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The Constitution and Justice Stevens

By Roger Pilon

With stormy midterm elections just ahead, and much of President Obama's agenda still undone, the last thing congressional Democrats needed is the distraction of a difficult and protracted Supreme Court confirmation battle.

Yet that's likely what's in store after Friday's announcement that Justice John Paul Stevens, the court's liberal lion, is stepping down in late June. The party's base, already disappointed with Mr. Obama, will doubtless press the president for a liberal replacement. But with the growing "tea party" movement raising long-ignored constitutional issues, even a moderate nominee will face questions congressional Democrats would rather leave buried.

Chief among those is that most basic question, brought to the fore by "ObamaCare": Are there any longer any constitutional limits on federal power?

If Congress can reorder one-sixth of the nation's economy, command states to establish insurance exchanges, and require individuals to buy insurance from private companies or face a tax, it would seem not. Yet the 19 states presently challenging such sweeping power will find little comfort in the decisions of Justice Stevens.

Coming of age during the New Deal, Stevens's jurisprudence more often than not has reflected the dominant themes of that era: judicial deference to broad assertions of government power, especially over the economy, coupled with seemingly inconsistent assertions of judicial power to ignore the law in deference to "evolving social values," all of which has given us modern "constitutional law" - not to be confused with the Constitution.

The Founders gave us a Constitution aimed at securing individual liberty through limited government, with most power resting in the states or, even more, in the private sector.

It wasn't perfect, to be sure: In fact, it took a civil war to end slavery, and the Civil War Amendments to make the Bill of Rights good against the states. And there never was a "Golden Age," as Jim Crow, Prohibition, and much else attest.

But from the start, the main idea was clear: Whatever the nation's faults in practice, the point of life was to live it, freely, not dependent on government. Indeed, answering anti-Federalists' fears that the new national government would be too powerful, Federalists detailed exquisitely the Constitution's limits on

federal power. Neither camp could have imagined anything like ObamaCare.

Well, all that changed when the social engineers of the Progressive Era, steeped in visions of the "public good," came finally to power under Franklin Roosevelt.

When the "nine old men" on the court balked, saying the Constitution prohibited FDR's schemes, the president threatened to pack the court with six new members. The plan failed, but the court got the message.

It turned the Constitution on its head, and the modern welfare state was born. A watershed moment came in 1942, when the court interpreted the Commerce Clause as giving Congress virtually unlimited authority over economic activity.

The result today is unfunded liabilities no one knows how to meet, debt as far as the eye can see, and taxes in the offing that will cripple individuals and businesses alike - quite apart from the restraints on liberty that dependency on government entails.

In 1995, the Supreme Court took a tiny step toward braking this juggernaut when it ruled that the Gun-Free Zones Act of 1990 exceeded Congress's power under the Commerce Clause. The power to address that issue belongs to states, the court held, not to Congress. Stevens dissented, calling the decision "radical."

Five years later, facing similar issues, he dissented again. But in 2005, facing a challenge to Congress's prohibition on home-grown medical marijuana administered under state law, Stevens wrote at last for the majority, upholding Congress's ability, under the Commerce Clause, to ban the drug and override state law, and effectively reversing the Rehnquist Court's meager efforts to put a brake on Congress's all but unbounded regulatory power.

That decision sets the stage, unfortunately, for the 19 states challenging ObamaCare today.

But Stevens hasn't always favored federal power over states and individuals.

A year ago, for example, in a case pitting the Food and Drug Administration's power to regulate prescription drug warning labels against state court awards to injured plaintiffs, he ignored the clause of the Constitution that makes federal law supreme and ruled for the plaintiff.

And in 2007 he entertained Al Gore-like claims about rising sea levels over the next century, thus ignoring rules about standing meant to keep mere speculative claims out of court. That enabled Massachusetts to get into court, where Stevens relied on still more dubious claims to rule against the Environmental Protection Agency's earlier finding that it had no authority to regulate greenhouse gases.

Turning from limiting power to protecting rights, Stevens's record is mixed, to be sure, but on several hot-button issues it could cause difficulties for Democrats in the upcoming Senate confirmation hearings.

Take guns and the Second Amendment: In a blockbuster decision two years ago, the court held, for the first time, that individuals had a right to own handguns for self-defense in the home. Stevens wrote the dissent.

Or take property rights: In the infamous Kelo decision of 2005, Stevens wrote for the court's majority,

holding that the city of New London, Conn., could transfer the title to Suzette Kelo's home to a private developer who promised upscale building on the land, thereby generating more taxes for the city. Here again Stevens ignored the plain language of the Constitution to reach a result he thought socially desirable. That decision produced such a backlash that over 40 states subsequently tightened their eminent domain laws.

In other areas, too - abortion, campaign finance, affirmative action, the death penalty - Stevens has written or joined opinions that are likely, in the current climate, to pose difficulties for congressional Democrats seeking reelection. By and large, they reflect a bias toward government. And that is inconsistent not only with the times but with the Constitution. Yet that's what Democrats may find themselves defending as the confirmation process unfolds.

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