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ObamaCare on Trial

The libertarian legal movement threatens Barack Obama's signature law.

Damon W. Root from the July 2012 issue

President Barack Obama was all smiles when he signed the Patient Protection and Affordable Care Act (PPACA) into law at a special ceremony in the East Room of the White House on March 23, 2010. "With all the punditry, all of the lobbying, all of the game playing that passes for governing in Washington," Obama declared, "it's been easy at times to doubt our ability to do such a big thing, such a complicated thing."

It turns out there was a much better reason to doubt the federal government's ability to do such a big, complicated thing: the Constitution of the United States of America. Barely two years after the president's health care overhaul was enacted, his solicitor general, Donald Verrilli, stood before the nine justices of the U.S. Supreme Court and tried desperately to salvage the law. When the clock ran out on Verrilli's time, Obama and his supporters faced a challenge they hadn't expected: Their sweeping conception of federal authority had to contend with a robust libertarian legal movement that insisted Congress may not exercise powers the Constitution does not grant.

At issue was a lawsuit originally filed by Florida and 12 other states on the very day Obama signed the PPACA. Although the suit challenged several components of the legislation, its main target was the controversial "requirement to maintain minimum essential coverage." Also known as the "individual mandate," this provision would force all Americans to obtain medical coverage meeting minimum standards set by the government. To justify the health insurance mandate, the PPACA cited the Constitution's Commerce Clause, which authorizes Congress "to regulate commerce…among the several states." By the time the legal challenge reached the Supreme Court, a total of 26 states had joined it, along with the National Federation of Independent Business and several individuals.

While it might seem inevitable in hindsight that the Supreme Court would weigh in on the constitutional merits of the individual mandate, that outcome was far from preordained. "When the idea for the challenge was created," says Orin Kerr, a conservative George Washington University law professor and former clerk to Supreme Court Justice Anthony Kennedy, "it was understood to

be a long shot." The legal challengers faced all sorts of obstacles along the way, including the daunting task of persuading federal courts to plunge into the highly political thicket of health care reform. "We were confident that if we got one ruling against [the law], it would go to the Supreme Court," says Ilya Shapiro, a lawyer and senior fellow at the libertarian Cato Institute, who wrote multiple amicus briefs supporting the challenge and provided early legal advice to Florida and the other state challengers.

Some PPACA supporters didn't think Shapiro and his allies would score even that one victory. Back in October 2009, a reporter asked Rep. Nancy Pelosi (D-Calif.), then the speaker of the House, "Where specifically does the Constitution grant Congress the authority to enact an individual health insurance mandate?" Her reply: "Are you serious?" Nadeam Elshami, Pelosi's communications director, later amplified the response, telling CNS News, "You can put this on the record: That is not a serious question."

It seemed serious enough to me as I sat in the Supreme Court on March 27, 2012, watching one justice after another grill the solicitor general about the individual mandate's constitutional defects. Verrilli was not taking heat only from the Court's most conservative members; he also faced extremely tough questioning from Justice Kennedy, the right-leaning moderate who often casts the crucial fifth vote in tight cases. "When you are changing the relation of the individual to the government in this, what we can stipulate is, I think, a unique way," Kennedy asked Verrilli as a hushed courtroom looked on, "do you not have a heavy burden of justification to show authorization under the Constitution?"

Suddenly, the legal challenge didn't seem like such a long shot anymore. How did the challengers beat the odds? By constructing a potent, case-specific legal strategy on a foundation of painstaking libertarian legal scholarship built over the course of three decades.

'Commerce Among the Several States'

On its face, the Commerce Clause seems like a straightforward proposition. Article 1, Section 8 of the U.S. Constitution grants Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The Framers and ratifiers of the Constitution understood that middle part, "among the several states," to mean that Congress may regulate commerce that crosses state lines but not the economic activity that occurs within each state.

