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Obamacare: Not Dead Yet

David Cole *April 4, 2012* | *This article appeared in the April 23, 2012 edition of The Nation.*

The oral argument on the constitutionality of the Affordable Care Act (ACA) left some Supreme Court watchers worried that the law was on the ropes. Jeffrey Toobin of *The New Yorker* and CNN pronounced the argument "a train wreck for the Obama administration" and predicted that the law would be struck down. Justices Antonin Scalia, Samuel Alito, John Roberts and Anthony Kennedy all asked seemingly hostile questions of Solicitor General Don Verrilli, who defended the law valiantly, and no one has any doubts about where Justice Clarence Thomas stands, even though he predictably maintained his now six-year silence as a sitting justice.

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But as Mark Twain might say, reports of Obamacare's demise are greatly exaggerated. Although the conservative justices expressed considerable reservations, Justice Kennedy, the key swing vote, also noted that the costs the uninsured impose on the rest of us may be a sufficient reason to validate the individual mandate, which requires those who can afford it to purchase health insurance or pay a tax. If Kennedy votes to uphold the law, it's possible that Chief Justice Roberts will join him, in the interest of not having the case decided by a single vote, in which case the vote would be 6-3.

The biggest challenge the administration faces in defending the law is the identification of a limiting principle. It is well settled that Congress can regulate all economic activity under the commerce clause. Those challenging the ACA maintain that if Congress can require people to "enter into commerce," i.e., purchase health insurance against their will, there would be no limit to the government's power. It could require people to buy broccoli, health club memberships, cellphones or burial insurance—hypotheticals posed to the solicitor general by the Court's conservative justices. One of the most basic premises of the Constitution is that the power of the government is limited. As Justice Kennedy asked Verrilli, "Can you identify any limits on the commerce clause?" To get Kennedy's vote, the answer to that question must be yes.

There is indeed a limiting principle, which Verrilli and several of the justices articulated during the two-hour argument: we are all inevitably participants in the healthcare market (except the Amish, and they are exempt). Unlike the markets for broccoli, health clubs and cellphones, no one can avoid the healthcare market. No one can predict when he or she will have to use it, and almost no one can afford it when he or she does use it. And because we don't allow people to die when they can't pay for emergency care, we provide it to them free at the hospital. Of course, nothing is truly free; hospitals and healthcare providers pass on the cost of caring for those who don't pay to those who do, in higher fees and premiums. So the uninsured shift the cost of their care to the rest of us, increasing the average family's premiums by a hefty $1,000 a year. The ACA's challengers have played on the intuition that it's unfair to require people to buy something they don't want, but the real unfairness is when people irresponsibly fail to pay their fair share and then shift the cost of their own care to others.

Because of these unique features of the healthcare market, upholding this law would not give Congress unfettered power to require us to eat granola, purchase electric cars or join health clubs. Buying those products is not a necessity, as healthcare is; nor does one person's choice not to purchase such products impose substantial and foreseeable costs on others. Upholding the individual mandate would simply establish that where a national market is the victim of free-riders, Congress may address the problem as part of its general authority to regulate that market.

The concerns voiced by the conservative justices suggest that their objections rest on something other than the scope of Congress's commerce clause power. Justice Alito and Chief Justice Roberts were troubled that the law requires young and healthy people to subsidize unhealthy people by compelling them to buy insurance they might not use, at least not immediately. But as Justice Ruth Bader Ginsburg pointed out, that's the whole reason for insurance—and nothing in the Constitution forbids redistribution of resources or collective burden-sharing. Federal laws that protect workers from exploitation by employers redistribute benefits to employees, and federal laws favoring farmers, corporations and investment income have redistributive effects, for better or worse; but that is no basis for finding them unconstitutional.

Justice Scalia went further than Roberts and Alito. He dismissed as “extraordinary” the solicitor general’s argument that Congress could require people to pay higher taxes if they don’t buy health insurance. But the Constitution gives Congress broad power to tax and spend for the “general welfare.” Through tax credits and deductions, Congress routinely makes people pay higher taxes if they fail to do things Congress wants to encourage, such as buy a house. Congress already requires us to pay for Medicare and Social Security, even if we think we won’t need them and can cover our costs through the private market. There could be no conceivable constitutional objection to a single-payer insurance plan in which the government collected the fees and provided insurance—in fact, Medicare does precisely that. What was “extraordinary” was that in his hostility to the ACA, Scalia seemed willing to question even these long-accepted principles.

Justice Kennedy asked whether the healthcare law should be required to meet a higher burden of justification because it “changes the relationship of the federal government to the individual in the very fundamental way.” As he explained, tort law generally does not place affirmative duties on people, for example, to be a good Samaritan. The individual mandate does impose an affirmative duty to buy health insurance. But other federal laws impose numerous affirmative duties on us, including the obligation to pay taxes, to register for the Selective Service, to provide safe working conditions for our employees and to provide information about ourselves if we travel by airplane. Collective responses are sometimes necessary to address collective problems. Nothing in the commerce clause forbids imposing affirmative duties to address such problems, especially where, as here, the alleged freedom to “do nothing” imposes substantial costs on the rest of us.

The fact that the conservative justices’ concerns are not supported by the text or doctrinal history of the commerce clause—and seem to have more to do with an ideological commitment to individualism that ignores the responsibilities of living in a collective—will not necessarily keep five of them from using that clause as a vehicle for expressing and enforcing those concerns. The Supreme Court did exactly this in the early twentieth century. At that time, a conservative Court repeatedly invalidated progressive labor laws on commerce clause grounds when its real objection was to any government regulation of the “free market” as an imposition on “individual freedom to contract.” But that path was a disaster, and led to the most significant challenge to the Court’s legitimacy in US history: President Franklin Roosevelt threatened to increase the size of the Court by appointing new justices favorably disposed to the New Deal.

Roosevelt never had to follow through on his threat, because the Court wisely abandoned its formalistic and unjustifiably constrained view of Congress’s power to address collective problems on a national scale. Since then, the Court has not dared to revive such an approach. To do so now, by invalidating the Affordable Care Act, risks doing substantial damage to the Court’s reputation (not to mention to the millions of people who have already been assisted by the law). Justice Kennedy and Chief Justice Roberts ought to think long and hard before going down that road.

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