinctly as you possibly can," the answer was in the form of two extremely prolix principles that were actually limiting situations. A constitutional limiting principle requires a generally applicable rule that is rooted in the Constitution, not a mere description of the nature of the health care market, and I think Americans understand this, yet both of Solicitor General Verrilli's "principles" not only raised more questions than they answered, but they elided over the core question at issue, namely "what sorts of behavior are economic activities that Congress can regulate pursuant to the commerce power?"

Nevertheless, oral arguments can only tell us so much, and they probably told us as much about liberal commentators and legal academics as they did about the opinions of the justices. It is entirely possible that the eventual decision will uphold the ACA. Whatever the eventual decision is, however, it will not vindicate the academics who declined to take the challenge seriously.

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