In *Federalist* 42, James Madison explained that without the Commerce Clause, Congress would be powerless to clear away the tariffs, monopolies, and other interstate trade barriers erected by various state governments under the Articles of Confederation. "A very material object of this power," he wrote,

"was the relief of the States which import and export through other states from the improper contributions levied on them." Madison and the other Framers believed that if the new United States was going to make it, the federal government needed to secure what today we might call a domestic free trade zone.

Compared to the decentralized Articles of Confederation, the Commerce Clause was a very significant grant of power to the new federal government, but it was not a blank check. As Alexander Hamilton, normally a champion of broad federal authority, explained in *Federalist* 17, the Commerce Clause did not extend congressional power to "the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation." The Commerce Clause gave Congress no power to touch intrastate economic activity. Indeed, the Framers understood "commerce" to refer to the trade or exchange of goods, including transportation, not to commercial endeavors such as farming or manufacturing.

That original understanding held sway for a century and a half, until the Supreme Court dramatically expanded the federal government's powers under the Commerce Clause in the 1942 case *Wickard v. Filburn*. At issue in *Wickard* was Congress' attempt, via the Agricultural Adjustment Act of 1938, to inflate crop prices by limiting the amount farmers were permitted to grow. Among those farmers was Roscoe Filburn of Montgomery County, Ohio, who violated the law by planting twice the amount of wheat allowed by his quota. In his defense, Filburn noted that he did not send that extra wheat off to the market. Instead he consumed it entirely on his own farm, either by feeding it to his animals or turning it into flour for use in his kitchen. Yet according to the Supreme Court, those actions still counted as "commerce…among the several states." Filburn's extra wheat may not have crossed any state lines, Justice Robert Jackson wrote for the majority, but he and other similarly disobedient farmers nevertheless exerted a "substantial economic effect" on the interstate wheat market by growing what they otherwise might have bought.

Wickard opened the door to a wide variety of government actions that would have previously been seen as unconstitutional under the Commerce Clause, including federal penalties for local crimes like loan sharking and federal wage controls for state and municipal employees. In the 2005 case *Gonzales v. Raich,* the Supreme Court arguably went further than *Wickard* did by upholding the federal ban on marijuana, even as applied to plants grown by patients for their own medical use in states that allow such cultivation. Taken together, *Wickard* and *Raich* mean that Congress possesses vast powers to regulate the American economy, including purely local activities that in the aggregate can be said to affect interstate commerce. Congress relied on the language of these rulings in drafting the PPACA. As Section 1501 of the law puts it, the individual mandate "is commercial and economic in nature, and substantially affects interstate commerce."

But there's a catch. As the libertarian and conservative lawyers who crafted the legal challenge to the PPACA emphasized, *Wickard* and *Raich* are not the only Commerce Clause precedents that matter.

'We Start With First Principles'

On November 8, 1994, the Supreme Court heard oral arguments in *United States v. Lopez*. At issue was whether the Commerce Clause allowed Congress to forbid the possession of a gun within 1,000 feet of a school. Unlike the federal price-rigging scheme upheld in *Wickard*, the Gun Free School Zones Act challenged in *Lopez* had no direct connection to economic activity, whether local or national. Instead the government claimed that gun violence, taken in the aggregate, undermined the nation's educational system, which in turn substantially affected the U.S. economy.

"When we saw that case coming up from the 5th Circuit, you can imagine how excited we were," says Roger Pilon, an influential legal thinker who directs the Cato Institute's Center for Constitutional Studies. Cato commissioned a paper by University of Tennessee law professor Glenn Harlan Reynolds (better known today as the proprietor of the popular political blog Instapundit.com), who marshaled impressive legal and historical evidence to explain why "*Lopez* is not about gun control or even about federal-state relations but about whether the Court is ready to hold Congress to its constitutional limits."

The evidence cited by Reynolds included a groundbreaking 1987 *Virginia Law Review* article by the libertarian legal scholar Richard Epstein, a law professor at the University of Chicago. "The expansive construction of the clause by the New Deal Supreme Court is wrong," Epstein concluded in "The Proper Scope of the Commerce Clause." Based on a careful analysis of numerous founding-era sources, including the text and structure of the Constitution itself, Epstein's argument rang out like a constitutional call to arms. When *Lopez* hit the Supreme Court in 1994, Pilon and his colleagues at Cato were ready to heed that call.

