GOP Five Like Stripping Americans

Exclusive: The Supreme Court's GOP Five just finished a run as brave libertarians protecting Americans from President Obama's health-care reform, but now are back to their usual role as defenders of abusive state power, allowing strip searches of anyone arrested for anything and perhaps particularly protesters, reports Robert Parry.

By Robert Parry

Last week, the five Republican partisans who control the U.S. Supreme Court were all about protecting American "liberties" against the threat of compulsory broccoli purchases. This week, they are defending the rights of prison guards to strip search a nun arrested in an anti-war protest or a black guy who got nabbed by mistake for not paying a fine that he had actually paid.

But the Court's strip-search ruling on Monday was more about the future than the past. One could almost see the GOP Five rubbing their hands together at the prospect of mass strip searches of young men and women arrested for challenging corporate greed in Occupy protests. Perhaps the justices would like to take a page from Rush Limbaugh's playbook and suggest the videos be posted online so they could watch.

"Every detainee who will be admitted to the general population may be required to undergo a close visual inspection while undressed," wrote Justice Anthony Kennedy for the Republican majority.

Of course, the justices don't expect that they and their powerful friends would ever be subjected to such humiliation. That's more for the lesser beings or those with lesser money especially those who find themselves disproportionately tossed into America's massive prison system: the poor, the minorities and the protesters.

The GOP Five's 5-4 ruling was so extreme that it even caused the usually solicitous New York Times to note that "the procedures endorsed by the majority are forbidden by statute in at least 10 states and are at odds with the policies of federal authorities. According to a brief filed by the American Bar Association, international human rights treaties also bar the procedures."

What the GOP Five's ruling means for average Americans is that they can have their private parts and body cavities inspected by prison guards after arrests for even the most non-violent of charges, such as "violating a leash law, driving without a license and failing to pay child support," the Times reported.

Supreme Court Justice Stephen Breyer noted in his dissenting opinion that people have been subjected to “the humiliation of a visual strip-search” after getting arrested for a noisy muffler, not using a turn signal and not having a proper bell on a bicycle. Breyer also noted that a nun was strip-searched after getting arrested for trespassing in an anti-war protest.

But the GOP Five would have none of that human rights stuff, continuing with their disconnected logic to reach rulings that fit their ideological bent. For instance, Justice Kennedy noted that “one of the terrorists involved in the Sept. 11 attacks was stopped and ticketed for speeding just two days before hijacking Flight 93.”

What the prejudicial 9/11 reference had to do with strip-searching someone whose dog runs off leash or whose bicycle bell doesn’t work might not be readily apparent to anyone who doesn’t spend the day watching Fox News unless Kennedy thinks that strip-searching everyone who gets a speeding ticket might prevent another 9/11.

The Naked Plaintiff

Albert W. Florence, the African-American plaintiff who lost in the Supreme Court’s ruling, was subjected to two strip searches in 2005 after his wife, April, was pulled over for speeding. Though Florence was in the passenger seat, he was arrested when a police records search discovered an outstanding warrant against him for an unpaid fine (which had actually been paid).

Before the clerical error was corrected, Florence was detained for a week, held in two jails which each required a strip search. He was forced to stand naked in front of a guard who made him lift his penis and testicles so they could be examined. Then, Florence said, he was ordered to turn around, squat cough and spread his cheeks to expose his anus.

The GOP Five claimed the extensive use of strip searches was necessary to provide security in the nation’s massive prison complex, which holds millions of detainees. But strip searches also would give authorities a powerful psychological weapon to use against protesters, like those who have participated in Occupy Wall Street and related demonstrations around the country.

The GOP Five’s latest ruling also undercuts their posturing last week during hearings on the Affordable Care Act when they presented themselves as principled defenders of American “liberties” by signaling a readiness to strike down the individual health insurance mandate at the center of a law aimed at providing near universal health-care coverage for Americans.

During those oral arguments, Republican justices demanded that U.S. Solicitor

General Donald B. Verrilli Jr. define a “limiting principle” to the Constitution’s Commerce Clause (though the Framers included none when they wrote the document in 1787). Justice Antonin Scalia wondered if Congress also could mandate that Americans buy broccoli; Justice Samuel Alito worried about burial insurance.

Although the individual mandate originated as a conservative idea from the right-wing Heritage Foundation and was applied against health-care “free riders” by Republican Gov. Mitt Romney of Massachusetts, it suddenly became a tyrannical infringement on American “liberties” when embraced by Democratic President Barack Obama.

At one point in last week’s oral arguments, Justice Scalia let his right-wing ideology peak out from under his black robes when he dressed down Verrilli for noting that the United States has accepted the principle of providing emergency medical treatment for a person who is injured or stricken with a sudden illness.

“We’ve obligated ourselves so that people get health care,” Verrilli said in the context of explaining that those costs then get passed on as higher premiums charged to Americans who have health insurance. Scalia answer to the dilemma was, “well, don’t obligate yourself to that,” in other words just let the person suffer or die.

Again, it might be noted that Scalia and his well-to-do friends would not be the ones dumped on sidewalks outside hospitals, but rather the lesser people, i.e. those with lesser money.

Yet, after a week of posing as brave libertarians protecting Americans from President Obama’s health-care reform, the GOP Five quickly reverted to form as defenders of abusive state power, with their minds likely filled with visions of naked young anti-Wall Street protesters male and female forced to bend over and expose their genitals.

The Founders' 'Musket Mandate'

Exclusive: The negative tone of the Republicans on the U.S. Supreme Court suggests that the Affordable Care Act, with its individual mandate to buy health insurance, may be overturned as "unconstitutional" by a partisan 5-4 vote. But key Founders had a less hostile view toward mandates in 1792, as Robert Parry reports.

By Robert Parry

If Fox News and Antonin Scalia were around in 1792 when James Madison and George Washington helped push through the Militia Acts requiring citizens to buy muskets and other military supplies, those Founders likely would have heard complaints like: "What else will the federal government do? Make us buy broccoli?"

Okay, broccoli wasn't really grown in the United States at the time, arriving in the next century with waves of Italian immigrants. But the distinction between the founding era and today is illustrative of how the seriousness of American politics has eroded.

In 1792, just four years after ratification of the U.S. Constitution, Madison and Washington two key Framers of the document saw nothing wrong with mandating Americans to buy certain products in the private market. It was simply a practical way for the government to arm militias to put down insurrections and defend against foreign enemies.

Last week, however, the Republican majority on the U.S. Supreme Court behaved like Fox News pundits, offering goofy hypothetical possibilities about what Congress might mandate if the Affordable Care Act's requirement to buy health insurance stands. We heard lots about required purchases of broccoli, burial insurance, cars, cell phones, etc.

The debate also was influenced by the false assertion that never before in U.S. history had the federal government required Americans to buy a private product. For "originalists" like Justice Scalia that was particularly important because he claims to believe that only actions reflective of the Framers' original vision can be constitutional.

But here was a stubborn historical fact, that Madison, as a member of the Second Congress, and Washington, as the first President, had supported the Militia Acts of 1792, which gave each able-bodied white male of fighting age six months to "provide himself with a good musket or firelock, a sufficient bayonet and belt,

two spare flints, and a knapsack, a pouch, with a box therein, to contain not less than twenty four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball."

Yes, I know that the law was passed under Article Two powers of the Executive, which makes the President the Commander in Chief of the military, not Article One's Commerce Clause, which grants Congress unrestricted power to regulate interstate commerce. But the principle is the same, that the government can order Americans to buy something that Congress deemed necessary for the country's good.

So Long Ago

I'm also aware that the musket precedent is dismissed by some because it was so long ago. But that should be exactly the point when Scalia and the other Republican justices are weighing the constitutionality of the health insurance mandate.

If mandates were okay for Madison, the Constitution's architect, and Washington, who presided at the Constitutional Convention, then that should be determinative on the question of whether mandates passed constitutional muster with the Framers. Madison and Washington along with other men in the Second Congress and inside Washington's administration were, like, the actual Framers.

The fact that the musket mandate was approved just four years after the Constitution's ratification should count even more for the "originalists" like Scalia than if some mandate had been approved later.

Unlike the petty partisans of today, the Framers of the Constitution were mostly pragmatic individuals. Sure, they cared about liberty (at least for white males), but they also were driven by the need to build a strong nation that could maintain its independence against the encroachment of European powers.

That was why Madison proposed the strong Commerce Clause in the first place. He understood that only national action and coordination could enable the United States to marshal its resources properly and fend off Europe's predatory economic tactics.

Madison's Commerce Clause idea even predated the Constitution. He initially proposed giving the federal government control over national commerce when the Articles of Confederation were still governing the country (from 1777 to 1787).

General Washington, who hated the Articles because they had created a weak central government that often left his troops unpaid and unfed, backed Madison's

proposal when it was before the Virginia Legislature after the Revolutionary War. In a letter, Washington expressed the need for greater national unity.

“The [commerce] 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. “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.”

Madison failed in his bid to attach his commerce amendment to the Articles, but 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 Start

So, on the first day of substantive debate May 29, 1787 as a fellow Virginian, Edmund Randolph, presented Madison’s constitutional framework, the Commerce Clause was there.

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.

So, 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-rights orientation of the Articles of Confederation, Madison returned, in the Federalist Papers, to arguing the value of the Commerce Clause.

Ironically, Madison considered the Commerce Clause 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 comports with the original intent of the Commerce Clause, to keep U.S. industry competitive with international rivals. Today, one of the heaviest burdens on U.S. companies in relation to foreign competitors is the soaring cost of health care that has made American products more expensive.

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.”

But what is perhaps most striking when comparing the founding era of the United States to today's politicized and petty times is the stunning loss of pragmatism and common sense.

