

FROM: THE VOLOKH CONSPIRACY

# NONLEGAL ARGUMENTS FOR UPHOLDING THE INDIVIDUAL MANDATE

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**B**oth sides in the individual mandate litigation have developed a wide range of legal arguments to support their position. Some defenders of the mandate have also emphasized several nonlegal reasons why they believe the Court should uphold the law. These arguments have gotten more emphasis since the Supreme Court oral argument seemed to go badly for the pro-mandate side.<sup>1</sup> The most common are claims that a decision striking down the mandate would damage the Court's "legitimacy," that a 5-4 decision striking down the mandate would be impermissibly "partisan," and that it would be inconsistent with judicial "conservatism."

Even if correct, none of these arguments actually prove that the Court should uphold the mandate as a legal matter. A decision that is perceived as "illegitimate," partisan, and unconservative can still be legally correct. Conversely, one that is widely accepted, enjoys bipartisan support, and is consistent with conservatism can still be wrong. *Plessy v. Ferguson* and *Korematsu*<sup>2</sup> are well-known examples of terrible rulings that fit all three criteria at the time they were decided.

In addition, all three arguments are flawed even on their own terms.

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<sup>1</sup> [www.volokh.com/2012/03/27/thoughts-on-the-individual-mandate-oral-argument/](http://www.volokh.com/2012/03/27/thoughts-on-the-individual-mandate-oral-argument/).

<sup>2</sup> [www.law.cornell.edu/supct/html/historics/USSC\\_CR\\_0323\\_0214\\_ZO.html](http://www.law.cornell.edu/supct/html/historics/USSC_CR_0323_0214_ZO.html).

I.  
A DECISION STRIKING DOWN THE MANDATE IS  
LIKELY TO ENHANCE THE COURT'S LEGITIMACY  
MORE THAN IT UNDERMINES IT.

Claims that a decision striking down the mandate will undermine the Court's "legitimacy"<sup>3</sup> founder on the simple reality that an overwhelmingly majority of the public wants the law to be invalidated.<sup>4</sup> Even a slight 48-44 plurality of Democrats agree, according to a Washington Post/ABC poll.<sup>5</sup> Decisions that damage the Court's legitimacy tend to be ones that run contrary to majority opinion, such as some of the cases striking down New Deal laws in the 1930s. By contrast, a decision failing to strike down a law that large majorities believe to be unconstitutional can actually damage the Court's reputation and create a political backlash, as the case of *Kelo v. City of New London* dramatically demonstrated.<sup>6</sup>

Striking down the mandate will damage the Court's reputation in the eyes of many liberals and some legal elites. But a decision upholding it will equally anger many conservatives and libertarians, including plenty of constitutional law experts. There is not<sup>7</sup> and never has been<sup>8</sup> an expert consensus on the constitutionality of the mandate. Any decision the Court reaches is likely to anger some people, both experts and members of the general public. But more are likely to be disappointed by a decision upholding the law.

Ultimately, the Court should not base its decision in this case on "legitimacy" considerations. If the justices believe that the mandate is constitutional, they should vote to uphold it despite the possible damage to their reputations. But it would be a terrible signal if key

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<sup>3</sup> [www.tnr.com/blog/jonathan-cohn/102204/supreme-court-roberts-kennedy-health-mandate-legitimacy](http://www.tnr.com/blog/jonathan-cohn/102204/supreme-court-roberts-kennedy-health-mandate-legitimacy).

<sup>4</sup> [www.volokh.com/2012/03/19/public-opinion-the-individual-mandate-and-the-supreme-court/](http://www.volokh.com/2012/03/19/public-opinion-the-individual-mandate-and-the-supreme-court/).

<sup>5</sup> [www.washingtonpost.com/blogs/behind-the-numbers/post/toss-individual-health-insurance-mandate-poll-says/2012/03/18/glQAaZtpLS\\_blog.html](http://www.washingtonpost.com/blogs/behind-the-numbers/post/toss-individual-health-insurance-mandate-poll-says/2012/03/18/glQAaZtpLS_blog.html).

<sup>6</sup> [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=976298](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976298).

<sup>7</sup> [www.volokh.com/2012/03/23/the-individual-mandate-case-is-not-easy/](http://www.volokh.com/2012/03/23/the-individual-mandate-case-is-not-easy/).