"Six weeks before oral argument in the case," Pilon told me, "we sent copies [of Reynolds' study] to each justice and to each of their clerks." It did the trick. Not only did many of the justices voice skepticism about the government's claims during oral arguments, but several justices adopted the Cato study's main points as their own. "Is the simple possession of something at or near a school 'commerce' at all?" Justice Sandra Day O'Connor asked Solicitor General Drew Days. "Is it?" When Days responded that he thought it was, O'Connor shot back, "I would have thought that it wasn't, and I would have thought that it, moreover, is not interstate."

Five months later, the Court nullified the law. It was the first time since the New Deal that a federal regulation had been struck down for exceeding the

scope of the Commerce Clause. “We start with first principles,” Chief Justice William Rehnquist wrote for the majority. “To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.…This we are unwilling to do.”

Five years later, in *United States v. Morrison*, the Court extended this line of reasoning to void a provision of the Violence Against Women Act that created a federal cause of action for victims of gender-motivated crimes. The government’s argument in that case was essentially the same as its argument in *Lopez*: that violence against women ultimately has an adverse effect on the national economy. In both cases, the Court ruled that the Commerce Clause is not broad enough to reach noneconomic local activity. Despite the Court’s 2005 ruling in *Raich*—which took *Wickard*’s “substantial effects” logic a step further, applying it to someone who was not even a farmer—the limits on congressional power articulated in *Lopez* and *Morrison* remained in force.

‘Unprecedented and Unconstitutional’

The relationship between *Lopez*, *Morrison*, and *Raich* is tricky, and perhaps no lawyer in America understands it better than Georgetown University law professor Randy Barnett, author of the influential libertarian legal treatise *Restoring the Lost Constitution*. Barnett was the losing lead attorney in *Raich*, and he has been pondering its implications ever since.

When *Raich* was decided, Barnett says, “it was my belief that there would never be another Commerce Clause case,” because the Court’s interpretation seemed as expansive as it could possibly get. But Congress and the White House surprised him in 2009 when they settled on the idea of forcing every American to buy health insurance from a private company. “It turns out they found something new that they hadn’t ever done before,” he says. “And the very fact that it’s new means it’s subject to question. If they were just sticking with it, just trying to regulate interstate activity the way they were before, we wouldn’t be able to stop them.”

In both *Lopez* and *Morrison*, Congress sought to regulate noneconomic activities by citing their aggregate impact on interstate commerce. But the Supreme Court refused to “pile inference upon inference,” following the hypothesized chain of effects from gun possession or rape to “commerce…among the several states.” As the Court held in *Morrison*, “thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.” *Raich* continued this trend, with the Court deeming the act of growing your own marijuana to be economic.

Now consider the individual mandate. The failure to buy health insurance is not even an activity, let alone an economic one. Because the Supreme Court has never said Congress may regulate *in*activity, Barnett and his allies argued, the individual mandate violates the Court's precedents as well as the long-lost original meaning of the Commerce Clause. For federal judges who are interested in placing some limits on congressional power but who are nevertheless bound by the Supreme Court's expansive reading of the Commerce Clause, the distinction between activity and inactivity promised to be an attractive legal argument.

Barnett, along with two co-authors, spelled out this argument in a 2009 Heritage Foundation paper titled "Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional." Heritage unveiled the paper at a December 9, 2009, event featuring a debate between Barnett and other legal experts on the mandate's constitutionality. Also present was Sen. Orrin Hatch (R-Utah), who delivered a well-received keynote speech. Later that month, Hatch and other Senate Republicans raised a point of constitutional order against the PPACA, which was still being debated in Congress.