Then, the Founders were finding ways to do what was necessary to build the nation. Now, partisans like Scalia and Fox News are all about scoring debating points. They conjure up arguments to win for the GOP side even if the nation loses.

Today's Republican partisans, including justices on the Supreme Court, denounce the health-insurance mandate even though it was originally a conservative proposal from the Heritage Foundation. Yet, once a Democratic president embraced it, the individual mandate became a socialistic affront to the Constitution.

One might reflect upon Washington's letter supporting Madison's commerce idea: "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."

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.

If the Supreme Court Goes Rogue

Exclusive: George Washington and James Madison, two key Framers of the Constitution, saw nothing wrong with issuing mandates to citizens (to buy muskets for a militia), but today's Republican majority on the Supreme Court seems set on going rogue and rewriting the founding document to say otherwise, Sam Parry writes.

By Sam Parry

What happens to a Republic under a written Constitution if a majority of the Supreme Court, which is empowered to interpret that Constitution, goes rogue? What if the court's majority simply ignores the wording of the founding document

and makes up the law to serve some partisan end? Does that, in effect, turn the country into a lawless state where raw power can muscle aside the democratic process?

Something very much like that could be happening if the Supreme Court's five Republicans continue on their apparent path to strike down the individual mandate at the heart of the Affordable Care Act. In doing so, they will be rewriting the Constitution's key Commerce Clause and thus reshaping America's system of government by fiat, rather than by the prescribed method of making such changes through the amendment process.

The only way the five Republicans can strike down the individual mandate and with it probably the entire law is to ignore the literal and traditional interpretations of the Commerce Clause by redefining the word "regulate" to mean something it has never meant before and that the Framers of the Constitution never intended.

The plain text of the Commerce Clause Article 1, Section 8, Clause 3 is so straightforward that a middle-school child should be able to understand it. Here it is: "Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

And the word "regulate" means today what it meant then, as was noted in a Nov. 8, 2011, ruling written by Judge Laurence Silberman, a senior judge on the U.S. Court of Appeals for the District of Columbia Circuit, a conservative appointee of President Ronald Reagan.

In upholding the individual mandate as constitutional, Silberman wrote: "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."

So, for the individual mandate to clear the Commerce Clause hurdle it must be a regulation of commerce among the states. Everyone agrees that health care and health insurance are interstate markets. Check. Everyone also agrees that health care and health insurance are commerce. Check. There's also no dispute that the individual mandate is a form of regulation. Check.

Judge Silberman went through the same check list and concluded that there was "no textual support" in the Constitution for striking down the individual mandate because the word "regulate" has always included the power to compel people to act.

But the law's opponents insist that the individual mandate is a unique and improper form of regulation because it forces an American to do something that the person might not want to do it, i.e. go into the private market and buy health insurance.

Yet, in other enumerated powers, this idea of Congress having the power to compel people to act is widely accepted. Take, for example, the draft. While there is not currently a draft, there has been at many points in U.S. history and even now every male citizen, when he turns 18, is required to register for selective service. And, should the draft come back and should you get drafted, you would be legally compelled to serve.

If compelling individuals to risk their lives in war is an accepted use of congressional authority, it is hard to see the logic in striking down the power of Congress to compel individuals to get health insurance.

Washington and Madison

And, despite what the Affordable Care Act's critics have said repeatedly, this is not the first time the federal government has ordered Americans to buy a private product.

Indeed, just four years after the Constitution's ratification, the second U.S. Congress passed the Militia Acts of 1792, which were signed into law by President George Washington. The militia law ordered white men of fighting age to arm themselves with a musket, bayonet and belt, two spare flints, a cartridge box with 24 bullets and a knapsack so they could participate in militias.

If one wants to gauge whether a mandate to buy a private product violates the original intent of the Framers, one probably can't do better than applying the thinking of George Washington, who presided at the Constitutional Convention in 1787, and James Madison, the Constitution's architect who served in the Second Congress and argued for the militia law. [For more, see Consortiumnews.com's "Madison: Father of the Commerce Clause."]

So, it would seem to be a rather clear-cut constitutional case. Whether one likes the Affordable Care Act or not, it appears to fall well within the Constitution and historical precedents. By the way, that's also the view of Ronald Reagan's Solicitor General Charles Fried who said this in a March 28 interview:

"Now, is it within the power of Congress? Well, the power of Congress is to regulate interstate commerce. Is health care commerce among the states? Nobody except maybe Clarence Thomas doubts that. So health care is interstate commerce. Is this a regulation of it? Yes. End of story."

However, if Chief Justice John Roberts and the Court's four other Republicans go in the direction they signaled during oral arguments and strike down the individual mandate, they will not merely be making minor clarifications to the noun "commerce" and the adjective "interstate" – as the Court has done previously – but they will be revising the definition of the verb "regulate" and thus substantially editing the Constitution.

Amendment Process

When it comes to editing the Constitution, there is a detailed process spelled out for how you do that. It's in Article 5 of the Constitution and it's called the amendment process something in which the Judicial Branch plays absolutely no role. The process for revising the founding document requires votes by two-thirds of both the House and the Senate and the approval of three-quarters of the states.

Besides representing an affront to the nation's constitutional system, an end-run by a narrow majority of the Supreme Court taking upon itself to rewrite an important section of the Constitution would drastically alter the balance among the three branches of government.

Such an action would fly in the face of the longstanding principle in constitutional cases that the Supreme Court should give deference to legislation passed by the government's Legislative Branch and signed into law by the President as chief of the Executive Branch. Under that tradition, the Judicial Branch starts with the assumption that the other two branches have acted constitutionally.

The burden of proof, therefore, should not be on the government to prove that the Constitution permits a law but rather on the plaintiffs to demonstrate how a law is unconstitutional.

Yet, during oral arguments this week, Republican justices pressed the government to prove that the Affordable Care Act was constitutional and even demanded that Solicitor General Donald B. Verrilli Jr. put forward a limiting principle to the Commerce Clause to speculate about what *couldn't* be done under that power.

Justice Anthony Kennedy several times raised the point that the individual mandate changes the relationship between citizens and the federal government in, as he put it, "fundamental ways" and thus the government needed to offer a powerful justification. In his questions, however, it was not entirely clear why Kennedy thought this, given the fact that Congress has previously enacted many mandates, including requirements to contribute money to Social Security and Medicare.

In the March 28 interview, former Solicitor General Fried took issue with Kennedy's question about this "fundamental" change, calling the line "an appalling piece of phony rhetoric" and dismissing it as "Kennedy's Tea Party-like argument."

Fried noted that Social Security in the 1930s and Medicare in the 1960s indeed were major changes in the relationship between the government and the citizenry, "but this? This is simply a rounding out in a particular area of a relation between the citizen and the government that's been around for 70 years."

On policy substance as well as on constitutional principle, Fried was baffled by the Republican justices' opposition to the law, saying: "I've never understood why regulating by making people go buy something is somehow more intrusive than regulating by making them pay taxes and then giving it to them. I don't get it."

A Noble Rationale

But Kennedy seemed to be fishing for some noble-sounding rationale for striking down the individual mandate. He was backed up by Justice Antonin Scalia who proffered the peculiar argument that if Congress could mandate the purchase of health care, why couldn't it require people to buy broccoli as if any outlandish hypothetical regarding congressional use of the Commerce Clause disqualifies all uses of the Commerce Clause.

This line of reasoning by the Republican justices also ignored the point that the Court's role is not to conjure up reasons to strike down a law, but rather to make a straightforward assessment of whether the individual mandate represents a regulation of interstate commerce and is thus constitutional.

In searching for a rationale to strike down the law, the Court's Republicans also ignored the true limiting principle of any act of Congress the ballot box. If any congressional majority were crazy enough to mandate the purchase of broccoli, the voters could throw that bunch out and vote in representatives who could then reverse the law.

In the case of the Affordable Care Act, Democrats won Election 2008, in part, because they promised the voters to tackle the crisis in U.S. health care. If the voters don't like what was done, they can vote the Democrats out of office in November. The pendulum of democracy can always undo or modify any law through legislative action.

However, what the Republican majority on the Supreme Court seems to be angling toward is a radical change in the longstanding principles behind the Constitution's checks and balances. The five justices would bestow upon themselves the power to not only undo legislation, which has been lawfully

enacted by Congress and signed by the President, but to rewrite the founding document itself.

Sam Parry is co-author of *Neck Deep: The Disastrous Presidency of George W. Bush*. He has worked in the environmental movement, including as a grassroots organizer, communications associate, and on the Sierra Club's and Amnesty International's joint Human Rights and the Environment campaign. He currently works for Environmental Defense Fund.

When Is a Hack a Hack?

Exclusive: Ronald Reagan's Solicitor General Charles Fried sees "politics, politics, politics" at play in the apparent move by the Supreme Court's Republican majority to kill health-care reform, but the Washington Post's neocon editors say it's unfair to call any of those five GOP justices a "hack," reports Robert Parry.

By Robert Parry

So what has happened to many of those conservative "strict constructionists" who insist that only a literal reading of the Constitution is acceptable and that "activist" justices can't simply "create rights" for Americans that the Framers didn't write down?

Apparently, because these "conservatives" hate "Obamacare" almost as much as they detest President Barack Obama they're celebrating the hypocritical spectacle of five Republican justices on the Supreme Court demanding that new limitations be placed on Congress' constitutionally unlimited power to regulate interstate commerce.

These self-proclaimed "strict constructionists" can't find limitations in the actual Constitution, since none are there, so the GOP Five apparently intend to insert some new words into the founding document to post-facto (or perhaps ipso facto) disqualify the Affordable Care Act as "unconstitutional."

