

Against Judicial Restraint

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A PRESIDENT HAS FEW CONSTITUTIONAL POWERS more important than making judicial appointments. After all, federal judges continue shaping our world long after the president who appointed them has left the White House. The late Justice Antonin Scalia served nearly 30 years on the High Court, giving President Ronald Reagan's legal-policy agenda a bridge well into the 21st century. An important ruling on nonprofit-donor disclosures was made just this past April by a district judge appointed by *Lyndon Johnson*.

Perhaps the most comprehensive treatment of the power of judicial appointments was provided by Clint Bolick, a long-time constitutional litigator who this year became a justice on the Arizona Supreme Court. In his 2012 book *Two-Fer: Electing a President and a Supreme Court*, Bolick explained how presidents appoint jurists who have direct and lasting effects on the American people and their freedoms. "The odds are great," he wrote on the eve of the last election, "that one of our next presidents will have the first opportunity in over two decades to alter the Court's ideological balance, either fortifying the conservative majority or tilting it to a liberal majority."

Indeed, without Scalia, the Supreme Court now stands starkly split 4-4 on many controversial issues: campaign-finance law, the Second Amendment, religious liberty, and executive and regulatory power, to name just a few. Scalia was, of course, one of four conservatives on the Court, who, when joined by Justice Anthony Kennedy, formed a majority that was crucial for enforcing the First and Second Amendments, federalism, the separation of powers, and other constitutional protections for individual liberty. If he's replaced by a progressive jurist — or

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even a “moderate” one — these crucial priorities will be all but defenseless, especially given the appalling executive overreach that has come to characterize the Obama administration.

Every four years, legal pundits make the case that judicial nominations — especially to the Supreme Court — should be among voters’ primary considerations when choosing a presidential candidate. But the future of the Supreme Court truly does hang in the balance of this election, and not just because Scalia’s seat remains empty; three other justices are now 78 years old or older. Voters understand that they’ll not just be voting for a presidential candidate, but also, in a way, weighing in on the balance of the Supreme Court, the consequences of which will last far longer than four years.

Many center-right observers, however, do not know exactly what this should mean for how politicians they support should think about judicial appointments. For decades, conservatives argued that the way to respond to “judicial activism” was to exercise restraint. But well-meaning judicial restraint has increasingly led to failures to check the other branches of government, especially as Congress passes sweeping laws like the Patient Protection and Affordable Care Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act, and as the executive has taken far more liberties in unilateral lawmaking.

This failure of the judiciary to check the other branches of government — in the name of restraint — bears much of the blame for the public’s frustrations with government, and for many of the dangers that worry conservatives most. An appropriately engaged judiciary, one that sees itself as a co-equal branch rather than an accommodating junior partner, is crucial to the rule of law and the public’s continued faith in the legitimacy of our constitutional system.

THE GOOD OF RESTRAINT

In response to decades of judicial activism on the left, conservatives adopted the theory of judicial restraint. After all, they argued, it is not the role of unelected judges to thwart the people’s will and overturn duly enacted legislation. In this, conservatives were, ironically, following the founders of the progressive legal movement, notably Harvard law professor James Bradley Thayer and Justice Oliver Wendell Holmes, Jr.

Thayer was a deferentialist — his view of the judicial role became the basis for *Plessy v. Ferguson* in 1896, upholding the constitutionality of

state laws requiring racial segregation—who expressed extreme skepticism about judges’ duty to follow the law as espoused by Alexander Hamilton and John Marshall. Accordingly, instead of exercising judicial review, Thayer warned the courts against “judicial nullification.” He argued that “neither the written form nor the oath of the judges necessarily involves the right of reversing, displacing, or disregarding any action of the legislature or the executive which these departments are constitutionally authorized to take, or the determination of those departments that they are so authorized.” In other words, not only should judges not question the other branches, but they should defer to their justifications for otherwise dubious actions.

Holmes operationalized this theory most famously in 1905 in his dissent in *Lochner v. New York*—in which the Supreme Court struck down a New York law limiting the hours that bakers could work on economic-liberty grounds—and his majority opinion in 1927’s *Buck v. Bell*, the forced-sterilization case that concluded with the infamous statement, “Three generations of imbeciles are enough.” To put a finer point on his desire to ratify popular impulses, he also famously wrote, “If my fellow citizens want to go to Hell I will help them. It’s my job.”