<sup>8</sup> [www.volokh.com/2009/12/23/the-myth-of-an-expert-consensus-on-the-constitutionality-of-an-individual-mandate/](http://www.volokh.com/2009/12/23/the-myth-of-an-expert-consensus-on-the-constitutionality-of-an-individual-mandate/).

swing justices refused to strike down a law merely because their reputations would be damaged in the eyes of a small minority of the public and a vocal faction of the legal elite. It would certainly call into question their willingness to make unpopular decisions that are compelled by their duty to uphold the Constitution, including in cases where they must strike down unconstitutional laws that really do enjoy broad public support.

## II. AN IMPERMISSIBLY “PARTISAN” DECISION?

Any decision striking down the mandate is likely to pit the five conservative Republican justices against the four liberal Democrats. Some commentators, such as Larry Lessig<sup>9</sup> and Jonathan Cohn,<sup>10</sup> claim that such a result would be impermissibly “partisan,” creating a perception that the Court is only willing to strike down “liberal” laws.

This sort of argument urges judges to engage in genuinely political decision-making in order to avoid the mere appearance of it. If a Republican-appointed justice votes to uphold a law he believes to be unconstitutional in order to avoid the appearance of “partisanship,” he would be allowing political considerations to trump his oath to uphold the Constitution.

Even if there is a judicial duty to avoid the appearance of a partisan split, why doesn’t it fall on the liberal justices just as much as the conservatives? If one or more of the liberal justices were to join the five conservatives in striking down the mandate, that would diminish the appearance of partisanship just as much as a conservative “defection” to the liberal side would.

Finally, this line of criticism overlooks an important reason why decisions enforcing limits on congressional power often have an ideological division: the Court’s liberals have consistently voted against

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<sup>9</sup> [www.theatlantic.com/national/archive/12/04/why-scalia-might-uphold-obamacare/255791/](http://www.theatlantic.com/national/archive/12/04/why-scalia-might-uphold-obamacare/255791/).

<sup>10</sup> [www.nnr.com/blog/jonathan-cohn/102204/supreme-court-roberts-kennedy-health-mandate-legitimacy](http://www.nnr.com/blog/jonathan-cohn/102204/supreme-court-roberts-kennedy-health-mandate-legitimacy).

nearly all structural limits on congressional power<sup>11</sup> under the Commerce Clause, the Necessary and Proper Clause, and the Tenth Amendment. Thus, the Court enforces such limits only in those cases where the five conservative justices can agree among themselves. The only way for the conservatives to avoid the appearance of partisanship in this area would be complete abdication of judicial enforcement of structural limits on congressional power.

### III. CONSISTENCY WITH JUDICIAL “CONSERVATISM.”

**J**effrey Rosen<sup>12</sup> and others have argued that a decision against the mandate would be inconsistent with “conservative” attacks on “judicial activism” and deference to legislative judgment. Judicial conservatism is not a single, unitary entity. All sorts of decisions can potentially be justified on “conservative” grounds.

However, one major strand of conservative legal thought over the last thirty years<sup>13</sup> has been the need to enforce constitutional limits on federal government power. This idea would be completely undercut by a decision upholding the mandate, since all of the government’s arguments in favor of the mandate amount to a blank check for unconstrained congressional power.<sup>14</sup> As I explain in detail in this amicus brief<sup>15</sup> for the Washington Legal Foundation and a group of constitutional law scholars, the government’s various “health care is special” arguments collapse under close inspection.

Conservative support for judicially enforced limits on federal power is in some tension with loose conservative rhetoric about “judicial activism,” which is one reason why I have long been criti-

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<sup>11</sup> [www.volokh.com/2012/04/15/larry-lessig-on-the-politics-of-the-supreme-courts-federalism-jurisprudence/](http://www.volokh.com/2012/04/15/larry-lessig-on-the-politics-of-the-supreme-courts-federalism-jurisprudence/).

<sup>12</sup> [www.tnr.com/article/politics/103090/magazine/conservative-judges-justices-supreme-court-obama](http://www.tnr.com/article/politics/103090/magazine/conservative-judges-justices-supreme-court-obama).

<sup>13</sup> [www.volokh.com/2010/03/25/federalist-society-types-were-committed-to-judicial-enforcement-of-federalism-long-before-obamacare/](http://www.volokh.com/2010/03/25/federalist-society-types-were-committed-to-judicial-enforcement-of-federalism-long-before-obamacare/).

