GOP Justices Ignore the Founders

Exclusive: As the Republican Supreme Court majority moves toward gutting health-care reform, the justices are making a mockery of the Constitution and the intent of the Founders who had good reasons to include the powerful Commerce Clause. But it appears GOP partisanship will again trump facts and reason, writes Robert Parry.

By Robert Parry

The Republican partisans who control the U.S. Supreme Court appear to have no regard for the actual language of the Constitution or the intent of the Founders. Indeed, the GOP justices, in their ham-handed questions attacking health-care reform, revealed themselves as far more devoted to right-wing talking points than to the law.

Based on their behavior on Tuesday posturing with goofy what-if questions about Congress mandating that Americans buy broccoli, cell phones, burial insurance, etc. these partisans in black robes also demonstrated their deep-seated hypocrisy.

They cast aside their supposed principles of “strict construction” and “judicial restraint” in favor of their own “legislating from the bench,” second-guessing not only the Congress and Executive Branch but the Founders themselves.

If these GOP justices actually cared about the Founders’ “originalist” intent, they would know that the open-ended power over interstate commerce that the Constitution grants to Congress was intended precisely for cases like the Affordable Care Act at times when the United States found itself at a competitive disadvantage versus its international competitors.

Any honest review of the nation’s founding era would reveal that key Framers of the Constitution the likes of James Madison and George Washington were pragmatists creating a system with a strong central government that could address the nation’s daunting challenges, including and one might say especially commercial ones.

That is why Madison, with Washington’s strong support, inserted the Commerce Clause into the Constitution. So, the central government could devise solutions that would enhance American competitiveness and thus strengthen the young nation’s independence from Europe.

For instance, Gen. Washington, who despised the weak Articles of Confederation because they allowed “sovereign” states to renege on promised funding for his

troops, endorsed one of Madison's early schemes to amend the Articles to give the central government control over the nation's commerce.

"The proposition in my opinion is so self evident that I confess I am at a loss to discover wherein lies the weight of the objection to the measure," Washington wrote about Madison's proposal. "We are either a united people, or we are not. If the former, let us, in all matters of a general concern act as a nation, which have national objects to promote, and a national character to support. If we are not, let us no longer act a farce by pretending it to be."

Though Madison failed in his bid to attach his commerce amendment to the Articles, he revived the idea when the Constitutional Convention convened in Philadelphia in 1787. Though the convention was supposed to simply propose changes to the Articles, Madison and Washington engineered the scrapping of the earlier system to be replaced with an entirely new Constitution.

There at the Beginning

On the first day of substantive debate May 29, 1787 a fellow Virginian, Edmund Randolph, presented Madison's framework. The Commerce Clause was there from the start.

Madison's convention notes recount Randolph saying that "there were many advantages, which the U. S. might acquire, which were not attainable under the confederation such as a productive impost [or tax] counteraction of the commercial regulations of other nations pushing of commerce ad libitum &c &c."

In other words, the Founders at their most "originalist" moment understood the value of the federal government taking action to negate the commercial advantages of other countries and to take steps for "pushing of [American] commerce." The "ad libitum &c &c" notation suggests that Randolph provided other examples off the top of his head.

Historian Bill Chapman has summarized Randolph's point as saying "we needed a government that could co-ordinate commerce in order to compete effectively with other nations."

So, from the very start of the debate on a new Constitution, Madison and other key Framers recognized that a legitimate role of Congress was to ensure that the nation could match up against other countries economically and could address problems impeding the nation's economic success.

After the Convention, when the proposed Constitution was under fire from Anti-Federalists who favored retaining the states-right orientation of the Articles of Confederation, Madison returned in the Federalist Papers to arguing the value

of the Commerce Clause.

Despite today's right-wing attacks on the Commerce Clause, Madison considered it one of the least controversial elements of his new governing structure. In Federalist Paper No. 45, writing under the pseudonym Publius, Madison referred to the Commerce Clause as "a new power; but an addition which few oppose, and from which no apprehensions are entertained."

In Federalist Paper No. 14, Madison explained how the Commerce Clause could help the young nation overcome some of its problems with communications and access to interior lands.