This sort of deference both to experts and to democracy is represented in more modern times by the work of Yale law professor Alexander Bickel, who identified the judiciary’s “counter-majoritarian difficulty” and its resolution by employing the “passive virtues.” In other words, judicial review is problematic because it overrules legislators and thus the will of the majority. To avoid such illegitimacy, judges should strive to avoid resolving substantive issues, to decide not to decide by deferring to the legislature or administrative agencies if at all possible. Bickel had tremendous influence on Robert Bork and the conservative legal movement of the 1960s and ’70s.

Roger Pilon, the founder of the Cato Institute’s Center for Constitutional Studies, wrote a prescient *Wall Street Journal* op-ed in 1991, worth quoting at length, that encapsulated the response of those who shared a disdain for the progressive rewriting of the Constitution but were wary of this “restraint”:

[C]onservatives and classical liberals alike—indeed, anyone who favors limited government and a wide range of both personal and economic liberties—should be concerned when the third branch

of government effectively withdraws from the scene. The dangers of popular tyranny were well known to the Founders. They recognized the tendency of “factions,” whether majoritarian or special interest, to use government for their own ends, expanding the state in the process. It was for this reason that they drafted a written constitution and created an independent judiciary to interpret it—a judiciary that was meant, as James Madison put it, to be “the bulwark of our liberties.”

Yet how can a judiciary dedicated to restraint be “the bulwark of our liberties”? To be sure, an unrestrained judiciary is no bulwark either—that is why we have a constitution, and why Mr. Bork’s critique of the excesses of “judicial activism” is perfectly correct. But it is no answer to the perennial problem of securing ordered liberty to ask the judiciary to serve as handmaiden to the other branches. Too often that is precisely what judicial “deference” amounts to.

Pilon continued, revealing the irony of conservative deferentialism:

When courts extend a presumption of constitutionality to statutes and executive actions, they simply buy into the majoritarianism that grew out of the Progressive Era. That majoritarianism was no part of the original design. On the contrary, the Founders took every step to protect our liberties, even from the majority—indeed, especially from the majority.

He recommended that conservatives re-evaluate their stance on restraint, starting with an examination of what Bork misidentified as the “Madisonian dilemma,” in which there are two founding principles of the United States that are in constant tension: “The first principle is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities.” The second is “that there are nonetheless some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule.” Pilon objected strongly to this idea:

That gets the Madisonian vision exactly backward....[T]he Founders instituted a plan whereby in “wide areas” individuals would

be entitled to be free simply because they were born so entitled, while in “some” areas majorities would be entitled to rule not because they were inherently so entitled but as a practical compromise.

That gets the order right: individual liberty first; self-government second, as a means toward securing that liberty—with wide berths to state governments, to be sure....

The judiciary, then, must not shirk its duty to secure [both enumerated and unenumerated] rights by deferring to the political branches in the name of “self government.” Rather, it must hold the acts of the other branches up to the light of strict constitutional scrutiny.

Pilon’s insights of 25 years ago are still relevant, and his warnings remain largely unheeded, though the tide is beginning to turn. Some traditional conservatives have come around, including George Will (see “The Limits of Majority Rule” in the Summer 2016 issue of *National Affairs*), and there is now a lively debate that has made calls for an “active” or “engaged” judiciary commonplace at Federalist Society meetings. “Judicial engagement” is the felicitous nomenclature coined by the Institute for Justice, which Bolick co-founded, to describe the proper judicial role while getting away from the vacuous activism/restraint dichotomy.

The argument is not merely abstract, philosophical, or historical. Indeed, some of the strongest case studies that show the trouble with restraint have come in the Obama years.

JUDICIAL RESTRAINT AND OBAMACARE

The Supreme Court’s 2012 ruling in *National Federation of Independent Business v. Sebelius* displayed an unfortunate convergence of two unholy strains of constitutional jurisprudence: liberal judicial activism and conservative judicial passivism. Liberal activism finds in the Constitution no judicially administrable limits on federal power. Conservative passivism, a knee-jerk reaction to that activism, argues that we must defer to Congress and state legislatures as much as possible, presuming their legislation to be constitutional.

Neither approach considers that the Constitution’s structural provisions—federalism, the 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. As Randy Barnett details in his new book, *Our Republican Constitution*, “the first duty of government is to equally protect these personal and individual rights from being violated The agents of the people [legislators] must not themselves use their delegated powers to violate the very rights they were empowered to protect.” Courts are thus charged with holding elected officials’ feet to the constitutional fire and striking down laws that exceed the powers granted to the government by the people.