<sup>14</sup> [www.scotusblog.com/2011/08/will-the-supreme-court-give-congress-an-unlimited-mandate-for-mandates/](http://www.scotusblog.com/2011/08/will-the-supreme-court-give-congress-an-unlimited-mandate-for-mandates/).

<sup>15</sup> [www.wlf.org/upload/litigation/briefs/11-398bsacWashingtonLegalFoundation.pdf](http://www.wlf.org/upload/litigation/briefs/11-398bsacWashingtonLegalFoundation.pdf).

cal<sup>16</sup> of such rhetoric. However, for most on the right, “judicial activism” is not coextensive with any judicial overruling of statutes, but rather with departures from the text and original meaning of the Constitution.<sup>17</sup> And the originalist case against the mandate<sup>18</sup> is very strong.

Conservatives and others can disagree among themselves as to how much deference should be given to Congress in any given case. In considering this issue, they should weigh two points that Rosen advanced in his important 2006 book *The Most Democratic Branch: How The Courts Serve America.*<sup>19</sup>

Although generally advocating judicial deference to Congress, Rosen notes two important exceptions to this principle. The first is that “When Congress’s own prerogatives are under constitutional assault (in cases involving legislative apportionment or free speech, for example), it may be less appropriate for judges to defer to Congress’s self-interested interpretations of the scope of its own power.” Obviously, there are few more “self-interested” interpretations of “the scope of its own power” than one that would give Congress virtually unlimited power to impose any mandate it wants.

Second, Rosen suggests that “[f]or the Court to defer to the constitutional views of Congress, Congress must debate issues in constitutional (rather than political) terms” (pg. 10). In order to deserve deference, Congress needs to take the relevant constitutional issues seriously. In the individual mandate case, congressional Democrats notoriously demonstrated utter contempt for the constitutional issues, and plenty of ignorance to boot.<sup>20</sup>

In fairness, their performance was no worse than that of the GOP when they controlled Congress during the Bush years. Far from generating serious constitutional deliberation in the legislative branch, the judiciary’s tendency to defer to Congress on federalism

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<sup>16</sup> [www.volokh.com/archives/archive\\_2007\\_10\\_28-2007\\_11\\_03.shtml](http://www.volokh.com/archives/archive_2007_10_28-2007_11_03.shtml).

<sup>17</sup> [www.volokh.com/posts/1184022611.shtml](http://www.volokh.com/posts/1184022611.shtml).

<sup>18</sup> [www.davekopel.com/HEW/Incidental-unconstitutionality.pdf](http://www.davekopel.com/HEW/Incidental-unconstitutionality.pdf).

<sup>19</sup> [www.oup.com/us/catalog/general/subject/Law/ConstitutionalLaw/?view=usa&ci=9780195174434](http://www.oup.com/us/catalog/general/subject/Law/ConstitutionalLaw/?view=usa&ci=9780195174434).

<sup>20</sup> [www.volokh.com/2012/03/28/democratic-congressman-and-senators-on-constitutional-authority-for-the-aca/](http://www.volokh.com/2012/03/28/democratic-congressman-and-senators-on-constitutional-authority-for-the-aca/).

issues has had the opposite effect. Both parties give short shrift to constitutional limits on federal power because judicial deference has created a political culture in which almost anything goes. More careful judicial scrutiny of Congress' handiwork might lead Congress to start taking the Constitution seriously again. That result should be welcomed by conservatives, libertarians, and liberals alike.

A nondeferential posture by the Court wouldn't necessarily lead to the invalidation of the mandate. It merely means that the justices should give little weight to Congress' "self-interested" interpretations of its own power and instead come to their own independent judgment on the constitutional issues at stake.

Ultimately, the Court should not decide the individual mandate case based on these sorts of nonlegal considerations. It is more important that its decision be right than that it be perceived as legitimate, nonpartisan, or conservative. But even on its own terms, the nonlegal case for upholding the mandate is not as impressive as its advocates claim.

UPDATE: Ed Whelan makes some relevant points [here](#).<sup>21</sup> //

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<sup>21</sup> [www.nationalreview.com/bench-memos/300630/intimidation-today-leaks-tomorrow-ed-whelan#](http://www.nationalreview.com/bench-memos/300630/intimidation-today-leaks-tomorrow-ed-whelan#).