Barnett did not formally join the legal challenge until roughly a year later, when he was retained as counsel by the National Federation of Independent Business (which had joined Florida's suit). Until that point, he says, "I was attempting to influence the discourse solely from the outside of the case, through blogging and writing." It worked. If you read Barnett's 2009 Heritage paper today, you will find virtually every major argument that has been deployed against the individual mandate through every stage of litigation, from Florida's original March 2010 lawsuit to the March 2012 oral arguments at the Supreme Court.

Setting the Stage

The challenge kicked off officially on March 23, 2010, when Florida, joined by 12 other states, and Virginia, acting alone, filed separate federal lawsuits charging the PPACA with exceeding congressional authority and undermining the principles of federalism. As the Florida complaint put it, "The Constitution nowhere authorizes the United States to mandate, either directly or under threat of penalty, that all citizens and legal residents have qualifying healthcare coverage." Several other challenges soon followed, including suits by the Thomas More Law Center, a public interest law firm focusing on religious freedom, and Liberty University, the conservative Christian college founded by the late Jerry Falwell.

But it was the Florida-led challenge that won big enough to reach the Supreme Court. Its first victory came on January 31, 2011, in a ruling by U.S. District Judge Roger Vinson. "Congress must operate within the bounds established by the Constitution," Vinson declared, striking down the individual mandate for

exceeding those bounds. Furthermore, Vinson ruled, because the PPACA did not include a so-called severability clause, which would have specified what happens to the rest of the law when a single provision is struck down, "the entire Act must be declared void."

A little over six months later, on August 11, the U.S. Court of Appeals for the 11th Circuit partially affirmed Vinson's ruling, voting to strike down the individual mandate but allowing the rest of the PPACA to stand. "We have not found any generally applicable, judicially enforceable limiting principle that would permit us to uphold the mandate without obliterating the boundaries inherent in the system of enumerated congressional powers," the 11th Circuit declared.

Because a different federal appeals court, the 6th Circuit, had voted two months earlier to uphold the health care law, the Supreme Court was now virtually guaranteed to step in and resolve the split. In the meantime, the 4th Circuit voted to uphold the law on September 8 and the D.C. Circuit did likewise on November 8. Six days after the D.C. Circuit's ruling, the Supreme Court announced that it would hear oral arguments in *Department of Health and Human Services v. Florida* the following year.

Oral arguments were scheduled to run for a modern record of five and a half hours (later expanded to six hours) spread out over three days: March 26, 27, and 28, 2012. In addition to the constitutionality of the individual mandate, the Court would consider three other issues.

The first was whether the legal challenge to the PPACA must be dismissed under the terms of the Anti-Injunction Act, an 1867 statute that says "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." In other words, a tax cannot be challenged in court until it has been assessed and paid. Did the "shared responsibility payment" imposed on people who disobey the individual mandate count as a tax, even though Congress specifically called it a penalty? If so, the legal challenge to the PPACA would have to wait until 2015, when the mandate was scheduled to take effect. The Court set aside 90 minutes for this question on March 26.

The second additional question concerned the issue of severability. In his January 2011 ruling, Judge Vinson held that because the PPACA lacked a severability clause, the whole law must fall if the mandate is ruled unconstitutional. The Supreme Court reserved 90 minutes on March 28 to hear arguments for and against that proposition. Later that same day, the Court would hear one final question: Does the PPACA's expansion of Medicaid, the joint federal-state health care program for the poor, represent an unconstitutionally coercive use of Congress' spending power? One hour was set aside for that.

But the main event was scheduled for the morning of March 27, when the Supreme Court would devote two full hours to the constitutionality of the PPACA's controversial centerpiece: the individual mandate.

In Search of a Limiting Principle

A few days before this legal marathon began, I sought some Court-watching advice from a Washington lawyer who knows a thing or two about high-profile cases. Clark Neily is a senior attorney at the Institute for Justice, a libertarian public interest law firm. In his private capacity, he was one of the victorious lead attorneys in *District of Columbia v. Heller*, the landmark 2008 case in which the Supreme Court ruled definitively that the Second Amendment secures an individual right to keep and bear arms.

