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Strict Scrutiny

ObamaCare and the long slow death of conservative judicial restraint

Damon W. Root | August 18, 2011

In his recent [opinion](#) upholding the constitutionality of the Patient Protection and Affordable Care Act's mandate that all Americans purchase health insurance, conservative 6th Circuit Judge Jeffrey Sutton adopted what used to be a very common conservative legal position: judicial deference. The battle over ObamaCare, Sutton wrote, is "just as stirring, no less essential to the appropriate role of the National Government and no less capable of political resolution" than the debate over the constitutionality of the Second Bank of the United States in *McCulloch v. Maryland* (1819). And in that case, he argued, "the Supreme Court erred on the side of allowing the political branches to resolve the conflict." Similarly, the fate of ObamaCare should be decided by "the peoples' political representatives, rather than their judges."

It was an eloquent ode to judicial deference. But does judicial deference matter anymore? Twenty years ago Sutton's position occupied the commanding heights of the conservative legal establishment, expressed most prominently by federal Judge Robert Bork, who argued that the "first principle" of the American system was not the protection of individual rights against overreaching majorities, but was instead the idea "that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities."

That was then. Conservatives today most likely prefer the words of last Friday's [decision](#) by the 11th Circuit Court of Appeals, which not only struck down the individual mandate as a "wholly

novel and potentially unbounded assertion of Congressional authority,” but also offered a none-too-subtle rebuke to Sutton’s judicial restraint. “When Congress oversteps [the Commerce Clause’s] outer limits,” the 11th Circuit declared, “the Constitution requires judicial engagement, not judicial abdication.”

What explains the shift in conservative legal thinking? Libertarians, for starters. More specifically, libertarian legal theorists, including Richard Epstein, a distinguished law professor at the University of Chicago, and Roger Pilon, the influential director of the Cato Institute’s Center for Constitutional Studies. Their principled arguments for aggressive judicial action in defense of individual rights forced many conservative lawyers to reconsider their own constitutional views.

The changing political winds didn’t hurt either. It’s one thing for conservatives to favor judicial restraint when the judiciary leans to the left; it’s quite another thing when right-leaning federal judges have the opportunity to overturn liberal legislation. Judicial restraint isn’t so appealing when it comes down to the other side’s legislation.

But what about the conservative justices on the Supreme Court? The split between the 6th and 11th Circuits all but guarantees that the Court will take up one or more of the individual mandate cases, perhaps as early as this coming term. Will Sutton’s words carry any weight with them?

Keep an eye on Chief Justice John Roberts. Of the five right-leaning justices, his vote is the most likely to echo Sutton’s. Remember that during his Senate confirmation hearings, Roberts stressed his belief that the Supreme Court should practice “judicial modesty,” a respect for precedent and consensus that he extended all the way to the abortion-affirming *Roe v. Wade* (1973), which he called “the settled law of the Land.” Roberts may approach the Court’s expansive Commerce Clause precedents in the same way and vote to uphold the individual mandate as a deferential application of that “settled law.”

There’s also Roberts’s expansive view of congressional power to consider. This was exhibited most recently in *U.S. v. Comstock* (2010), where he sided with the Court’s liberals and endorsed a sweeping interpretation of the Necessary and Proper Clause that allowed federal officials to order the indefinite civil commitment of “sexually dangerous” persons who had already finished serving their prison sentences. The Obama administration’s legal defense of the individual mandate rests, in part, on an equally broad reading of that same clause.

So Roberts may very well uphold the health care law as an act of judicial restraint. Just don’t expect the conservative rank and file to thank him for it. They’ve united overwhelmingly against the law and won’t take kindly to any abdication by the chief justice. The long slow death of conservative judicial restraint is starting to speed up.

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