Chief Justice John Roberts had to rewrite two important parts of the Affordable Care Act to avoid overturning the law, turning the individual mandate into a tax and reworking the Medicaid expansion. Ever the good conservative, Roberts was attempting to show judicial “restraint” or even “modesty” by merely tweaking Congress’s work rather than striking it down.

Unfortunately, he failed on his own terms. As four justices wrote in a joint dissent, “[t]he 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 passivism, combined with the activism of the four liberal justices, created the Frankenstein’s monster that was *NFIB v. Sebelius*.

It is gratifying, however, 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 vindicated those of us who led the constitutional challenge to the law on the grounds that the government cannot regulate inactivity (in this case, declining to purchase health insurance). Congress’s power to regulate interstate commerce is not, as Roberts wrote, “a general license to regulate an individual from cradle to grave.”

To be sure, that part of the decision was a win for constitutional jurisprudence in at least four ways. First, it is now clear that the government can’t compel activity in order to regulate it. Second, legislation that is “necessary” may still be unconstitutional if it is not “proper.” Third, the narrow taxing-power ruling allows the government only to levy small taxes on decisions not to buy something — but Congress won’t ever use this power because it can achieve the same goal by offering (politically easier) tax credits. And fourth, for the first time ever, the Court found,

by a vote of seven to two, that the federal government cannot coerce states by attaching too many strings onto federal (Medicaid) funding.

Justifying the individual mandate to buy insurance under the taxing power, however, does not rehabilitate the government's constitutional excesses; it merely creates a "unicorn tax," a creature of no known constitutional provenance that will never be seen again. And by letting Obamacare survive in such a dubious manner, Roberts undermined the trust people have that courts are impartial arbiters rather than political actors.

As Justice Anthony Kennedy said in summarizing the joint dissent from the bench, "[s]tructure 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 was correct in its analysis of the government's spending power and the strings it can attach to funding, its ruling was 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 has thrown the insurance market into disarray, increasing costs and decreasing competition. It left the states with a choice between two undesirable alternatives—a different but no less unfair circumstance than the one they originally faced under the law. In short, liberal activism and conservative passivism suspended their tired debate—or found common progressive cause—just long enough to agree on a decision that, while not without its bright spots, marked a dark day for constitutional governance.

The sad thing about this episode is that the chief justice didn't have to do what he did to "save the Court." For one thing, Obamacare has always been unpopular—particularly its individual mandate, which even a majority of Democrats thought was unconstitutional, according to a national Gallup poll taken a few months before the Court's ruling. For another, Roberts only damaged his own reputation by making this move after warnings from pundits and politicians that striking down the law would be "conservative judicial activism." I don't think that

impolitic pressure had anything to do with his ultimate decision, but the American public certainly does.

Most important, the whole reason we care about the Court's independence and integrity is so it can make the tough calls while letting the political chips fall where they may. Had the Court struck down Obamacare, it would have merely been a high-profile legal ruling, just the sort of thing for which the Court needs all that accrued respect and gravitas. Instead, we have a strategic decision dressed up in legal robes, judicially enacting a new law.

Recall Robert Bolt's play (and later film) *A Man for All Seasons*, in which a young lawyer named Richard Rich perjures himself so the Crown can secure Sir Thomas More's conviction. Rich is promoted to attorney general of Wales as a reward. Upon learning of Rich's connivance, More plaintively asks, "Why Richard, it profits a man nothing to give his soul for the whole world . . . but for Wales?"

In refraining from making the sort of balls-and-strikes call he discussed at his confirmation hearings, John Roberts sold out the law for less than Wales—and showed why we shouldn't want our judges playing politics.

POPULIST CONSEQUENCES

NFIB v. Sebelius also showed the consequences of judges' political gamesmanship in indulging their "passive virtues." Chief Justice Roberts left the ball in the people's court, possibly hoping that they who had opposed Obamacare for so long would do his job for him and thereby keep the Court out of politics. It was up to the people to rein in the government whose unconstitutional actions have taken us to the brink of economic disaster—but they have gone a different way.

It is important not to overstate the extent to which the Court is responsible for the direction our politics has taken; there are many causes behind our populist moment. President Obama, the perfidious GOP elite, the Harry Reid-Nancy Pelosi nihilists, demographic shifts, globalization, and a host of other forces have brought us to where we are. Plenty of interpretations and analyses have been and will be written about all of these culprits. But if one moment could be blamed for spawning the current *annus horribilis*, it could well be Chief Justice Roberts's vindication of Obamacare on June 28, 2012.

