Court's ruling a 'Frankenstein's Monster'

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(CNN) -- Today's heart-wrenching, baby-splitting Supreme Court decision illegitimately rewrote the Affordable Care Act in order to save it. It's certainly gratifying that a majority on the court rejected the government's dangerous assertion of power to require people to engage in economic activity in order to then regulate that activity.

That vindicates everything that we who have been leading the constitutional challenge have been saying: The government cannot regulate inactivity. It cannot, as Chief Justice John Roberts put it in summarizing his opinion from the bench, regulate mere existence.

Justifying the individual mandate under the taxing power of Congress, however, in no way rehabilitates the government's

constitutional excesses. As Justice Anthony Kennedy said in summarizing his four-justice dissent, "Structure means liberty." If Congress can avoid the Constitution's structural limits simply by "taxing" anything it doesn't like, its power is no more limited than it would be had it done so under the Commerce Clause.

Opinion: Health care victory, but still a long way to go

While imposing new taxes may be politically unpopular and therefore harder to do than creating new regulations, that political check does not obviate constitutional ones -- and in any event, Congress had avoided even that political gauntlet here by explicitly structuring the individual mandate as a commercial regulation.

Nor does the Supreme Court vindicate its constitutional legerdemain by rewriting the Medicaid expansion to tie only new federal funding to an acceptance of burdensome and fundamentally transformative regulations. While correct on its face -- and a good exposition of the spending power and what strings the federal government can attach to its funds -- that analysis is relevant to a hypothetical statute, not the one that Congress actually passed when it passed health care reform legislation.

Opinion: Liberty lost? The Supreme Court punts

Moreover, allowing states to opt out of the new Medicaid regime while leaving the rest of Obamacare in place throws the insurance market into disarray, increases costs to individuals, and gives states a Hobson's choice -- different but no less tragic than the one it previously faced. As Kennedy wrote in dissent, while purporting to apply judicial modesty or restraint, the court's rewriting of the law is anything but restrained or modest.

In short, we have reaped the fruits of two poisonous trees of constitutional jurisprudence: On the one (liberal activist) hand, there are no judicially administrable limits on federal power. On the other (conservative pacifist) one, we must defer to Congress and presume (or construe) its legislation to be constitutional. It is that tired old framework -- with four justices in the former category and one in the latter -- that produced the Frankenstein's Monster of today's ruling.

Gergen: Are voters ready to move on?

What judges should be doing instead is applying the Constitution, no matter whether that leads to upholding or striking down legislation. And a correct application of the Constitution inevitably rests on the Madisonian principles of ordered liberty and limited government that the document embodies.

In any event, the ball now shifts to another court, that of the people -- the ultimate sovereigns who, in ratifying the Constitution, delegated certain limited powers to the federal government. Many have opposed Obamacare all along and it is they who must now decide -- or not -- to rein in the out-of-control government whose unconstitutional actions have taken us to the brink of economic disaster.