"[T]he union will be daily facilitated by new improvements," Madison wrote. "Roads will everywhere be shortened, and kept in better order; accommodations for travelers will be multiplied and meliorated; an interior navigation on our eastern side will be opened throughout, or nearly throughout the whole extent of the Thirteen States.

"The communication between the western and Atlantic districts, and between different parts of each, will be rendered more and more easy by those numerous canals with which the beneficence of nature has intersected our country, and which art finds it so little difficult to connect and complete."

The building of canals, as an argument in support of the Commerce Clause and the Constitution, further reflects the pragmatic and commercial attitudes of key Founders. In 1785, two years before the Constitutional Convention, George Washington established the Potowmack Company, which began digging canals to extend navigable waterways westward where he and other Founders had invested in Ohio and other undeveloped lands.

Thus, the idea of involving the central government in major economic projects a government-business partnership to create jobs and profits was there from the beginning. Madison, Washington and other early American leaders saw the Constitution as creating a dynamic system so the young country could grow and compete with rival economies. [See Consortiumnews.com's "Did the Founders Hate Government?"]

Health Costs

In that sense, the Affordable Care Act fits neatly under the Commerce Clause and the "originalist" intent of the Founders. Today, one of the greatest burdens on U.S. industry in relation to its foreign competitors is the soaring cost of health care that has made American products more expensive and harmed the profitability of U.S. companies.

The Constitution also explicitly empowers the federal government "to promote the general Welfare" and when tens of millions of Americans are without affordable health care and tens of thousands are dying each year because they can't afford to see a doctor, that is surely an impediment to "the general Welfare."

Even, thoughtful conservative jurists in lower courts have agreed that the Affordable Care Act does conform to the language of the Constitution. For instance, in a Nov. 8, 2011, ruling, U.S. Appeals Court senior judge Laurence Silberman, an appointee of Ronald Reagan, wrote a legal opinion affirming the law's constitutionality.

"We look first to the text of the Constitution," Silberman wrote in his opinion. "Article I, § 8, cl. 3, states: 'The Congress shall have Power . . . To *regulate Commerce* with foreign Nations, *and among the several States,* and with the Indian Tribes.'" [Emphasis added by Silberman]

Silberman continued: "At the time the Constitution was fashioned, to 'regulate' meant, as it does now, '[t]o adjust by rule or method,' as well as '[t]o *direct.*' To 'direct,' in turn, included '[t]o prescribe certain measure[s]; to mark out a certain course,' and '[t]o order; to command.'

"In other words, to 'regulate' can mean to require action, and nothing in the definition appears to limit that power only to those already active in relation to an interstate market. Nor was the term 'commerce' limited to only *existing* commerce. There is therefore no textual support for appellants' argument" that mandating the purchase of health insurance is unconstitutional.

As Silberman noted, there is "no textual support" in the Constitution for people to challenge the individual mandate at the heart of the Affordable Care Act. That is because the Constitution didn't place any limits on that regulatory power besides, of course, the political judgment required to pass a bill through both houses of Congress and get the President's signature.

Starting with a Conclusion

But the Republicans and the Right have decided that despite the clear language of the Constitution and the intent of the Founders to give Congress broad powers to fashion policies to respond to the nation's commercial needs the Affordable Care Act is "unconstitutional," using the term as a curse word meaning, "we don't like it."

Of course, you might think that the Supreme Court justices, especially conservatives who call themselves "strict contructionists" and who honor the "originalist" intent of the Founders, would rise above petty politics. But if you think that you haven't been paying attention to the right-wing hacks who

currently sit in the majority on the Supreme Court.

Instead of a serious discussion of these legal issues, Republican justices on Tuesday sounded like pundits on Fox News, peppering U.S. Solicitor General Donald B. Verrilli Jr. with ludicrous what-if questions, like could the government require Americans to buy broccoli, cell phones, automobiles, gym memberships and burial insurance.

Strictly speaking, the constitutional answer would be yes if those activities were deemed part of interstate commerce and if Congress and the President had the political will to do so. The practical answer, of course, would be no, since those ideas are nutty.

