NATIONAL REVIEW ONLINE

APRIL 4, 2012 12:00 A.M.

Conservatives and the Courts

Striking down Obamacare would not be judicial "activism."

By Michael Tanner

Who says bipartisanship is dead? Left and Right have finally found something that they agree on. They are both unalterably opposed to judicial activism — except, of course, when they aren't.

The latest meme from the Obama administration, congressional Democrats, and much of the media is that if the Supreme Court were to strike down all or part of Obamacare, it would place the Court's legitimacy itself at risk. After all, since only 28 state attorneys general, at least two District Court Judges and five Circuit Court Judges (including a Clinton appointee), numerous law professors, the 52 organizations and hundreds of state legislators who filed briefs in support of the plaintiffs, and 72 percent of the American public believe that Obamacare's attempt to force every American to buy a specific commercial product is unconstitutional, it would obviously be an unprecedented act of judicial activism for the Court to agree.

Of course, there is nothing really unprecedented about the Court striking down legislation that it finds outside of constitutional bounds. Between 1803 and 2002, the Supreme Court struck down as many as 1,315 laws on constitutional grounds. Indeed, many of the judicial decisions that liberals hold most dear involved striking down legislation. For liberals to now argue that legislative action has become inviolate is pretty much the height of chutzpah.

To some extent, though, conservatives are simply being hoisted on their own hypocritical petard. After all, opposition to "activist judges" has become a standard part of conservative boilerplate. It was only a few weeks ago that Newt Gingrich was winning plaudits for his threat to haul recalcitrant judges before

Congress and pledging that he would simply ignore Court rulings with which he disagreed. And, when the courts struck down California's Proposition 8, many conservatives were apoplectic at the idea that a court could overrule the democratic will of the voters. An entire generation of conservatives have seemed to echo Robert Bork's call for deference to legislative majorities in nearly all circumstances and dismiss the Ninth Amendment's description of unenumerated rights as a mere "inkblot."

For both sides, judicial activism has come to mean "any Supreme Court decision that I disagree with."

Actually though, don't we want an active or engaged Court when it comes to upholding our constitutional rights and guarantees? Obviously courts should not invent "rights" out of whole cloth, or substitute their views for that of the Constitution. But, the Founding Fathers understood that sometimes legislatures go too far, that there will be a temptation to exceed the proper powers of government. When they do so, it is the proper role of the courts to rein them in.

Roger Pilon, the B. Kenneth Simon Chair in Constitutional Studies at the Cato Institute, has argued that conservatives too often "limit constitutional rights to those fairly clearly 'in' the document. . . . Thus for conservatives, if a right (is) not clearly 'in' the Constitution, it (does) not exist. What conservatives of the judicial restraint school have to come to grips with, then, is the full richness of the Constitution, including its natural rights foundations . . . for as the Ninth and Fourteenth Amendments make clear, the rights 'in' the Constitution are not limited to those the document plainly enumerates." Indeed, he adds, were it otherwise, we'd have had precious few rights against the federal government before the Bill of Rights was added.

But as George Will notes, "Truly conservative conservatives take their bearings from the proposition that government's primary purpose is not to organize the fulfillment of majority preferences but to protect preexisting rights of the individual — basically, liberty. . . . This obligatory engagement with the

Constitution's text and logic supersedes any obligation to be deferential toward the actions of government merely because they reflect popular sovereignty."

It would indeed be proper for the Court to strike down Obamacare. That would be exactly the sort of principled, active judiciary that the Founding Fathers envisioned in order to secure our liberties and limit the power of government. It is an "activism" that we should welcome.

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