

Health care ruling: A strange constitutional win

Randy Barnett

Who would have thought we could win our Commerce Clause challenge while the Affordable Care Act is upheld?

Thursday, the Roberts court vindicated all of our arguments about why the individual insurance mandate exceeded the commerce power: "The individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause," wrote Chief Justice John Roberts. "That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it." Then the court went further to invalidate the health care law's withholding of existing Medicaid funding as coercive, thereby finding an enforceable limit on the Spending Power.

By rewriting the law to make it a "tax," however, the court has now thrown Obamacare into the political process. The people will decide at the ballot box whether this so-called "tax" will stand.

Just as important, the people will decide whether future Supreme Court nominees will pledge to enforce the Constitution's restrictions on the power of Congress. Regardless of whether Roberts switched his vote in response to the enormous pressure brought to bear on him by President Obama, Senate Judiciary Committee Chairman Patrick Leahy, D-Vt., and the entire progressive establishment, future nominees to the Supreme Court must be vetted to ensure they have the character to stand against the intense political pressure to uphold unconstitutional acts of Congress.

Though the ultimate disposition of the case was disappointing, today could become a turning point of constitutional law, so long as the public maintains its current level of interest in the constitutional limits on congressional power that have been affirmed by the court. To see why, we need to step back.

In the early 1930s, a Democratic president and Congress were swept into power to do something about an economic catastrophe. Not letting an economic crisis go to waste, they enacted sweeping legislation that greatly expanded the Commerce power of Congress beyond its constitutional limits as they had been interpreted for 150 years. The court's eventual acquiescence to these new powers have shaped our understanding of federal power ever since.

In 2009, history seemed on its way to repeating. Swept into office during a financial panic, a Democratic president and supermajority Democratic Congress tried using another crisis to achieve the long-standing progressive dream of putting the national government in control of the medical care of all Americans.

The result was quite different this time, though. Instead of reshaping the nation as in the 1930s, Democrats were swept right back out of power in the next election.

The American public wanted action during the Great Depression, and there is little evidence it was much interested in constitutional questions. But in 2009 and 2010, millions demanded a return to our written Constitution with its scheme of limited and enumerated powers. The election of a Congress hostile to President Obama's health care law, and of state officials willing to challenge it in court, has resulted in an epic national constitutional debate and this week's ruling affirming that Commerce and Spending Clause have real limits.

In November, the American people will have the opportunity to renew their commitment to their written Constitution by insisting on a president who will nominate and a Senate who will confirm constitutionally conservative justices who won't wilt under fire -- justices who will hold Congresses of both parties to the limits prescribed in the Constitution.

Constitutional turning points have occurred before in America, and sometimes in cases where the apparently losing side went on to be history's winner. It can happen again. Today is only the beginning.

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