Dreaming up crazy hypothetical possibilities has become something of a cottage industry on right-wing talk shows, but it was still shocking to hear these silly talking points coming out of the mouths of Supreme Court justices.

Perhaps the most hypocritical of the justices was Antonin Scalia, who is widely praised by the U.S. news media as a brilliant legal thinker but is really anything but. Scalia is a master of applying double standards to the Constitution depending on what outcome he wishes to achieve.

For instance, Scalia, as a self-proclaimed "originalist," has argued that the 14th Amendment and its principle of "equal protection" under the law should not apply to equal rights for women and gays because the drafters in 1868 were thinking about the legal rights to black men after slavery.

However, Scalia had no problem using the 14th Amendment in December 2000 in *Bush v. Gore* to shut down the Florida recount and award Republican George W. Bush the presidency though surely Congress in 1868 wasn't thinking about protecting the political ambitions of white plutocrats. [See Consortiumnews.com's "Are the GOP Justices Political Hacks?"]

Similarly, Scalia seems intent on taking a situational approach to the Commerce Clause. In 2005, Scalia embraced a broad interpretation of that constitutional authority in upholding a federal law prohibiting the growing of medical marijuana for personal use. Yet now, he's parroting right-wing talking points about forced broccoli-eating to justify striking down a law he doesn't like.

Whose Burden?

Even more shocking in a way was a question posed by Justice Anthony Kennedy, who is often considered the most reasonable Republican on the High Court, though he too has a troubling history of perverting the Constitution for partisan ends. He was the author of the *Bush v. Gore* decision that misused the 14th Amendment to

put a popular-vote loser in the White House.

Kennedy told Solicitor General Verrilli that the government faced “a heavy burden of justification” for the individual mandate on Americans to buy insurance, the provision at the heart of the Affordable Care Act. Like his Republican cohorts, Kennedy insisted that Verrilli offer “some limits on the Commerce Clause.”

However, in his comments, Kennedy turned the actual “burden” on its head. It was the Framers of the Constitution who decided that the Commerce Clause should be open-ended, in part because they knew that the future challenges to the United States could not be fully anticipated. They left these future choices up to the democratic process and congressional debates.

It is not up to the Obama administration to revise the Constitution by saying what Americans may deem necessary in the future to compete economically or “to promote the general Welfare.” Who knows what emergencies might lie ahead requiring extraordinary actions?

The Framers were wise enough to create this flexibility for their “posterity,” although today’s Republican justices appear to fear that the democratic process might lead, down the road, to all sorts of silliness.

Kennedy was also misguided in claiming that the administration had a “heavy burden” in justifying the mandate. The “heavy burden” should actually be on the Supreme Court not to overturn an act of Congress that has been signed by the President – unless the Court has a clear constitutional rationale. Yet, in this case, a “strict construction” of the Constitution actually sides with the law.

In upholding the Affordable Care Act at the appellate level, Judge Silberman made precisely that point. He noted that opponents of the law lacked support for their case in the text of the Constitution and in Supreme Court precedents before adding: “We are obliged and this might well be our most important consideration to presume that acts of Congress are constitutional” absent “a clear showing to the contrary.”

So, while Silberman actually stood up for the conservative principle of “judicial restraint” showing respect for the Constitution and other branches of government, Kennedy and his Republican cohorts were creating a rationale for “legislating from the bench” even though their partisan goals defied both the language of the Constitution and previous precedents, including some like the self-grown medical marijuana ruling, that they had endorsed.

Which is why on Tuesday the Republican justices ended up repeating goofy right-wing talking points. These partisan justices may have in mind a new twist on an

old legal adage, “When the law is on your side, argue the law; when the facts are on your side, argue the facts; when neither the facts nor the law are on your side, talk about compulsory broccoli-eating.”

Robert Parry broke many of the Iran-Contra stories in the 1980s for the Associated Press and Newsweek. His latest book, *Neck Deep: The Disastrous Presidency of George W. Bush,* was written with two of his sons, Sam and Nat, and can be ordered at neckdeepbook.com. His two previous books, *Secrecy & Privilege: The Rise of the Bush Dynasty from Watergate to Iraq* and *Lost History: Contras, Cocaine, the Press & ‘Project Truth’* are also available there.
