It Now Falls to Congress

By Roger Pilon - June 28, 2012

ObamaCare was a mistake from the start, a massive effort by the federal government to take over and control one-sixth of the economy – indeed, the part that concerns the most complex and intimate details of life, our health. It's the most ambitious example to date of the political hubris progressives have displayed for over a century now, the belief that government can solve all of our problems.

Today, the Supreme Court had an opportunity to put a brake on that hubris. Four justices, led by Justice Kennedy, would have done so. But Chief Justice Roberts joined the four justices who are Exhibit A of the modern hubris, writing for the Court to uphold almost all of this monstrous intrusion on our liberty and on the very theory of the Constitution. And he did so on the flimsiest of rationales for deciding a constitutional question – precedent. If precedent carried the weight Roberts gave it today, we'd still be riding in segregated trains and sending our children to segregated schools.

So let's look a bit more closely at this decision – which, to be clear, will take some time to fully digest. The Court rejected the administration's main argument for the individual mandate, based on Congress's power to regulate interstate commerce: "The power to regulate commerce presupposes the existence of commercial activity to be regulated." But that's a slim victory for those of us who'd argued that "not buying insurance" is not an act of commerce. How often does Congress try to regulate "non-commerce" under its power to regulate interstate commerce? As best anyone could tell, this was the first time Congress had ever tried such an expansion of its power.

And because there's no "commerce," the Court rejected the parasitic Necessary and Proper Clause argument, too, which affords Congress the means to carry out its other powers.

But Robert's bought the administration's second fallback argument – that the penalty for not buying insurance is a tax, even though the administration abandoned that argument during the course of litigation, and even though calling it a "tax" would seem to implicate the Anti Injunction Act, which would preclude the Court from even deciding this case until someone was forced to pay the tax, which won't happen for another couple of years. Yet the Court apparently brushed aside that AIA impediment – talk about lawlessness – in its rush to uphold ObamaCare.

And so there's your foundation for the decision: the individual mandate is constitutional based on Congress's power to tax: Congress can "tax" those who don't buy government approved health insurance. Don't ask what kind of a "tax" that is! It's not an income tax. Nor is it a duty, impost, or excise tax, the only kinds of taxes recognized under the Tax Clause of the Constitution, where Roberts purports to rest Congress's power; and it certainly isn't "uniform throughout the United States," as is required for those taxes. It's sui generis, which is a polite way of saying it's unconstitutional – if we take the Constitution seriously.

But that's just the problem, isn't it? As James Madison, the principal author of the Constitution, Thomas Jefferson, and virtually everyone else at the Founding made clear, the power to tax, the first of Congress's 18 enumerated powers, like the power to borrow, Congress's second enumerated power, was designed to enable Congress to obtain the funds needed to carry out its other enumerated powers or ends. It was not, as Madison made clear in Federalist 41, and often on the floor of Congress, an independent power to tax for any purpose at all. Search as you will through those 18 enumerated powers and you will find no power to enact ObamaCare or anything like it. And please don't say that the taxing power serves the commerce power which in turn authorizes the individual mandate, because the Court nixed that second leap today.

But all of that was lost in 1937 when the New Deal Court, cowed by Roosevelt's infamous Court-packing threat, suddenly "found" that Congress had an independent power to tax and spend for the "general welfare," a power that had escaped the Court's attention for 150 years. That's the "precedent" for today's decision – which, like the precedent itself, turn's the Constitution on its head, giving us effectively unlimited government.

It will fall to Congress, then, to undo this monstrosity, if it can. Under the Constitution, as written, health care would be provided like any other service that's stayed largely free from government control. But starting with World War II wage-and-price controls and the tax advantages that were given to employer-provided health insurance, it's been one government intrusion after another and a textbook example of how government can completely mess up what free markets plus voluntary charity can efficiently order while respecting the rights and dignity of people in the process. That's a vision, the Founders' vision, that Congress can restore, even if this Court has failed to do its part today.

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