Maybe, the GOP Five should just drive down to the National Archives, pry open the case holding the Constitution and pencil in some new words. After the relevant section about Congress having the power to regulate interstate commerce, the GOP Five can scribble in "except for things like purchases of broccoli, gym memberships, cell phones and health insurance."

More likely, the GOP Five Justices Anthony Kennedy, Antonin Scalia, Clarence Thomas, John Roberts and Samuel Alito will come up with some more elegant wording that suggests a higher principle is involved.

After all, in December 2000, a subset of this group (Kennedy, Scalia and Thomas along with the late Chief Justice William Rehnquist and now-retired Justice Sandra Day O'Connor) dressed up its *Bush v. Gore* ruling with a lot of legal references.

Essentially, however, those five Republican partisans detected a previously unknown provision in the 14th Amendment requiring that when a Republican presidential candidate is in danger of losing an election, then all the voting procedures in the key deciding state must have been identical, precinct to precinct. If they weren't and they never are the GOP candidate wins.

Post Editors to the Defense

On Friday, the Washington Post neoconservative editorial writers rallied to the defense of today's GOP Five as men of undying personal integrity who simply have an honest difference over how to read the Constitution.

While praising the three days of oral arguments as "the Supreme Court's civics lesson," the Post's editors expressed dismay over the "cynicism" of some liberals who "were preemptively trying to delegitimize a potential defeat at the court" by making the Republican justices look "partisan, activist and, essentially, intellectually corrupt."

How unfair, wailed the Post's editors. While the Post suggested that the five Republicans should show some "modesty and deference to elected legislators" who fashioned the difficult health insurance compromise, the Post seemed most upset that the integrity of the GOP Five was being questioned.

"We wouldn't assume anyone who disagrees [with the constitutionality of the law] is a hack," the Post declared.

And one might say the Post's editors, who treated Saddam Hussein's possession of WMD stockpiles as a "flat fact" in 2003 and who disparaged Americans who dared question the veracity of that *casus belli*, should know something about being hacks.

In Friday's editorial, the Post also adopted the posture that most befits a journalistic hack, the cowardly and simpleminded framing of debates as both-sides-are-equally-at-fault. The Post suggested that the four Democratic justices were somehow behaving in a partisan manner by following the actual wording of the Constitution.

“We share the disappointment that the justices on both sides of their ideological divide are, for the most part, so predictable,” the Post lamented. “That’s not, in an ideal world, how judging is supposed to work.”

No, in an ideal world or even a world where we expect a modicum of philosophical consistency we might hope that Supreme Court justices would stick to interpreting the Constitution rather than demanding extemporaneous rewrites, or “limiting principles” that the Framers chose not to include.

Serious Conservatives

We also might expect in an editorial on this important topic a reference to what the Commerce Clause actually says or an explanation of why serious conservatives, like senior Appeals Court Judge Laurence Silberman and Ronald Reagan’s Solicitor General Charles Fried, came down solidly on the side of the law’s constitutionality.

Silberman, a Reagan appointee, wrote the Nov. 8, 2011, ruling, for the U.S. Court of Appeals in Washington affirming the constitutionality of the Affordable Care Act. Silberman took pains to note the unrestricted wording of the Commerce Clause.

He wrote: “We look first to the text of the Constitution. 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.

Let’s hear that again: “There is therefore no textual support” in the Constitution for challenging the individual mandate as unconstitutional. At that point, “strict constructionists,” as all the GOP Five claim to be, should have begun folding their tent or got to work on a constitutional amendment to rewrite the Commerce Clause.

Instead, the GOP Five got busy “legislating from the bench,” demanding that the

Obama administration provide some “limiting principle” to apply to the Commerce Clause that would differentiate health insurance (or the hundreds of other federal provisions that hinge on this clause) from Justice Scalia’s goofy what-if question about buying broccoli.

Nor did the Post’s editorialists address former Solicitor General Fried’s comments in a March 28 interview with the Post’s Ezra Klein. When asked about the “limiting principle” issue, Fried responded:

“The limiting principle point kind of begs the question. It assumes there’s got to be some kind of articulatable limiting principle and that’s in the Constitution somewhere. What Chief Justice John Marshall said in 1824 is that if something is within the power of Congress, Congress may exercise that power to its fullest extent. So the question is really whether this is in the power of Congress.

“Now, is it within the power of Congress? Well, the power of Congress is to regulate interstate commerce. Is health care commerce among the states? Nobody except maybe Clarence Thomas doubts that. So health care is interstate commerce. Is this a regulation of it? Yes. End of story.”

Tea Party Comments

Fried also criticized some of the specific comments by the Court’s Republicans. “Justice Kennedy,” Fried noted, “said this fundamentally changes the relationship of the citizen to the government. That’s an appalling piece of phony rhetoric.

“There is an important change between the government and the system. It was put in place in 1935, with Social Security. And it said everyone has to pay into a retirement fund, and an unemployment fund. It was done when Medicare came in in the ’60s.

“That’s a fundamental change. But this? This is simply a rounding out in a particular area of a relation between the citizen and the government that’s been around for 70 years. Kennedy’s Tea Party-like argument that this fundamentally changing the relationship between government and the citizen? Well, I was very sorry to hear it.”

On policy substance as well as on constitutional principle, Fried was baffled by the Republican justices’ opposition to the law:

“I’ve never understood why regulating by making people go buy something is somehow more intrusive than regulating by making them pay taxes and then giving it to them. I don’t get it.”

Fried also took aim at the right-wing Heritage Foundation, which originated the individual mandate idea as an alternative to Democratic proposals for either a single-payer system or employer-mandated insurance, but now heatedly opposes its own concept. Fried said:

“It was comical to read the Heritage Foundation’s brief attempting to explain why they were changing their position on this. Something needed to be done about this problem. Everyone understood that. So, the Heritage Foundation said let’s do an individual mandate because it keeps it within free enterprise. The alternative was single payer. And they didn’t want that, and I’m in sympathy with that.

“So now all of a sudden the free-market alternative becomes unconstitutional and terribly intrusive where a government imposition and government-run project would not be? I don’t get it. Well, I do get it. It’s politics.”

When asked if the Supreme Court observers, who had initially considered the constitutional challenge to the law frivolous, had “underestimated the politicization of the Judiciary,” Fried answered:

“Politics, politics, politics. You look at the wonderful decision by [federal Judge] Jeff Sutton, who is as much of a 24-karat gold conservative as anyone could be. He is a godfather to the Federalist Society. Look at his opinion [in the Sixth Circuit upholding the law]. Or look at Larry Silberman’s opinion. I don’t understand what’s gotten into people. Well, I do I’m afraid, but it’s politics, not anything else.”

Fried’s “politics, politics, politics” point would seem particularly clear given the fact that the individual mandate to buy insurance was first developed by Heritage and first adopted by a Republican governor (and current GOP presidential front-runner) Mitt Romney of Massachusetts as a way to prevent “free riders” from getting health care and passing the costs to others.

Indeed, President Obama embraced the mandate idea after opposing it during Campaign 2008 because he concluded that it was the only way he could hope to win the votes of some moderate Republicans and conservative Democrats. But once Obama supported the idea, Republicans denounced it as an “unconstitutional” affront.

Then, after the law’s difficult enactment two years ago, the Republicans ran to the courts to get it overturned although conservatives have traditionally decried people who seek court intervention rather than working out policy differences through the political system.

Though serious conservatives like Silberman, Sutton and Fried judged the

challenge to be without merit, it received a friendly hearing by the GOP Five on the Supreme Court. It's now expected that the GOP Five will get busy behind closed doors drafting some ruling that will insert some newly invented "rights" into the Constitution.

Despite this rather obvious politicization of the federal courts, the Washington Post's editors are more upset that "some liberals" would suggest that cynical politics is at work here. Yet, however you spin what the GOP Five is doing, it sure doesn't look like the behavior of principled "strict constructionists."

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.

A Judicial War on Democracy

Exclusive: Comments on the U.S. Supreme Court's three-day debate over the Affordable Care Act have focused on the damage the five Republican justices are expected to do to President Obama by striking down his prized new law. But the bigger story may be their judicial war on democracy, says Robert Parry.

By Robert Parry

James Madison and other Framers of the Constitution had their concerns about the potential excesses of democracy thus explaining the six-year Senate terms and the intricate system of checks and balances but they also trusted in democracy and the ability of the people's government to fashion national solutions to serious problems.

That was one of the reasons Madison and the Framers granted Congress an unlimited power to regulate interstate commerce, trusting that political leaders operating within the democratic process would recognize the needs of their time and apply this broad authority as necessary "to promote the general Welfare" of the American people.

But the spectacle that has unfolded over the past three days before the U.S. Supreme Court marks an historic reversal of this longstanding trust in democracy, as the Court's narrow right-wing majority prepares to eviscerate the

Commerce Clause as part of a broader assault on the principles of representative democracy and on the Framers' philosophical belief in the value of government itself.

These five Republican justices John Roberts, Antonin Scalia, Clarence Thomas, Anthony Kennedy and Samuel Alito appear poised to effectively rewrite the Constitution's Commerce Clause in order to justify thwarting the judgment of elected officials who enacted the Affordable Care Act in 2010.

If the GOP Five continue on this presumed course toward striking down "Obamacare," it also would become the latest front in what looks to be a right-wing judicial war on democracy with the Supreme Court's Republicans serving not as fair-minded arbiters of the Constitution but as a black-robed rear-guard of an ideological army.

Bush v. Gore

The first major battle of this judicial war on democracy was the *Bush v. Gore* decision in December 2000, overturning the will of the American electorate, which favored Al Gore both nationally and apparently in the key state of Florida.

