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REVIEW & OUTLOOK | Updated March 22, 2012, 7:15 p.m. ET

Liberty and ObamaCare

The Affordable Care Act claims federal power is unlimited. Now the High Court must decide.

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Few legal cases in the modern era are as consequential, or as defining, as the challenges to the Patient Protection and Affordable Care Act that the Supreme Court hears beginning Monday. The powers that the Obama Administration is claiming change the structure of the American government as it has existed for 225 years. Thus has the health-care law provoked an unprecedented and unnecessary constitutional showdown that endangers individual liberty.

It is a remarkable moment. The High Court has scheduled the longest oral arguments in nearly a half-century: five and a half hours, spread over three days. Yet Democrats, the liberal legal establishment and the press corps spent most of 2010 and 2011 deriding the government of limited and enumerated powers of Article I as a quaint artifact of the 18th century. Now even President Obama and his staff seem to grasp their constitutional gamble.

Consider a White House strategy memo that leaked this month, revealing that senior Administration officials are coordinating with liberal advocacy groups to pressure the Court. "Frame the Supreme Court oral arguments in terms of real people and real benefits that would be lost if the law were overturned," the memo notes, rather than "the individual responsibility piece of the law and the legal precedence [sic]." Those nonpolitical details are merely what "lawyers will be talking about."



Associated Press

President Obama signing the health care bill at the White House on March 23, 2010.

The White House is even organizing demonstrations during the proceedings, including a "'prayerful witness' encircling the Supreme Court." The executive branch is supposed to speak to the Court through the Solicitor General, not agitprop and crowds in the streets.

The Supreme Court will not be ruling about matters of partisan conviction, or the President's re-election campaign, or even about health care at all. The lawsuit filed by 26 states and the National

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Federation of Independent Business is about the outer boundaries of federal power and the architecture of the U.S. political system.

The argument against the individual mandate—the requirement that everyone buy health insurance or pay a penalty—is carefully anchored in constitutional precedent and American history. The Commerce Clause that the government invokes to defend such regulation has always applied to commercial and economic transactions, not to individuals as members of society.

This distinction is crucial. The health-care and health-insurance markets are classic interstate commerce. The federal government can regulate broadly—though not without limit—and it has. It could even mandate that people use insurance to purchase the services of doctors and hospitals, because then it would be regulating market participation. But with ObamaCare the government is asserting for the first time that it can compel people to *enter* those markets, and only then to regulate how they consume health care and health insurance. In a word, the government is claiming it can create commerce so it has something to regulate.

This is another way of describing plenary police powers—regulations of private behavior to advance public order and welfare. The problem is that with two explicit exceptions (military conscription and jury duty) the Constitution withholds such power from a central government and vests that authority in the states. It is a black-letter axiom: Congress and the President can make rules for actions and objects; states can make rules for citizens.

The framers feared arbitrary and centralized power, so they designed the federalist system—which predates the Bill of Rights—to diffuse and limit power and to guarantee accountability. Upholding the ObamaCare mandate requires a vision on the Commerce Clause so broad that it would erase dual sovereignty and extend the new reach of federal general police powers into every sphere of what used to be individual autonomy.

These federalist protections have endured despite the shifting definition and scope of interstate commerce and activities that substantially affect it. The Commerce Clause was initially seen as a modest power, meant to eliminate the interstate tariffs that prevailed under the Articles of Confederation. James Madison noted in Federalist No. 45 that it was "an addition which few oppose, and from which no apprehensions are entertained." The Father of the Constitution also noted that the powers of the states are "numerous and infinite" while the federal government's are "few and defined."

That view changed in the New Deal era as the Supreme Court blessed the expansive powers of federal economic regulation understood today. A famous 1942 ruling, *Wickard v. Filburn*, held that Congress could regulate growing wheat for personal consumption because in the aggregate such farming would affect interstate wheat prices. The Court reaffirmed that precedent as recently as 2005, in *Gonzales v. Raich*, regarding homegrown marijuana.

The Court, however, has never held that the Commerce Clause is an ad hoc license for anything the government wants to do. In 1995, in *Lopez*, it gave the clause more definition by striking down a Congressional ban on carrying guns near schools, which didn't rise to the level of influencing interstate commerce. It did the same in 2000, in *Morrison*, about a federal violence against women statute.

