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Amend the Commerce Clause

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In last week’s decision upholding the constitutionality of most of the Affordable Care Act, the Supreme Court accepted our contention that the commerce and necessary-and-proper clauses impose real limits on the power of Congress and that the individual insurance mandate, as drafted, exceeded those limits. For this reason, Chief Justice Roberts eliminated the insurance "requirement" from the statute by a "saving construction," while leaving the penalty standing as a "tax."

Restore the commerce clause to its original meaning, thereby leaving wholly intrastate activities to be prohibited or regulated by the states.

But our challenge never attempted to undo any of the post-New Deal Supreme Court precedents that have allowed Congress to exercise powers well beyond the original meaning of the commerce clause. Had we won on the mandate, these precedents would still have remained intact.

If voters who favor a return to these original limits elect more "constitutional conservative" senators and representatives in November, the next Congress can propose a constitutional amendment that would restore the original meaning of the commerce and necessary-and-proper clauses by reversing these precedents. But I would also favor a bit of an expansion beyond the original meaning of the commerce power to adjust for changed circumstances.

Here is the wording:

"The power of Congress to make all laws that are necessary and proper to regulate commerce among the several states, or with foreign nations, shall not be construed to include the power to regulate or prohibit any activity that is confined within a single state regardless of its effects outside the state, whether it employs instrumentalities therefrom, or whether its regulation or prohibition is part of a comprehensive regulatory scheme; but Congress shall have power to regulate harmful emissions between one state and another, and to define and provide for punishment of offenses constituting acts of war or violent insurrection against the United States."

This amendment restores the commerce clause to its original meaning, thereby leaving wholly intrastate activities to be prohibited or regulated by the states, or be left completely free of any regulations as states may choose. If the regulations of any state become too oppressive, it is much easier for citizens or business to move to a friendlier state than to leave the country.

This amendment expressly grants Congress the power to regulate interstate pollution and the power to address such national security matters as the possession of weapons of mass destruction. And it leaves untouched the delegated powers of Congress to regulate wholly intrastate activities to enforce civil rights as expressly authorized by, for example, the 13th, 14th, 15th and 19th Amendments; it only restricts the improper construction of the commerce and necessary-and-proper clauses to reach wholly intrastate activity.

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