"If you're looking for hand tipping during the arguments," Neily told me, pay attention to how often "the justices keep going back to a question for the government: Namely, what is the limiting principle here? If Congress can do this, what are the things that Congress cannot do? That's the thing I will be looking for."

When the 11th Circuit had voted to strike down the individual mandate, it did so largely because the Obama administration failed to articulate a limiting principle for the federal government's Commerce Clause powers. Even the D.C. Circuit, which upheld the PPACA, admitted that the government was asserting an essentially unlimited regulatory power. "The Government concedes the novelty of the mandate and the lack of any doctrinal limiting principles," the D.C. Circuit said. "Indeed, at oral argument, the Government could not identify any mandate to purchase a product or service in interstate commerce that would be unconstitutional, at least under the Commerce Clause."

Solicitor General Donald Verrilli would have to come up with a better answer when he argued the case before the Supreme Court. According to the brief filed by the multistate challengers, "there is no way to uphold the individual mandate without doing irreparable damage to our basic constitutional system of governance." At a minimum, the Court's conservatives would expect the solicitor general to counter that claim by laying out a plausible limiting principle for congressional power under the Commerce Clause. If Verrilli did not, the individual mandate would be in jeopardy.

'All Bets Are Off'

Verrilli ran into trouble right away. To prevail, he needed to win over at least one of the Supreme Court's five right-leaning justices. The two most obvious candidates were Kennedy, who regularly sides with the Court's liberal bloc, and Chief Justice John Roberts. The conservative Roberts may seem like an unlikely ally of the federal government, but consider his record: In the 2010

case *United States v. Comstock*, which posed the question of whether the Necessary and Proper Clause allowed federal officials to order the indefinite civil commitment of "sexually dangerous" persons who had already finished serving their prison sentences, Roberts sided with the Court's liberals, endorsing a sweepingly broad understanding of congressional power.

Then there's the issue of judicial restraint. During his 2005 Senate confirmation hearings, Roberts stressed his belief that the Supreme Court should practice "judicial modesty," a respect for precedent and consensus that he extended even to *Roe v. Wade*, the 1973 decision that declared a constitutional right to abortion. He called *Roe*, a bête noire of conservatives, "the settled law of the Land." Given the Court's extremely broad Commerce Clause precedents in *Wickard* and *Raich*, the government had reason to believe Roberts would vote to uphold the individual mandate as an application of "settled law."

But when oral arguments began, Roberts wasted no time tearing apart Verrilli's case, which rested on the idea that because we all will require health care at some point, the government may stipulate how we pay for it in order to prevent the uninsured from imposing a burden on others. "Once we say that there is a market and Congress can require people to participate in it, as some would say, or as you would say," Roberts told the solicitor general, "it seems to me that we can't say there are limitations on what Congress can do under its commerce power." In fact, Roberts continued, "given the significant deference that we accord to Congress in this area, all bets are off."

Justice Antonin Scalia soon amplified Roberts' misgivings. "Why do you define the market that broadly?" he asked the solicitor general. "Everybody has to buy food sooner or later," Scalia continued, "so you define the market as food. Therefore everybody is in the market; therefore you can make people buy broccoli."

So much for a limiting principle. Nor did liberal Justice Stephen Breyer do the government's case any favors when he chimed in to say that "yes, of course" Congress can "create commerce where previously none existed," which could include forcing all Americans "to buy cellphones" to facilitate the provision of emergency services (a hypothetical posed by Roberts). Verrilli hastened to clarify that the government was not in fact endorsing a cellphone mandate, but the damage had been done.

To make matters worse, after Verrilli suggested that a ruling against the individual mandate would be tantamount to judicial activism, Roberts shot forward in his chair to accuse the government of demanding that the Court engage in activism by deciding that a health insurance mandate is acceptable but that a broccoli or cellphone mandate is not. "It would be going back to *Lochner* if we were put in the position of saying, no, you can use your commerce power to regulate insurance, but you can't use your commerce

power to regulate this market in other ways," Roberts declared. "I think that would be a very significant intrusion by the Court into Congress' power."

