

John Roberts, judicial pacifist

The Supreme Court's health-care ruling displayed an unfortunate convergence of two unholy strains of constitutional jurisprudence: liberal activism and conservative pacifism.

Liberal activism, typified by the four Democratic-appointed justices, finds in the Constitution no judicially administrable limits on federal power. Conservative pacifism, a knee-jerk reaction to the liberal activism of the 1960s and '70s, argues that we must defer to Congress as much as possible, presuming its legislation to be constitutional.

Neither approach considers that the Constitution's structural provisions — federalism, separation and enumeration of powers, checks and balances — aren't just a dry exercise in political theory, but a means to protect individual liberty against the concentrated power of popular majorities.

So, to avoid overturning the Affordable Care Act, Chief Justice John Roberts rewrote two important parts of it, turning the individual mandate into a tax and reworking the Medicaid expansion. Ever the good conservative, Roberts was attempting to show judicial "restraint."

Frankenstein's monster

Unfortunately, he failed on his own terms. As four justices wrote in a joint dissent, "The court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching. It creates a debilitated, inoperable version of health-care regulation that Congress did not enact and the public does not expect."

The chief justice's immodest pacifism, combined with the activism of the four liberal justices, created the Frankenstein's monster that was Thursday's decision.

It's certainly gratifying that a majority of the justices — Roberts and the other four Republican appointees — rejected the government's dangerous assertion of the power to compel commerce in order to regulate it. That at least vindicates those of us who led the constitutional challenge to the law on the grounds that the government cannot regulate inactivity — in this case, those declining to purchase health insurance. Congress' power to regulate interstate commerce is not, as Roberts wrote, "a general license to regulate an individual from cradle to grave."

Justifying the individual mandate to buy insurance under the taxing power, however, does not rehabilitate the government's constitutional excesses. As Justice Anthony Kennedy said in summarizing the joint dissent from the bench, "Structure means liberty." If Congress can avoid the Constitution's structural limits by simply "taxing" inactivity, its power is no more limited than if it were allowed to regulate at will under the Commerce Clause.

The court also rewrote the law's Medicaid expansion so that states stand to lose only new federal funding — instead of all their funding under the program — if they do not accept burdensome and transformative new regulations. While the court is correct in its analysis of the government's spending power and the strings it can attach to funding, its ruling here is relevant only to a hypothetical statute, not the one Congress actually passed.

Moreover, allowing states to opt out of the new Medicaid regime while leaving the rest of the law in place will throw the insurance market into disarray, increase costs for individuals, and give the states a Hobson's choice between two undesirable alternatives — a different but no less unfair circumstance than the one they originally faced under the law.

A dark day

In short, liberal activism and conservative pacifism suspended their tired debate just long enough to agree on a decision that, while not without its bright spots, marks a dark day for constitutional governance.

The high court and the rest of the judiciary should instead be applying the Constitution regardless of whether it 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.

Now the ball is in another court, that of the people — those who, in ratifying the Constitution, delegated certain limited powers to the federal government. They have opposed Obamacare all along, and now they must rein in the government whose unconstitutional actions have taken us to the brink of economic disaster.

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