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Tort reform and the GOP's fair-weather federalism

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In considering a tort reform bill, the Republicans in the House of Representatives are about to violate one of the first promises they made upon taking control. In their "Pledge to America," House Republicans committed to "require every bill to cite its specific Constitutional Authority."

The House rule implementing this pledge requires every bill's sponsor to submit "a statement citing as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution."

Yet there was always an enormous loophole to this commitment: For 70 years, the Supreme Court has "deferred" to Congress' assessment of its powers by adopting a "presumption of constitutionality."

So, if the Supreme Court's precedents defer to Congress' assessments of its powers, but Congress is relying for "constitutional authority" on the Supreme Court's precedents, then NO ONE is actually looking at the Constitution itself to see if a bill is within Congress' enumerated powers. Call this the problem of "double deference," with each branch of government pointing to the other and no one pointing to the Constitution.

Congress is now considering the "Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2011." This bill alters state medical malpractice rules by, for example, placing caps on noneconomic damages.

But tort law -- the body of rules by which persons seek damages for injuries to their person and property -- has always been regulated by states, not the federal government. Tort law is at the heart of what is called the "police power" of states.

What constitutional authority did the supporters of the bill rely upon to justify interfering with state authority in this way? Not their own assessment of the Commerce Clause, which grants Congress the power "to regulate commerce . . . among the several states."

Instead, they relied on a report prepared for it by a law firm, a report based entirely on post-New Deal Supreme Court cases that defer to Congress -- in particular the "Substantial Effects Doctrine."

This Supreme Court doctrine allows Congress to regulate any economic activity in the country that can be said, in the aggregate, to have a "substantial affect" on interstate commerce. This doctrine was unknown before the 1940s, and goes far beyond the original power to regulate trade between states. This is how most of Congress' regulatory power has been justified since then.

Although it is followed even by conservative justices, Justice Clarence Thomas has long criticized the Substantial Effects Doctrine on the ground that it exceeds the original meaning of the Constitution.

"This test, if taken to its logical extreme," he wrote in a concurring opinion in 1995, "would give Congress a 'police power' over all aspects of American life. . . . [T]he power we have accorded Congress has swallowed Art. I, ¤8."

Indeed, if Congress now can regulate tort law, which has always been at the core of state powers, then Congress, and not the states, has a general police power.

This issue concerns constitutional principle, not policy: the fundamental principle that Congress has only limited and enumerated powers, and that Congress should stay within these limits.

While I strongly support reforming our malpractice laws to protect honest doctors from false claims and out-of-control state juries, this reform must come at the state level, as it has in recent years. Constitutional law professors have long cynically ridiculed a "fair-weather federalism" that is abandoned whenever it is inconvenient to someone's policy preferences. If House Republicans ignore their Pledge to America to assess the Constitution themselves, and invade the powers "reserved to the states" as affirmed by the Tenth Amendment, they will prove my colleagues right.

Professor Randy Barnett teaches constitutional law at the Georgetown Law Center and is author of "Restoring the Lost Constitution: The Presumption of Liberty" (Princeton 2005).

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