Lochner v. New York was a 1905 case in which the Supreme Court struck down a state limit on bakers' hours, saying it violated the liberty of contract protected by the 14th Amendment. Today *Lochner* serves as a sort of bogeyman to most liberal legal thinkers, who see it as a notorious example of conservative judicial activism. But many conservative legal thinkers also dislike *Lochner*, including Roberts. During his Senate confirmation hearings, the future chief justice 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." So when Roberts told Verrilli that the government's theory of the Commerce Clause risks unleashing *Lochner*-style activism, he was raising a powerful conservative objection, one that would allow him to strike down the individual mandate while wearing the mantle of judicial restraint.

'A Heavy Burden of Justification'

"People say I'm a libertarian," Justice Anthony Kennedy told *The New York Times* in 2005. "I don't really know what that means." Most libertarians would tend to agree with him. In 2004, when the libertarian lawyer Randy Barnett stood before the Supreme Court to explain why his client, a cancer patient named Angel Raich, was not engaged in interstate commerce because her medical marijuana had been cultivated and consumed entirely within California, Kennedy did not buy it. Several months later, he joined Justice John Paul Stevens' majority opinion upholding the federal ban on marijuana as a valid exercise of congressional power under the Commerce Clause.

But Kennedy seemed to have a different take on the reach of federal power when Solicitor General Verrilli made his case for the individual mandate. He not only suggested that Verrilli had "a heavy burden of justification" but also described a mandated purchase as so "different from what we have in previous cases" that it "changes the relationship of the federal government to the individual in a very fundamental way."

At another point, however, Kennedy seemed inclined to accept the government's argument that all of us will at some point receive health care, so it is reasonable to regulate the manner in which we pay for it. In an exchange that occurred toward the end of the day's oral arguments, he referred to an uninsured young person as "uniquely proximately very close to affecting the rates of insurance and the costs of providing medical care in a way that is not true in other industries." Then again, Kennedy prefaced that statement with yet another reference to the government's failure to articulate a limiting principle. "The government tells us that's because the insurance market is unique," he said. "And in the next case, it'll say the next market is unique."

Will Kennedy's willingness to accept the government's description of the health care market outweigh his discomfort with the government's potentially unlimited assertion of congressional power? The future of ObamaCare may depend on the answer to that question. We won't know for sure until the decision comes out (likely in late June, at the end of the Court's current term), but it may be significant that Kennedy interrogated Verrilli far more aggressively than he did the law's challengers.

'A No-Brainer'

When this article went to press, the Supreme Court had not yet issued its health care ruling, but the oral arguments suggested the decision, whichever way it goes, will be close. Which is a far cry from the cocksure predictions of victory made by the PPACA's defenders during the last two years. "I am quite sure that the health care mandate is constitutional," Harvard University law professor Charles Fried, a solicitor general in the Reagan administration, testified before the Senate Judiciary Committee in February 2011. "I would have said [it's] a no-brainer," he added with a condescending smirk, "but I mustn't, with such intelligent brains going the other way."

Other PPACA supporters did not bother to mask their contempt for the legal challenge. "Under existing case law this is a very easy case; this is obviously constitutional," University of Virginia law professor Douglas Laycock told *The New York Times* in a front-page story that ran the very day the Supreme Court wrestled with the constitutional questions raised by the individual mandate. The law's challengers, Laycock breezily asserted, were "going to lose 8 to 1."

I caught up with Randy Barnett, an architect of the legal challenge that Laycock so casually dismissed, on the front steps outside the Supreme Court a few minutes after oral arguments on the mandate had concluded. He did not look like someone who had just suffered a defeat. "The people who confidently predicted this was an 8-1 or 7-2 case are wrong," he declared. Although Barnett declined to offer any further predictions, he could not hide the satisfaction in his voice. "It's a very closely divided Court," he said with a smile, "and we're going to have to wait and see how it goes."

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