A thread that runs through all these cases is that the Court has always required some limiting principle that is meaningful and can be enforced by the legal system. As the Affordable Care Act suits have ascended through the courts, the Justice Department has been repeatedly asked to articulate some benchmark that distinguishes this specific individual mandate from some other purchase mandate that would be unconstitutional.



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Justice has tried and failed, because a limiting principle does not exist.

The best the government can do is to claim that health care is unique. It is not. Other industries also have high costs that mean buyers and sellers risk potentially catastrophic expenses—think of housing, or credit-card debt. Health costs are unpredictable—but all markets are inherently unpredictable. The uninsured can make insurance pools more expensive and transfer their costs to those with coverage—though then again, similar cost-shifting is the foundation of bankruptcy law.

The reality is that every decision not to buy some good or service has some effect on the interstate market for that good or service. The government is asserting that because there are ultimate economic consequences it has the power to control the most basic decisions about how people spend their own money in their day-to-day lives. The next stops on this outbound train could be mortgages, college tuition, credit, investment, saving for retirement, Treasuries, and who knows what else.

Confronted with these concerns, the Administration has echoed Nancy Pelosi when she was asked if the individual mandate was constitutional: "Are you serious?" The political class, the Administration says, would never abuse police powers to create the proverbial broccoli mandate or force people to buy a U.S.-made car.

But who could have predicted that the government would pass a health plan mandate that is opposed by two of three voters? The argument is self-refuting, and it shows why upholding the rule of law and defending the structural checks and balances of the separation of powers is more vital than ever.

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Another Administration fallback is the Constitution's Necessary and Proper Clause, which says Congress can pass laws to execute its other powers. Yet the Court has never hesitated to strike down laws that are not based on an enumerated power even if they're part of an otherwise proper scheme. This clause isn't some ticket to justify inherently unconstitutional actions.

Editorial board member Joe Rago on the Supreme Court show down over ObamaCare.

In this context, the Administration says the individual mandate is necessary so that the Affordable Care Act's other regulations "work." Those regulations make insurance more expensive. So the younger and healthier must buy insurance that they may not need or want to cross-subsidize the older and sicker who are likely to need costly care. But that doesn't make the other regulations more "effective." The individual mandate is meant to *offset* their intended financial effects.

Some good-faith critics have also warned that overturning the law would amount to conservative "judicial activism," saying that the dispute is only political. This is reductive reasoning. Laws obey the Constitution or they don't. The courts ought to defer to the will of lawmakers who pass bills and the Presidents who sign them, except when those bills violate the founding document.

As for respect of the democratic process, there are plenty of ordinary, perfectly constitutional ways the Obama Democrats could have reformed health care and achieved the same result. They could have raised taxes to fund national health care or to make direct cross-subsidy transfers to sick people. They chose not to avail themselves of those options because they'd be politically unpopular. The individual

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mandate was in that sense a deliberate evasion of the accountability the Constitution's separation of powers is meant to protect.

Meanwhile, some on the right are treating this case as a libertarian seminar and rooting for the end of the New Deal precedents. But the Court need not abridge *stare decisis* and the plaintiffs are not asking it to do so. The Great Depression farmer in *Wickard*, Roscoe Filburn, was prohibited from growing wheat, and that ban, however unwise, could be reinstated today. Even during the New Deal the government never claimed that nonconsumers of wheat were affecting interstate wheat prices, or contemplated forcing everyone to buy wheat in order to do so.

The crux of the matter is that by arrogating to itself plenary police powers, the government crossed a line that Justice Anthony Kennedy drew in his *Lopez* concurrence. The "federal balance," he wrote, "is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of government has tipped the scale too far."

The constitutional questions the Affordable Care Act poses are great, novel and grave, as much today as they were when they were first posed in an op-ed on these pages by the Washington lawyers David Rivkin and Lee Casey on September 18, 2009. The appellate circuits are split, as are legal experts of all interpretative persuasions.

The Obama Administration and its allies are already planning to attack the Court's credibility and legitimacy if it overturns the Affordable Care Act. They will claim it is a purely political decision, but this should not sway the Justices any more than should the law's unpopularity with the public.

The stakes are much larger than one law or one President. It is not an exaggeration to say that the Supreme Court's answers may constitute a hinge in the history of American liberty and limited and enumerated government. The Justices must decide if those principles still mean something.

A version of this article appeared Mar. 23, 2012, on page A14 in some U.S. editions of The Wall Street Journal, with the headline: Liberty and ObamaCare.

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