The Court's Republican partisans first enjoined the state of Florida from continuing a recount so the result would not undermine George W. Bush's "legitimacy" once the Court could figure out a rationale for handing him the Presidency. Then, they got to work coming up with some "constitutional" excuse.

The President's power to appoint federal judges was of particular importance to Justice Sandra Day O'Connor, who was eager to retire so she could tend to her ailing husband. As reporter Mollie Dickenson learned in the days after the November 2000 election, O'Connor had been distraught on Election Night to hear the TV networks initially declare Gore the winner in Florida.

Dickenson reported that O'Connor, at an Election Night party, was "visibly upset — indeed furious — when the networks called Florida for Vice President Al Gore." The justice declared that "this is terrible" and gave others attending the party "the impression that she desperately wanted Bush to win," Dickenson wrote.

In that same article, dated Dec. 11, 2000, the day before the Supreme Court ruled on *Bush v. Gore*, Dickenson quoted a former high-ranking Justice Department official in the Clinton administration as grasping the Court's conflict of interest over the President's appointment power.

"The Supreme Court's vote is a totally self-interested vote," the former official said. "They are ensuring that they will remain in the majority, even

increase their majority."

Still, Gore remained confident that the Supreme Court and especially O'Connor would uphold the "rule of law" and allow the legally mandated Florida recount to proceed. Gore apparently couldn't get his brain around the emerging reality of a judicial process thoroughly infected by partisanship and ideology.

Behind the scenes, O'Connor was collaborating with Justice Anthony Kennedy in cobbling together a ruling that relied on a tortured interpretation of the 14th Amendment to justify awarding the White House and the power to appoint federal judges to the popular-vote loser, George W. Bush.

The key part of the ruling approved on a 5-4 vote cited the Amendment's "equal protection of the law" principle to throw out the recount because of Florida's variant voting standards across the state. The Court then gave the state a laughable two hours to fix the problem and complete a new recount.

The ruling, with Kennedy as the principal author, had turned the 14th Amendment on its head because the recount was an attempt to reduce the discrepancies in Florida's voting processes, which included antiquated equipment that undercounted votes in poor and minority precincts while state-of-the-art equipment in richer and whiter precincts had far fewer lost votes.

By blocking the recount, the Court, in effect, ensured that the votes of wealthy whites had more "equal protection" than those of low-income retirees, blacks and Hispanics. In other words, the five Republican justices used the 14th Amendment to guarantee greater racial and social-class discrimination in the Florida vote count, not less.

Also, by allowing only two hours to fix the problem and conduct the recount, the GOP justices ensured that the state's Republican officials working under the gaze of Gov. Jeb Bush could declare his brother, George W. Bush, the winner of Florida's electoral votes and thus the Presidency of the United States. [For details, see *Neck Deep*.]

Appointment Power

After Bush took office, things did look up for the Judiciary's right-wing faction, which benefited from a steady stream of reinforcements, new conservative judges who strengthened the Right's ideological battle lines in the federal courts.

Also, when right-wing Chief Justice William Rehnquist died on Sept. 3, 2005, Bush replaced him with right-wing Chief Justice John Roberts. When Justice O'Connor finally stepped down on Jan. 31, 2006, Bush filled her seat with an

even more conservative justice, Samuel Alito.

Still, there was that pesky thing called democracy that couldn't always be thwarted, especially if the victory margins were too big. So, after President Barack Obama won Election 2008 and brought in a Democratic Congress, the Republican majority on the Supreme Court had to swing into action with a powerful counter-attack to protect the GOP's crucial financial supply lines.

On Jan. 21, 2010, the five justices – Kennedy, Roberts, Scalia, Thomas and Alito – pushed through the *Citizens United* decision, clearing the way for the ultra-rich to effectively buy elections through unlimited spending on attack ads against disfavored candidates. Again, Justice Kennedy was the author.

Though right-wing billionaires had already created powerful artillery batteries in the form of a massive media infrastructure and influential think tanks, they now could pour millions and millions more dollars directly into campaigns through SuperPACs.

This combination of saturation propaganda from the Right's media, think tanks and SuperPACs guarantees that many Americans will rally to the Right's banner even when that means lining up against their own interests and on the side of powerful corporations and the wealthy.

It also appears that even on those rare occasions when the Democrats can muster the votes in the House and a super-majority in the Senate to send an important bill to the desk of a Democratic President, the Republicans on the Supreme Court will fulfill their role as a reserve army in black robes, a last line of defense waiting to do whatever is necessary to win the day even if the Constitution becomes collateral damage.

That is the significance of what has played out over the past three days. Based on the tone and tenor of the questions, it seems the five Republican partisans are engaged in another flanking maneuver against democracy, to wipe out a duly enacted law.

Inventing Law

Though the Constitution sets no limits on the power of Congress to regulate interstate commerce since the Founders trusted in the future judgment of elected officials to make reasonable decisions for the good of the country the GOP Five apparently intend to fix this oversight by the Framers.

The GOP Five apparently will amend the Constitution by fiat, inserting new restrictions in the Commerce Clause and then judging that the health-care law is outside those limits. [See Consortiumnews.com's "GOP Justices Ignore the

Founders."]

Underscoring this intent, the Republican justices spent their third day of oral arguments musing about what to do with the remainder of the Affordable Care Act once they strike down its central feature, the individual mandate to buy insurance, as a violation of their newly invented constitutional limitation on the Commerce Clause.

This need for the GOP Five to rewrite the Commerce Clause was driven home by a straightforward U.S. Appeals Court ruling by a conservative senior judge, Laurence Silberman, who bluntly endorsed the constitutionality of the Affordable Care Act by noting the absence of any limitation on congressional regulation of national commerce.

In a Nov. 8, 2011, ruling, Silberman, an appointee of Ronald Reagan, wrote: "We look first to the text of the Constitution. 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.

Silberman's accurate and indeed obvious statement that there is "no textual support" in the Constitution for challenging the individual mandate as unconstitutional should be especially striking to "strict constuctionists," as all the GOP Five claim to be. "Strict construction" means to follow the words of the Constitution precisely.

For decades, this principle of "strict construction" has been a central talking point for the Right, which has accused "activist judges" of divining new constitutional "rights" which are not explicitly stated.

Some of those right-wing complaints are baseless since the Courts in, say, striking down racial segregation in the South have simply followed the clear language embedded in constitutional provisions such as the 14th Amendment and, significantly, the Commerce Clause.

In such cases, the Right also has argued that these issues should be left up to the elected branches of government and it is not up to the Supreme Court to intuit new "rights" in the Constitution. Except it appears when the process goes against the Right. Then, it's up to the Court to invent new "rights" and declare duly enacted legislation to be in violation of those "rights."

That is precisely what the GOP Five were signaling in their three days of acting more like a pundit panel on Fox News than as jurists entrusted with the profound responsibility to act as a fair arbiter of the law.

Goofy What-Ifs

On the second day of oral arguments, with their goofy what-if questions about Congress forcing Americans to buy broccoli, gym memberships, cell phones and other silly items, the Republican partisans were signaling that they were not only going to second-guess Congress and the President but the Framers as well.

Though Madison and the other Framers had left the power to regulate interstate commerce open-ended understanding that the nation might face challenges unforeseen in the late 18th Century Kennedy and other GOP justices demanded that the Obama administration present some limitations to the Commerce Clause.

When U.S. Solicitor General Donald B. Verrilli Jr. wouldn't play their what-if game, Kennedy and the others indicated that they would take it upon themselves to invent those limits, presumably to insure that no future Congress can require Americans to buy broccoli, gym memberships, cell phones or health insurance.

The Republican justices then got down into the reeds of legislative minutiae discussing what other parts of the law should be dumped and what scraps might be kept. Sometimes, the Court's debate sounded like a college bull session as some know-it-alls declare how they would solve some nettlesome problem if they were king.

As Washington Post columnist E.J. Dionne Jr. noted they acted like "they were members of the Senate Health, Education, Labor and Pensions Committee. Senator, excuse me, Justice Samuel Alito quoted Congressional Budget Office figures on Tuesday to talk about the insurance costs of the young.

"On Wednesday, Chief Justice John Roberts sounded like the House whip in discussing whether parts of the law could stand if other parts fell. He noted that without various provisions, Congress 'wouldn't have been able to put together, cobble together, the votes to get it through.' Tell me again, was this a courtroom or a lobbyist's office.

"One of the most astonishing arguments came from Roberts who spoke with alarm

that people would be required to purchase coverage for issues they might never confront. He specifically cited ‘pediatric services’ and ‘maternity services.’”

Justice Antonin Scalia also let his right-wing ideological uniform peak out from under his black robes when he dressed down Verrilli for noting that the United States has accepted the principle of providing medical treatment for a person who is injured or stricken with a sudden illness.

“We’ve obligated ourselves so that people get health care,” Verrilli said, drawing a riposte from Scalia: “Well, don’t obligate yourself to that.”

In other words, what the world saw over those three days was the intrusion of five right-wing justices into the democratic process on behalf of an Ayn Rand-style “free-market” capitalism which says that lesser people or at least those with lesser money should be allowed to die untreated and that the people through their representatives in Congress shouldn’t be allowed to do anything about it.

It might be noted here that when “free-market” champion Ayn Rand contracted lung cancer, she snuck into the Medicare system, using a revised spelling of her first name and her husband’s last name, to get government-paid-for medical care.

It also might be noted that the individual mandate was a conservative idea devised by the right-wing Heritage Foundation and embraced by Republicans, such as former House Speaker Newt Gingrich and former Massachusetts Gov. Mitt Romney.

Embraced that is until President Obama tried to demonstrate bipartisanship by reversing his earlier resistance to the idea and adopting the individual mandate as a way to expand health coverage and contain rising costs within a system of private health insurance companies.

