Randy Barnett | June 28th

# A weird victory for federalism

Who would have thought that we could win while losing?

In 1995, when the Supreme Court in *United States v. Lopez* invalidated the Gun Free School Zone Act because it was regulating intrastate noneconomic activity, progressive commentators had two reactions. First, that *Lopez* represented an outrageous exercise of "conservative judicial activism" and, second, that the Supreme Court would defer to Congress if it merely offered better findings of fact to support its regulations. In 2000, when the Court invalidated the civil cause of action in the Violence Against Women Act, enacted after numerous hearings and supported by copious "findings," progressive commentators again accused the Court of "activism," but started to worry that the Court might just be serious about enforcing Article I's enumerated powers scheme after all.

However, in 2005, when the Court turned away the Commerce Clause challenge to the Controlled Substances Act in *Gonzales v. Raich*, progressives breathed a sigh of relief. They were right all along. The much-vilified "New Federalism" of the Rehnquist Court was either dead, or merely a symbolic limit on Congressional power, applicable only to small and peripheral legislation.

So when the constitutionality of the Affordable Care Act came under fire by Senate Republicans before its passage, their complaint was dismissed as frivolous. Academic commentators predicted that legal challenges to the law were so baseless, they would trigger Rule 11 sanctions from federal courts. Even after the Court announced an historic 6 hours of oral argument over three days, supporters of the law insisted that the case would be decided by a 8-1 or 7-2 vote. Ironically, the very same academics who condemned the "activism" of *Lopez* and *Morrison* clung to them as hallowed precedents providing the *only* limits on the Commerce power.

Today, the Roberts Court reaffirmed the "first principle" announced by Chief Justice Rehnquist some 17 years ago in *Lopez*: the federal government is one of limited and enumerated powers. It accepted all of our arguments about why the individual insurance mandate exceeded the commerce power: "The individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause," wrote Chief Justice Roberts. "That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it." Then the Court went farther to invalidate the withholding of existing Medicaid funding as coercive, thereby finding an enforceable limit on the Spending Power.

In the 1930s & 40s, when Congress was asserting new powers to address the grave distress caused by the Great Depression, the Court relented and allowed it to reach wholly intrastate activity that, in the aggregate had a substantial effect on interstate commerce. This was interpreted by academics to mean that Congress now had a plenary power over anything that affected the national economy, which means any activity at all. The Court would always defer to Congress's assertion of its Commerce Clause powers.

The New Federalism was attacked precisely because it offered a different vision of the so-called "New Deal Settlement": although the Court acquiesced to the constitutionality of New Deal-style regulations, when Congress goes beyond this already expansive reading of its powers, the Court will meet any further expansion with skepticism. It will continue to insist on *some* judicially enforceable limit on federal power. Congress cannot be the sole judge of the scope of its own powers. Today a majority of the Roberts Court reaffirmed this vision.

Academics are sure to react to today's decision by declaring the New Federalism dead, but they would be wrong to do so. The Founders' scheme of limited and enumerated powers has survived to fight another day.