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## In Losing On Obamacare, Barnett Says, Conservatives Won

By: Daniel Fisher – February 21, 2013

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Constitutional scholar Randy Barnett pushed the legal challenge to Obamacare when most legal experts considered it absurd, and he came within one vote of winning it at the U.S. Supreme Court. Then, in what many conservatives consider an act of betrayal, Chief Justice John Roberts voted to uphold the sweeping healthcare reform act. But all is not lost, Barnett says — far from it.

In a provocative article just posted on SSRN, “Who Won the Obamacare Case (and Why Did so Many Law Professors Miss the Boat)“, the Georgetown University Law Center professor acknowledges he lost on the central question of whether Congress can charge citizens a penalty if they don’t buy health insurance. But in upholding the tax penalty, Barnett says, Roberts closed off far more intrusive powers Congress otherwise might have assumed for itself. Roberts firmly rejected the idea that the Commerce Clause gives Congress authority to force citizens to engage in economic behavior, he says. Had the liberals won on that key point, he says, “future Congresses could jack up the amount of the penalty, and add prison time to boot”

Many believed that this would be inevitable because the penalties in the ACA are too low to effectively compel the performance of those who would be willing to violate the legal requirement to purchase insurance. Now, in the absence of any mandate, thousands, if not millions will opt to pay the tax rather than buy insurance, and Congress will be barred from increasing the penalty as it would have had the four liberal justices’ view prevailed.

More importantly, the liberal justices did sign off, without comment, on the part of the opinion where Roberts says the Constitution “protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity,” Barnett says. “Why the liberals concurred in this holding is a matter of the same sort of speculation that attends the Chief Justice’s reported switch in time to save the ACA. But vote for it they did.”

Roberts joined with the liberals to uphold Obamacare by inserting a “saving construction” that essentially rewrote the law in a way that Congress couldn’t, Barnett says. Congressional Democrats — and the President — denied Obamacare was a new tax for political reasons, but Roberts decided the only way to save the law was to transform the requirement to buy health insurance into a mere suggestion.

Under the ACA, those Americans who paid the penalty but did not get health insurance were still outlaws because they disobeyed the “requirement.” Under the Supreme Courts ruling, if you pay the tax, you’re cool with the feds.

Barnett still thinks the decision was “bad law” for two reasons. First, by rewriting Obamacare in a way Congress couldn’t, he says, Roberts reinforced the idea that Congress can write defective laws and count on the Supreme Court to fix them. And the chief justice also ignored the Constitutional requirement that direct taxes be apportioned equally among the states, he says, giving Congress an “unprecedented” new power.

On balance, however, Barnett thinks conservatives won. If Congress tries to amend the law now to add criminal penalties on top of the tax, or make the tax so high it is coercive, he thinks courts will have to strike those laws down. “Would the Supreme Court even grant cert on such a ruling?” he says. “I doubt it.”

And the decision solidifies the doctrine of “New Federalism” that stands on its head the understanding held by most tenured law professors in this nation, which is that the New Deal fundamentally changed the Constitution to grant more powers to the federal government and diminish individual rights over contracts and other economic decisions.

“For better or worse, all the powers that were approved by the New Deal and Warren Courts are now to be taken as constitutional,” Barnett says. “But any claim of additional new powers still needs to be justified. Put another way, the expansion of congressional power authorized by the New Deal and Warren Courts established a new high water mark of constitutional power. Going any higher than this requires special justification.”

A reconstituted Supreme Court could sweep all this away, of course. But for now, Barnett says, the limits on the Commerce Clause and the power of Congress to compel citizens to engage in commerce stand.

***Ilya Shapiro at the Cato Institute has written a similar take for the Texas Review of Law & Politics, concluding: “Those who challenged the law won everything but the case.” It’s also a good summation of what the ruling does and does not say. Shapiro calls the Roberts “saving construction” a “unicorn tax,” and says he got it wrong for “at least ten reasons.” One big one that occurred to me as I was reading the Barnett article: The government can still throw you in jail for not paying the Obamacare tax.***