Then, the individual mandate suddenly became an “unconstitutional” affront to American “liberty,” even though conservative jurists like Silberman could find nothing in the Constitution or in court precedents to make it so.

Before the Supreme Court’s ruling comes down in June, it is possible that Kennedy or another member of the GOP Five might have some second thoughts about the course they’re on possibly after a shame-inducing flashback of their lofty pronouncements about “judicial restraint” and their beloved “strict construction” of the Constitution.

But the writing seems to be on the wall that the five Republicans on the Supreme Court will take out the Affordable Care Act as part of their larger judicial war on democracy.

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.

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.

GOP Justices Clown over Health Care

Exclusive: The questions asked by the Republican partisans on the U.S. Supreme Court suggest they will overturn the Affordable Care Act. Instead of a serious debate about health care and the Constitution, they clowned around with silly what-ifs about mandating broccoli-eating and requiring burial insurance, writes Robert Parry.

By Robert Parry

The Republican justices on the U.S. Supreme Court behaved more like Fox News pundits than serious jurists weighing the constitutionality of an important law addressing the health of the American people. On Tuesday, they posed silly hypothetical questions of the sort that might boost TV ratings among Tea Party viewers but had little to do with the Constitution.

Based on their goofy and hostile questions, the Republican majority seems poised to strike down the core of the Affordable Care Act, the so-called individual mandate, an idea that ironically originated with the right-wing Heritage Foundation, was enacted by Republican Gov. Mitt Romney in Massachusetts, and only became a *bÃªte noire* when President Barack Obama embraced it.

Now, despite the Constitution's grant of broad powers to Congress to regulate interstate commerce, the five Republican partisans on the Supreme Court appear ready to kill the health reform law in the midst of a presidential election and deliver a body blow to Obama's reelection hopes.

The core of their objections to the law was that if Congress can mandate Americans buy health insurance, it can do all sorts of other crazy things, like make people buy cell phones, broccoli, automobiles and burial insurance. (Or maybe make them wear funny hats and clown noses.)

Of course, what the Republican majority is ignoring with its bizarre questions is that there must be the political will for a majority in Congress to undertake any such legislation and that the President must sign the bill into law. The Constitution also gives Congress a virtually unrestricted power to regulate interstate commerce.

But rather than deal with practical political realities or even the intent of the constitutional framers, four of the Republican justices John Roberts, Antonin Scalia, Samuel Alito and Anthony Kennedy asked prejudicial what-ifs, the sort that could be applied to discredit virtually any legislation or legal argument.

Basically, they were asking: What if the most extreme and nutty interpretation of every law and ruling were applied mindlessly in every conceivable instance?

Yet, surely, they would not like it if such a goofball approach were applied to their prized rulings, like the 2010 *Citizens United* case which opened the floodgates for billionaires to spend whatever they wished for negative ads to tilt elections. What if one person possessed all the money in the United States and bought up every minute of advertising time on every TV and radio station? What then?

And what if the Republican logic in *Bush v. Gore* that all states had to have equal voting standards and machinery in every precinct were applied to all elections? Then virtually every elected official in the United States would be in office illegally and thus every law ever passed in the United States must be thrown out, possibly along with the justices of the Supreme Court who are nominated by the President and confirmed by the Senate. Gee, what if?

Naturally, that would be crazy talk, but really no crazier than the notion that Congress and the President would willy-nilly enact legislation requiring everyone to eat broccoli. That is reminiscent of the old right-wing canard that granting equal rights to women would force unisex bathrooms.

The one Republican justice who didn't ask silly questions was Clarence Thomas,

who as usual sat silently during the oral arguments. But his no vote on the law is considered a sure thing, since his wife has been out publicly rallying opposition.

It was Chief Justice Roberts who suggested that the government might require Americans to buy cellphones to be ready for emergencies. Alito asked about forcing people to buy burial insurance.

Scalia tossed in the notion of the government requiring Americans to buy broccoli or automobiles. “If the government can do this,” Scalia asked, “what else can it not do?”

“Can you create commerce in order to regulate it?” Kennedy asked. (Okay, it was my idea to throw in the funny hats and clown noses.)

U.S. Solicitor General Donald B. Verrilli Jr. tried to answer the silly questions by making the obvious point that enacting the insurance mandate would not open the door to these other notions because healthcare is a unique product, one that virtually every American will need in his or her lifetime.

“Virtually everyone in society is in this market,” Verrilli said, noting that if someone without health insurance gets sick the costs are transferred to everyone else. To prevent that a burden equal to about $1,000 per American family the Obama administration has argued that Congress was within its rights to establish a system for regulating health insurance including the individual mandate.

But Verrilli’s reasonable responses didn’t stop the Republican justices from behaving like pundit-wannabes eager for a slot on Fox News.

There is, of course, the possibility that the Republicans were just showing off, giving Verrilli a hard time for the benefit of the Tea Partiers. It is true that in past cases, Roberts, Scalia and Kennedy have supported the federal government’s broad authority in regulating commerce.

And, sometimes, the justices don’t always vote in line with their public questioning. But it would seem odd for the Republican justices to ask their loony hypothetical questions in what looked like a bid to create public support for rejecting the individual mandate and then disappoint their right-wing constituency by upholding it.

[For more on the Court’s health-care debate, see Consortiumnews.com’s “Are the GOP Justices Political Hacks?’]

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.**

Are the GOP Justices Political Hacks?

Exclusive: The "Obamacare" debate will test whether the U.S. Supreme Court's five Republican justices are political hacks. After all, a right-wing think tank devised the individual mandate, which was embraced by GOP front-runner Mitt Romney, but it's now anathema because it was passed by a Democratic president, Robert Parry writes.

By Robert Parry

Does anyone doubt that if a Republican president had enacted the Affordable Care Act with its individual mandate devised by the right-wing Heritage Foundation and with Mitt Romney denouncing "free riders" not paying their share of health care costs the U.S. Supreme Court's Republican majority would be lining up to declare it constitutional?

Indeed, if the Heritage Foundation, which did dream up the individual mandate, were submitting supportive friend-of-the-court briefs instead of denouncing its own idea and if Romney were still deriding those "free riders" who palm off the costs for their emergency health care on others, the odds would be that the Court would vote overwhelmingly for the constitutionality of the health reform law.

After all, the Commerce Clause upon which the Affordable Care Act is based represents a virtually unlimited authority for Congress to enact laws to regulate interstate commerce, a power which can require individuals and companies to either do something or not do something.

For instance, in a Nov. 8, 2011, legal opinion affirming the constitutionality of the Affordable Care Act, conservative U.S. Appeals Court senior judge Laurence Silberman recognized this legal reality (even though he might not politically like "Obamacare").

Silberman, an appointee of President Ronald Reagan but a serious constitutional scholar, explained how the law including its most controversial feature, the individual mandate requiring the purchase of health insurance coverage fits with

the Commerce Clause.

“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).

“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.

Silberman’s last point bears repeating: There is “no textual support” in the Constitution for people challenging the Affordable Care Act’s individual mandate.

So, for “strict constructionists” as the Republican justices claim to be it would seem to be a simple case. The Constitution grants Congress the power to regulate interstate commerce; health insurance has a substantial impact on interstate commerce; ergo, a legally enacted congressional statute regulating the sale and purchase of health insurance fits within the Constitution.

However, almost no one expects the bloc of five partisan Republicans to abide by their purported principles of judicial restraint and strict construction when the Affordable Care Act is debated before them this week. The reason for that skepticism is the recent history of these justices making a mockery of their judicial philosophies when they collide with GOP partisan needs.

Hitting Obama

And, even though the individual mandate was initially a conservative Republican idea an alternative to Democratic plans that would have required employer-supplied insurance or a single-payer system run by the government the GOP and the conservative movement have now turned against their own concept *en masse*. Not a single Republican voted for “Obamacare.”

Therefore, at least some of the five Republicans John Roberts, Antonin Scalia, Clarence Thomas, Samuel Alito and Anthony Kennedy are expected to find some legal argument that they can use as judicial cover to strike a blow at the

Democratic president, Barack Obama.

To do that in essence to overturn the legal reasoning of Appeals Court Judge Silberman the GOP justices will have to intuit some unstated right in the Constitution on behalf of Americans who simply don't want to buy health insurance.

Such creative legal reasoning is exactly what the right-wing justices typically condemn. After all, the phrase "strict construction" is supposed to mean following the precise language of the Constitution and not "legislating from the bench." But it is already clear that some of the Republican justices, such as Clarence Thomas whose wife is publicly campaigning against the law, will find whatever excuse is necessary to vote no.

For anyone who thinks that such a suspicion is overly cynical, you should think back on the unprincipled behavior of Justice Scalia, who was a prime mover in the U.S. Supreme Court shutting down a Florida state recount of the presidential vote in 2000 with the explicit intent of protecting George W. Bush's "legitimacy" once the Court decided to hand him the White House.

In *Bush v. Gore*, Republican partisans on the Court, then including Chief Justice William Rehnquist and Justice Sandra Day O'Connor (who was considering retirement to care for her ailing husband), assembled a 5-4 majority on the key issue of rejecting the Florida recount standards and preventing them from being fixed.

It didn't seem to matter that the Court's intervention violated many of the supposed principles that the justices claimed to embrace, such as judicial restraint, respect for state privileges and refusal to divine meanings in constitutional provisions not explicitly stated by the Framers.

The five GOP partisans applied the 14th Amendment's requirement of "equal protection" under the law, essentially turning this important post-Civil War principle on its head. After all, the recount was an effort to recover legitimate ballots cast on antiquated voting machines mostly by poor and minority citizens while voters from richer and whiter precincts had their ballots counted in a higher proportion on state-of-the-art equipment.

