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Supreme Court's legitimacy at stake on Affordable Care Act

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Even before the Supreme Court delivers its decision about the Affordable Care Act, which is expected Thursday, there is already a sharply divided legal — and political — debate about the role of the court.

Some observers, such as Akhil Reed Amar, a leading legal scholar who has devoted his career to a close read of the Constitution, have said that their life's work would be called into question if the court strikes down the law. Commenting to Ezra Klein at The Washington Post about the impending ruling, Amar [said](#) "if they decide it by 5-4, then yes, it's disheartening to me, because my life was a fraud." It shows, he said that the law doesn't really matter. "What mattered," Amar said, "was politics, money, party and party loyalty."

Others, however, shrug their shoulders, scoffing that it's always been just about politics. Some cynics always doubt the court's good faith. Health care law opponents, meanwhile, have swiftly and aggressively accused anyone who questions the justices' commitment to the rule of law over partisan ideology of playing politics by even suggesting that policy preference could be behind a ruling that strikes down the act.

Is it illegitimate to question the court's legitimacy if it strikes down the reform? Is it wrong to hold Supreme Court justices to their duty to apply the clear text and history of the Constitution as well as the court's precedents — including opinions of sitting justices just a few years ago — rather than expect their decisions to be based on [tea party talking points](#) and partisan affiliation? If it is, then I don't want to be right.

There are serious, legitimate critiques to be made if Chief Justice John Roberts and Justices Antonin Scalia and Anthony Kennedy, in particular, join a ruling that strikes down the ACA.

Kennedy and Scalia, for example, both [voted to uphold](#) a federal ban on possession of marijuana grown under local law for personal medicinal use because the ban was part of broader regulation of interstate commerce, in the 2005 decision *Gonzales v. Raich*. ACA opponents distinguish this case from health care reform by saying the individual mandate is not constitutionally "proper."

But as Judge Jeffrey S. Sutton of the 6th Circuit Court of Appeals — a prominent conservative and former Scalia clerk — wrote when he voted last June to uphold the mandate's constitutionality, "if Congress could regulate Angel Raich when she grew marijuana on her property for self-consumption, indeed for self-medication, and if it could do so even when California law prohibited that marijuana from entering any state or national markets, it is difficult to see why Congress may not regulate the 50 million Americans who self-finance their medical care." Based on *Raich*, the mandate *should* be squarely constitutional.

It is also a fact that Roberts, in the 2010 ruling *U.S. v. Comstock*, joined a majority opinion that affirmed the sweeping nature of the Constitution's grant of power to Congress to use any "means that is rationally related to the implementation of a constitutionally enumerated power" in Article I's Necessary and Proper Clause. So long as the challenged regulation is intended to put into effect one of Congress's constitutionally delegated powers — in health care it is the commerce power, in *Comstock* it was the [implied federal power](#) to maintain prisons — and doesn't run afoul of any other provision of the Constitution, it is constitutional.

Because the legal logic behind the ACA's minimum coverage provision is more direct than the chain of reasoning that the court used to uphold *Comstock*, health care reform *should* be an easier case for Roberts than *Comstock*.

On Necessary and Proper Clause grounds alone, then, the *Raich* and *Comstock* rulings — not to mention text and history that demonstrate the Constitution was written and interpreted to delegate broad power to the federal government to provide national solutions to national problems — should make it difficult for conservative justices, including Roberts, Scalia and Kennedy, not to uphold the so-called mandate on similar grounds.

Do these prior rulings mean that these justices have made a [pinky-swear](#) to uphold the Affordable Care Act? Of course not. And the health care law's opponents will undoubtedly dispute the meaning of the Constitution's text or the applicability of precedent.

But the court will be ignoring real and compelling — if not downright inescapable — constitutional logic if it strikes down the act. Despite the inclination among jaded Washingtonians to assume everything is just politics, no one should be shy about holding the justices to their duty to apply precedent, not politics, and constitutional text, not talking points, to the health care challenges. This standard should apply to justices of any and all political stripes in all cases.

It is not illegitimate to say the legitimacy of the judiciary is at stake if the justices fail to uphold their duty to follow the law. It may be naive or "silly," but faith in the Constitution is the touchstone of our justice system — and our country will be better off if Americans can continue to believe in the integrity of the Supreme Court.

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