But the GOP Five didn't mind perverting the 14th Amendment because they were looking toward a political higher cause: an excuse to "elect" Bush and thus give him the power to appoint future federal judges. What really mattered was continued Republican control of the Supreme Court, so the Constitution was treated as a malleable weapon for partisan purposes.

Scalia's Turnabout

Though O'Connor may have had the most pressing concern about Bush's appointment power so she could leave her seat to another Republican the hypocrisy was perhaps most striking for Justice Scalia, an advocate for an "originalist" interpretation of the Constitution, i.e. that the courts must follow the original intent of the Founders or those who approved constitutional amendments.

Thus, Scalia has argued that the 14th Amendment could only apply to black males because in 1868, when the amendment was passed, it was intended to grant full citizenship to black males who were recently freed from slavery.

However, the amendment's language is much broader. It states: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

During the 20th Century, courts increasingly interpreted the clear wording to guarantee fairness for women, gays and other people facing legal discrimination. However, Scalia has ridiculed such rulings as violating the "original intent."

"In 1868, when the 39th Congress was debating and ultimately proposing the 14th Amendment, I don't think anybody would have thought that equal protection applied to sex discrimination, or certainly not to sexual orientation," Scalia said in an interview with the legal magazine *California Lawyer*. "So does that mean that we've gone off in error by applying the 14th Amendment to both? Yes, yes. Sorry, to tell you that."

However, if the "original intent" of the amendment's drafters was so determinative that the 14th Amendment supposedly was only meant to apply to black men at the end of slavery it might be safe to assume that the drafters weren't thinking about protecting a white plutocrat like George W. Bush from possibly losing an election in Florida in 2000.

Yet, the 14th Amendment was precisely what Scalia and four other partisan Republicans on the Supreme Court cited to justify shutting down the Florida recount and handing the White House to Bush, despite the fact that he lost the national popular vote and apparently would have come out on the short end of the Florida recount if all legally cast ballots were counted.

In other words, Scalia and other right-wing justices operate with a situational ethic when it comes to "originalism" and "strict construction." If their partisan and ideological interests require the abandoning of those precepts, the principles are unceremoniously dumped overboard.

No Politics?

Of course, after the Court's *Bush v. Gore* ruling – and Al Gore's gracious-but-pained concession speech the next day – Justice Thomas insisted that politics played "zero" role in the court's decisions. Later, asked whether Thomas's assessment was accurate, then-Chief Justice Rehnquist answered, "Absolutely."

In later comments about the Court's role in the case, Rehnquist seemed unfazed by the inconsistency of the Court's logic. His overriding rationale seemed to be that he viewed Bush's election as good for the country whether most voters thought so or not.

In a speech on Jan. 7, 2001, Rehnquist said sometimes the U.S. Supreme Court needed to intervene in politics to extricate the nation from a crisis. His remarks were made in the context of the Hayes-Tilden race in 1876, when another popular vote loser, Rutherford B. Hayes, was awarded the presidency after justices participated in a special election commission.

"The political processes of the country had worked, admittedly in a rather unusual way, to avoid a serious crisis," Rehnquist said. Scholars interpreted Rehnquist's remarks as shedding light on his thinking during the *Bush v. Gore* case as well. [For more details, see Consortiumnews.com's "So Bush Did Steal the White House" or the book, *Neck Deep*.]

A thankful Bush then used his authority over appointment of federal judges to further stack the Judiciary with right-wing ideologues, including later replacing Chief Justice Rehnquist with John Roberts and Sandra Day O'Connor with Samuel Alito.

So, with the presidential appointment power at stake again in 2012, the current Republican bloc of Roberts, Scalia, Thomas, Alito and Kennedy can be expected to be tempted once more with not just legislating from the bench but trying to tilt the political balance to the GOP.

For instance, their 2010 ruling on the *Citizens United* case allowing billionaires to pour unlimited money into negative campaign commercials was viewed as an advantage to Republicans and was condemned by Obama. Now, the same justices have a chance to deliver a body blow to the President who spent enormous political capital pushing through the Affordable Care Act.

Since many Americans still view the Supreme Court as the impartial arbiter of what's legal, they are likely to react to a judgment striking down "Obamacare" as reinforcement of the belief that Obama had wasted a year of the country's time getting the law passed.

Extracting a New Right

The expectation on the Right is that the five GOP justices will extract from the Tenth Amendment some previously unidentified “right” of a citizen not to have to submit to the broad congressional power embedded in the Commerce Clause.

On its face, the Tenth Amendment would seem to be irrelevant to the issue since it simply reserves for the states and individuals “the powers not delegated to the United States by the Constitution.” Because the Constitution does grant Congress power to regulate interstate commerce, the five Republicans would have to first conclude that the Commerce Clause does not cover regulation of the health insurance market despite its obvious significance to interstate commerce.

As Solicitor General Donald B. Verrilli Jr. noted in the U.S. government’s court brief, uninsured Americans consumed about $116 billion in health-care services in 2008, meaning that those costs were either paid by health providers or passed on in higher premiums to other consumers, adding up to about $1,000 per family.

Given this undeniable impact on national commerce by uninsured Americans, the only serious legal issue remaining would seem to relate to the novelty of the solution, i.e. the individual mandate. Judge Silberman’s ruling also addressed that point, concluding again that the law appeared to fall within constitutional precedents.

“Today, the only recognized limitations are that (1) Congress may not regulate non-*economic* behavior based solely on an attenuated link to interstate commerce, and (2) Congress may not regulate intrastate economic behavior if its aggregate impact on interstate commerce is negligible,” Silberman wrote.

Neither limitation applied to the health-care law, Silberman noted, because medical insurance was clearly an economic activity and surely had sizable interstate implications.

As for the claim that people had a constitutional right not to participate in the purchase of health insurance, Silberman was not persuaded. For instance, he cited a Supreme Court precedent that a farmer who wished to raise wheat for his own consumption could still face federal restrictions because his production (and that of other likeminded farmers) could affect the overall supply of wheat and thus undermine federal policy regarding the wheat market.

Congressional Powers

Silberman also recognized Congress’s power to address difficult national problems, like the tens of millions of Americans who lack health insurance but whose eventual use of medical services would inevitably shift billions of dollars in costs onto Americans who must pay higher insurance rates as a result, what courts have described as “substantial effects.”

“The shift to the ‘substantial effects’ doctrine in the early twentieth century recognized the reality that national economic problems are often the result of millions of individuals engaging in behavior that, in isolation, is seemingly unrelated to interstate commerce,” Silberman wrote.

“Its very premise is that the magnitude of any one individual’s actions is irrelevant; the only thing that matters is whether the national problem Congress has identified is one that substantially affects interstate commerce.

“It is irrelevant that an indeterminate number of healthy, uninsured persons will never consume health care, and will therefore never affect the interstate market. Broad regulation is an inherent feature of Congress’s constitutional authority in this area; to regulate complex, nationwide economic problems is to necessarily deal in generalities.

“Congress reasonably determined that as a *class*, the uninsured create market failures; thus, the lack of harm attributable to any particular uninsured individual, like their lack of overt participation in a market, is of no consequence.”

Silberman wrote that “Congress, which would, in our minds, clearly have the power to impose insurance purchase conditions on persons who appeared at a hospital for medical services as rather useless as that would be is merely imposing the mandate in reasonable anticipation of virtually inevitable future transactions in interstate commerce.”

He noted that since those challenging the health-care law “cannot find real support for their proposed rule in either the text of the Constitution or Supreme Court precedent, they emphasize both the novelty of the [individual] mandate and the lack of a limiting principle,” i.e. some example of when the government could not require citizens to purchase a specific product.

Silberman acknowledged that “the Supreme Court occasionally has treated a particular legislative device’s lack of historical pedigree as evidence that the device may exceed Congress’s constitutional bounds,” but added that “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.”

Silberman also addressed the core political objection to the health-reform law, its supposed intrusion on individual liberty. He wrote: “That a direct requirement for most Americans to purchase any product or service seems an intrusive exercise of legislative power surely explains why Congress has not used this authority before but that seems to us a political judgment rather than a recognition of constitutional limitations.”

He added: “It certainly is an encroachment on individual liberty, but it is no more so than a command that restaurants or hotels are obliged to serve all customers regardless of race, that gravely ill individuals cannot use a substance their doctors described as the only effective palliative for excruciating pain, or that a farmer cannot grow enough wheat to support his own family.

“The right to be free from federal regulation is not absolute, and yields to the imperative that Congress be free to forge national solutions to national problems, no matter how local or seemingly passive their individual origins.”

So, even a very conservative legal scholar examining the Constitution and precedents could not find a convincing argument to overturn “Obamacare” and that is because the Founders intentionally and broadly empowered Congress to address national economic problems through the Commerce Clause.

Among the principal advocates of the Commerce Clause were James Madison, the architect of the Constitution, and George Washington, who presided over the Constitutional Convention in Philadelphia in 1787. [See Consortiumnews.com’s “Madison: Father of the Commerce Clause.”]

Partisan Agenda

But it appears that constitutional principles will have less to do with how the Republican partisans on the Supreme Court rule than the perceived need to advance an ideological and political agenda.

These opponents of the health-care law surely will muster some impressive “lawyering” with lots of high-brow references to various articles and clauses just as they did in the *Bush v. Gore* ruling. But that will mostly be window-dressing to impress those who still believe in the integrity of this Supreme Court.

Of course, it is still possible that one or more of the Republican partisans will overlook their political loyalty to the GOP and their ideological commitment to the anti-government Right and agree with Judge Silberman that the Affordable Care Act is constitutional.

Such a justice might even think back on how the individual mandate began as a right-wing idea and thus refuse to behave as a political hack who simply switches constitutional principles based on whose name is associated with a law.

For instance, here is a Q and A by the magazine, *This Week*:

“Who first proposed making health insurance compulsory?

“The Heritage Foundation, a conservative think tank. In the late 1980s, when Democrats were pushing to require employers to provide health insurance, the foundation started thinking about ways to achieve universal coverage without placing a heavy burden on business. Its experts soon encountered the ‘free rider’ problem: In a system where insurers are barred from refusing applicants with pre-existing conditions, many people, especially the young and healthy, would only buy a policy when illness struck.

“But if only sick people bought coverage, insurers would pay out more in doctors’ bills than they received in premiums, and quickly go bust. To overcome this death spiral, the Heritage Foundation suggested that every American be required to buy health insurance, a requirement known as the individual mandate.

“Which politicians took up that idea?

“Many Republicans did in the early 1990s, after President [Bill] Clinton introduced a plan that would have forced companies to cover employees. ‘I am for people, individuals, exactly like automobile insurance, having health insurance and being required to have health insurance,’ said Newt Gingrich, then House minority whip, in 1993.

“When the Clinton plan collapsed in 1994, talk of the individual mandate died with it. But a decade later, Mitt Romney, then the governor of Massachusetts, resurrected the concept for his state health-care plan, which requires residents to buy health insurance or pay up to $1,212 in annual penalties.

“‘It’s a Republican way of reforming the market,’ Romney said when the law debuted, in 2006. ‘[To have] people show up [at a hospital] when they get sick, and expect someone else to pay, that’s a Democratic approach.’”

During Campaign 2008, Obama opposed the idea of an individual mandate while Hillary Clinton supported it. After taking office, Obama changed his mind because he judged that adopting the Republican approach was the only way to win passage of a health-care bill. He also favored a “public option” as an alternative to private insurance.

However, with every Republican now voting against health reform, Obama had to jettison the “public option” to secure the 60 votes needed in the Senate to stop a GOP filibuster. When the bill was signed into law two years ago, Republican state officials immediately began filing legal challenges and the Right rallied Tea Partiers and other Americans against the law’s supposed intrusion on their “liberties.”

It quickly became an article of faith on the Right that the law was “unconstitutional.” However, the law will likely only be judged so if the five

Republican justices do what a similar bloc of GOP justices did in December 2000 put their political interests ahead of the law.

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.

Ron Paul's False Founding Narrative

Exclusive: Rep. Ron Paul and other right-wingers have lured many average Americans into their camp by creating a false narrative about America's Founding, claiming that the drafters of the Constitution wanted a weak central government. But that's not the real history, Robert Parry writes.

By Robert Parry

Ron Paul, the libertarian congressman from Texas who has topped 20 percent in the first two Republican contests, is fond of claiming that the U.S. Constitution was written "to protect your liberty and to restrain the federal government," thus making modern laws – from Social Security, to civil rights statutes, to health-care reform – unconstitutional. But that isn't really true.

While the framers of the Constitution in 1787 undeniably cared about liberty at least for white men they were also practical individuals who wanted a vibrant central government that would enable the new nation to protect itself both militarily and economically, especially against European rivals.

The broad powers that the Constitution granted Congress were designed to let this central government address national problems that existed then as well as others that would arise in the future. For instance, the Constitution gave control over interstate commerce to Congress in order to counter economic advantages enjoyed by foreign competitors.

Far from Paul's assertions that the Founders wanted a weak central government, the Founders at least those at the Constitutional Convention in Philadelphia understood that a great danger came from having a national authority that was too weak, what they had experienced under the Articles of Confederation, which governed the nation from 1777 to 1787.

The Articles of Confederation embraced the concept of state “sovereignty” and called the United States not a government or even a nation, but “a firm league of friendship” among the states. The Confederation’s Article II declared: “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated.” And very few powers were delegated to the federal government.

The result had been severe problems for the young country, ranging from the failure of states to make voluntary contributions in support of the Continental Army to opening regional divisions that foreign rivals could exploit.

So, in 1787, the framers of the Constitution – led by Gen. George Washington, James Madison and others in the Virginia delegation – scrapped the Articles and put forward a very different plan, eliminating state sovereignty and creating a strong central government with broad powers, including control over “interstate commerce.”

The Commerce Clause wasn’t some afterthought, either. It was part of the original proposal outlined on the Constitutional Convention’s first day of substantive business on May 29, 1787. The Virginia delegation had one of its members, Edmund Randolph, include it in his opening presentation.

Virginia’s plan laid out the framework that would later become the U.S. Constitution, transferring sovereignty from the 13 original states to “we the people of the United States” as represented by a new national Republic.

Economic Strategies

Beyond giving the central government authority over the common defense, foreign policy and currency – as well as its own taxing power – the Founders also recognized the need to coordinate American commerce so it could compete effectively with Europe and other nations around the world.

James Madison’s convention notes on Randolph’s presentation recount him 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 taking 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 summarized Randolph's point in his teaching materials as saying "we needed a government that could co-ordinate commerce in order to compete effectively with other nations." So, from that first day of substantive debate at the Constitutional Convention, the Founders recognized that a legitimate role of Congress was to ensure that the nation could match up against other countries economically.

Though the likes of Ron Paul have worked hard in recent decades at constructing an alternative narrative claiming that the Founders envisioned a weak national government and were big supporters of states' rights that storyline is simply not supported by the history. Key framers of the Constitution even objected to adding a Bill of Rights to the original document, accepting the first 10 amendments only later as part of negotiations over ratification.

Yet, on Tuesday, celebrating his second-place finish in the New Hampshire primary, Paul told his cheering supporters that "the Constitution was written for a very precise manner. It was not designed to restrain the individual – not to restrain you – it was to protect your liberties and to restrain the federal government."

But that simply is a distortion of what the framers were up to. And for right-wingers who cite the Tenth Amendment as supposed support for their position, they should read the amendment's weak language on states' rights compared to what it replaced, Article II of the Articles of Confederation, which established the supremacy of the states.

After the Constitution wiped away the sovereignty of the states and established the supremacy of the federal government, the Tenth Amendment amounted to a minor concession to the anti-federalists, giving the states only ill-defined leftover powers.

Endorsing Obamacare

The Right's revisionist version of the nation's Founding isn't even accepted by serious conservative legal scholars, including one of the most right-wing members of the U.S. judiciary, senior Judge Laurence Silberman who was appointed to the influential U.S. Court of Appeals in Washington by President Ronald Reagan.

On Nov. 8, 2011, Silberman issued a ruling supporting the constitutionality of the Affordable Care Act, often called "Obamacare." In it, Silberman explained how the law and even its most controversial feature, the individual mandate requiring the purchase of health insurance coverage fit within the language of the Commerce Clause and within prior legal precedents.

“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).

“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.

Silberman’s opinion also examined decades of Supreme Court precedents that affirmed the power of Congress to establish regulations over various national markets.

“Today, the only recognized limitations are that (1) Congress may not regulate non-*economic* behavior based solely on an attenuated link to interstate commerce, and (2) Congress may not regulate intrastate economic behavior if its aggregate impact on interstate commerce is negligible,” Silberman wrote.

Neither limitation applied to the health-care law, Silberman noted, because medical insurance was clearly an economic activity and surely had sizable interstate implications.

As for the claim that people had a constitutional right not to participate in the purchase of health insurance, Silberman was not persuaded. For instance, he cited a Supreme Court precedent that a farmer who wished to raise wheat for his own consumption could still face federal restrictions because his production (and that of other likeminded farmers) could affect the overall supply of wheat and thus undermine federal policy regarding the wheat market.

Addressing National Problems

Silberman also recognized Congress’s power to address difficult national problems, like the tens of millions of Americans who lack health insurance but whose eventual use of medical services would inevitably shift billions of dollars in costs onto Americans who must pay higher insurance rates as a result, what courts have described as “substantial effects.”

“The shift to the ‘substantial effects’ doctrine in the early twentieth century

recognized the reality that national economic problems are often the result of millions of individuals engaging in behavior that, in isolation, is seemingly unrelated to interstate commerce," Silberman wrote.

"Its very premise is that the magnitude of any one individual's actions is irrelevant; the only thing that matters is whether the national problem Congress has identified is one that substantially affects interstate commerce.

"It is irrelevant that an indeterminate number of healthy, uninsured persons will never consume health care, and will therefore never affect the interstate market. Broad regulation is an inherent feature of Congress's constitutional authority in this area; to regulate complex, nationwide economic problems is to necessarily deal in generalities.

"Congress reasonably determined that as a *class*, the uninsured create market failures; thus, the lack of harm attributable to any particular uninsured individual, like their lack of overt participation in a market, is of no consequence."

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Silberman also addressed the core political objection to the health-reform law, its supposed intrusion on individual liberty. He wrote: "That a direct requirement for most Americans to purchase any product or service seems an intrusive exercise of legislative power surely explains why Congress has not used this authority before but that seems to us a political judgment rather than a recognition of constitutional limitations."

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more so than a command that restaurants or hotels are obliged to serve all customers regardless of race, that gravely ill individuals cannot use a substance their doctors described as the only effective palliative for excruciating pain, or that a farmer cannot grow enough wheat to support his own family.

“The right to be free from federal regulation is not absolute, and yields to the imperative that Congress be free to forge national solutions to national problems, no matter how local or seemingly passive their individual origins.”

Politicized Rulings

So, even a very conservative legal scholar examining the Constitution and precedents could not find a convincing argument to overturn “Obamacare” and that is because the Founders intentionally empowered Congress to address national economic problems. It was, as the Virginian delegation understood, one of the key reasons for the Constitutional Convention.

That does not mean, of course, that the partisan Republicans who currently control the U.S. Supreme Court might not overturn health-care reform anyway, to deal a blow to Obama right before Election 2012.

Some of the Republican justices have shown before that they would twist the law for partisan ends, such as in December 2000 when they invoked the 14th Amendment to stop the counting of votes in Florida and thus hand the White House to their political favorite, George W. Bush.

It didn’t matter that these Republican justices were turning their backs on their prior support for states’ rights and their insistence on only following the “originalist” intent of those who wrote the Constitution and the amendments. What was at stake in Election 2000 was more important to them who would get to fill vacancies on the federal courts.

Thus, Republican justices William Rehnquist, Antonin Scalia, Clarence Thomas, Anthony Kennedy and Sandra Day O’Connor suddenly saw in the “equal protection clause” of the 14th Amendment an “originalist” intent by its post-Civil War authors to shield a white plutocrat like George W. Bush from variations in ballot standards in Florida.

That was especially odd for Scalia, who has argued forcefully that the 14th Amendment despite its language that no state shall “deny to any person within its jurisdiction the equal protection of the laws” does not protect the rights of women or gays because it was originally written to guarantee only the rights of black males.

However, when the power of the presidency was at stake and the possibility loomed that a Democratic president might make appointments that would leave the court's right-wing faction in the minority Scalia had a remarkable change of heart. [For details, see Consortiumnews.com's "Justice Scalia's 'Originalist' Hypocrisy."]

It is one of the dirty secrets of the U.S. system that ultimately the Constitution means whatever a majority of the current justices on the Supreme Court says it means. Ideally, the court would be filled with honorable people who would put the law ahead of partisan interests, but that does not appear to be the current makeup of the court's majority.

So, it would not be surprising if the court's right-wing majority would overturn Judge Silberman's opinion even though it is based on a fair reading of the Constitution and the powers that the Founders granted to Congress. A chance to damage Obama's reelection hopes might prove too tempting.

After all, the larger goal of the American Right is not to uphold the ideals of the Founders, who wanted a vibrant central government, but to reverse government policies dating back to President Franklin Roosevelt's New Deal. The plan is to return the United States to a pre-Depression "gilded age" of a society divided into a few haves and many have-nots.

The Right is engaged in an ideological war with the intent of making the rich richer and marginalizing the rest of us. Creating a false narrative about the American Founding is just a convenient way to get some ill-informed Tea Party types to vote against their own interests.

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.

The Real Scandal of US Justice

Right-wing judges now dominate the American legal system, from the state level

where corporate donations help elect them to the U.S. Supreme Court where ideologues tip the scales in favor of big business. To Michael Winship, that's the true scandal in the administration of justice, not a few high-profile instances where juries make unpopular rulings.

By Michael Winship

July 13, 2011

Last week, an HBO film crew was in my Manhattan neighborhood shooting a movie about legendary record producer Phil Spector, now serving 19 years to life for the 2003 shooting death of actress Lana Clarkson.

The film, starring Al Pacino, already has stirred controversy because its writer-director, David Mamet, recently said he believes Spector wasn't guilty.

"I definitely think there is reasonable doubt," he told the *Financial Times*. "They should never have sent him away. Whether he did it or not, we'll never know but if he'd just been a regular citizen, they never would have indicted him."

His remarks generated an outraged letter from a group calling itself the Friends of Lana Clarkson that began, "This film may be a valentine for a convicted murderer and 40-year gun abuser."

It continued, "We are requesting that Mr. Mamet have the good sense and courtesy to write a factual and entertaining film concerning the facts. He does not need to rewrite history so soon. It will backfire on him."

Of course, their anger can't hold a patch to the rage of those millions furious over the not guilty verdict in the trial of Casey Anthony for the murder of her baby daughter Caylee.

But whether you believe Spector didn't do it or Casey Anthony did, the bottom line is the same: it's your opinion, you're welcome to it, and that's as far as it goes.

Rather than yield to passions whipped up by media and mob hysteria, it finally was up to a jury of men and women to presume innocence until otherwise proven beyond reasonable doubt – to hear the testimony, look at the evidence or lack thereof – and then make a decision.

In the matter of Casey Anthony's acquittal, "Some credit a wily defense team," the superb *Detroit Free Press* columnist Brian Dickerson wrote. "Others blame prosecutors for miscues real and imagined. Or maybe jurors simply took their job seriously and refused to make the extra-legal leap of faith demanded by those in

the bleacher seats."

Admittedly, I didn't follow the Anthony trial that closely (or the Spector case for that matter) until the very end. But I do know that jurors who sit for the length of a trial usually have a more thorough perspective than any outside observer, no matter how expert or camera ready.

I've served on juries, grand and otherwise, including, several years ago, one that heard a medical malpractice suit. It went on for weeks.

What was fascinating about the process was that at the beginning of the trial, all of us were completely convinced that the doctor in the case was guilty as hell. By the end, after all the evidence and witnesses had been presented, and the arguments made, we had completely changed our minds and the jurors (I was an alternate and could not vote) cleared him of all charges.

Like it or not, that's how we proceed in a democracy and for the most part it's worked pretty well.

In the words of attorney and journalist Jami Floyd, "Our constitution balances the tension between the public's desire for retribution against the greater societal goal of justice. The trial is the defendant shield against the societal sword of revenge."

If you have a better system, kindly tell the rest of us.

"Facts are stubborn things," John Adams famously argued when he successfully defended the British soldiers accused in the 1770 Boston Massacre, "and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence."

And yet on "Fox News Sunday" this week, there was Senate Minority Leader Mitch McConnell, who should know better, using the Anthony case as an example of why terrorists should not be tried by civilian courts.

"We just found with the Caylee Anthony case how difficult it is to get a conviction in a U.S. court," he declared.

Never mind that the Anthony trial was a state case in Florida and terrorists are tried in federal courts, nor that, as the website *Talking Points Memo* pointed out, "According to the federal data, federal prosecutors had an overall 93 percent conviction rate in fiscal year 2010."

McConnell simply was pandering to a base increasingly distrustful of civilian government and pissed off about pretty much everything else as well.

When aimed at juries, that anger is especially misdirected. Don't be mad at the jurors — they did their job. Better and perhaps even more productive to level your roiled ire at judges whose objectivity increasingly is compromised by ideology, politics and cash.

On the state level, with more than 80 percent of judges in this country elected and money, much of it corporate donations pouring into their campaigns — $200.4 million in the last decade — jurists, whether they admit it or not, are under constant pressure to favor their benefactors.

And on the federal level, take a look, for one, at the United States Court of Appeals for the Fifth Circuit, covering Texas, Louisiana and Mississippi, described by the progressive website *ThinkProgress* as "probably the most conservative court in the country."

Among its 16 active judges, "Emilio Garza and Edith Clement were both on President George W. Bush's 'short list' of potential Supreme Court nominees, and Clement serves on the board of the leading organization providing industry-funded junkets for judges.

"Garza, who recently suggested that undocumented immigrants have no right to be free from illegal searches and seizures, is best known as one of five Fifth Circuit judges who held that a death row defendant whose lawyer slept through much of his trial was not denied his constitutional right to counsel…

"[Judge] Priscilla Owen took thousands of dollars worth of campaign contributions from Enron and then wrote a key opinion reducing Enron's taxes by $15 million when she sat on the Texas Supreme Court."

These, by the way, are the three who ruled last year that a high school cheerleader had no case against her school when it required that she cheer for her alleged rapist and then ordered her to pay the school district's more than $40,000 in legal fees.

It was also last year, *ThinkProgress* reports, that the Fifth Circuit "had to dismiss a case brought by Katrina victims against the energy industry because so many judges were required to recuse themselves that there weren't enough judges left to hear an appeal.

"More recently, two Fifth Circuit judges, Jerry Smith and Eugene Davis, ruled in favor of the oil industry in a major drilling moratorium case, despite the fact that they both attended expense-paid 'junkets for judges' sponsored by an oil-industry funded organization.

"As of last year, a majority of the court's active judges had oil investments,

even though their court is frequently called upon to resolve questions involving the oil industry." (One subsequently divested herself of up to $15,000 n BP stock, several weeks after the Deepwater Horizon disaster.)

In May, none of this gave House Republicans the slightest pause when they included in the "Putting the Gulf Back to Work Act" a provision requiring that civil lawsuits arising from drilling in the Gulf must be heard in, you guessed it, the Fifth Circuit.

But at least federal judges are supposed to be bound by a code of conduct. On the United States Supreme Court, adherence to the code is merely voluntary, flouted by Justice Clarence Thomas, whose conflicts of interest, along with his wife's, have been widely reported; and Justices Scalia and Alioto, who have shown up at political events.

"The court cannot maintain its legitimacy as guardian of the rule of law when justices behave like politicians," the July 1 *New York Times* editorialized. "Yet, in several instances, justices acted in ways that weakened the court's reputation for being independent and impartial…

"Among the court's 82 rulings this term, 16 were 5-to-4 decisions. Of those, 10 were split along ideological lines, with Justice Anthony Kennedy supplying the fifth conservative vote. These rulings reveal the court's fundamental inclination to the right, with the conservative majority further expanding the ability of the wealthy to prevail in electoral politics and the prerogatives of businesses against the interests of consumers and workers."

Stanford Law professor Jeffrey L. Fisher told the *Times*, "This is a court that is, oddly enough, very suspicious of the courts as a place to vindicate rights. The hostility is amped up when it's a civil-rights-type claim."

Next session, many say, could be "the term of the century." With possible major decisions on affirmative action, same-sex marriage, immigration and health care reform, the devastating impact of this right-leaning, ideological court may only get worse.

So if you want to get mad about something, get mad about *that*.

Michael Winship is senior writing fellow at Demos, president of the Writers Guild of America, East and former senior writer at "Bill Moyers Journal" on PBS.