That is not because his ruling in *NFIB*—and last year in *King v. Burwell*, when the die had already been cast—allowed a hugely

unpopular piece of legislation to survive and corrode our health-care system and economy. It's because Roberts recognized that the ACA was unconstitutional yet still saved it out of a misbegotten devotion to judicial restraint—under the guise of deferring to “the people.”

Sure, the chief justice cleverly wrote his opinion so it wouldn't increase Congress's power to regulate interstate commerce; he even reduced its power under the necessary and proper clause. But by refusing to follow his own logic, Roberts increased cynicism and anger at play-by-the-rules conservatives and decreased respect for institutions across the board.

Moreover, the contortions required to justify the decision drove the constitutionalist Tea Partiers into the arms of the populists—or made it easy for their populist instincts to trump their constitutional ones. Why bother with the Constitution? Even when you're right, you lose. Indeed, if Kennedy had joined the liberals in holding that there are simply no structural limits on federal power, there would have been disappointment, but it would have been understandable given the conventional left-right rubric. But to lose in a wholly extra-legal way was a sucker punch, belying the idea that there's a difference between law and politics and that the judiciary is a check on the excesses of the political branches.

Roberts essentially told future Donald Trump supporters not to bother the courts with important issues, that if you want to beat Obama you have to get your own strongman—complete with pen, phone, and contempt for the Constitution. So they did, bypassing several flavors of constitutional conservative in favor of a populism that knows nothing but “winning.”

It's a shame, and deeply ironic. A constitutional moment had actually arrived in 2010: The people had risen up against crony capitalism, against bailouts and out-of-control government in every aspect of their lives. Real constitutionalists were sent to Congress—Massachusetts even elected a Republican senator in a bid to stop Obamacare—and state legislatures turned red based on opposition to federal overreach.

In 2016, the last domino, the White House, was poised to fall, too—and might have already if a charismatic constitutionalist had run in 2012—with the most talented and intellectually vibrant GOP primary field since Ronald Reagan ran unopposed in 1984. But then Roberts ushered in the Trump tornado. Constitutional conservatism simply couldn't survive this brand of judicial conservatism. The genteel

Roberts and the vulgar Trump thus seem to have one thing in common: a belief that judges should stop striking down laws and let political majorities rule, individual liberty be damned.

The constitutional moment thus expired on the shoals of Roberts's judicial restraint. Even Scott Brown, the Republican briefly elected to "Ted Kennedy's seat," endorsed Trump in the primaries. Instead of teaching the people that our republican form of government works, we're left with the false empowerment of a self-consuming democracy—and the further ascendance of the "democratic" Constitution, in Randy Barnett's terms. Comes now our own Juan Perón, leading his modern-age *descamisados* down the road to a "Great America" that could genuinely have existed if Roberts had only done his job.

CONSTITUTIONAL CORRUPTION

As if by cosmic coincidence, Justice Scalia's death and Donald Trump's victory in the all-important New Hampshire primary happened during the same week in February. Within hours of hearing the news of the former, Senate Majority Leader Mitch McConnell announced that his caucus would not be holding any hearings or votes on a replacement nominee until after the election. "Let the people decide" became the rallying cry of the Republican majority, and all of the party's members on the Senate Judiciary Committee signed a letter pledging fidelity to the "no hearings, no votes" plan.

When President Obama announced the nomination of Judge Merrick Garland a month later, nothing really changed. The hold-up wasn't the nominee's qualifications, but an argument from the political principle that the gaping hole left by a jurisprudential giant shouldn't be filled until the voters in a polarized nation—who re-elected Obama in 2012 but then handed the Senate to the GOP in 2014—could have their say.

While the media portrayed the Republicans' actions as unprecedented obstructionism, historically plenty of judicial nominees have never had hearings or votes. And the last time the Senate confirmed, before the presidential election, an opposing-party nomination to a High Court vacancy arising earlier that year was in 1888. Under recent Republican presidents, Democratic senators ranging from Joe Biden to Chuck Schumer to Harry Reid have announced that they would either not consider or filibuster to block any nominees. That is their prerogative: Just like the Senate can decline to take up a bill passed by the House

or a treaty signed by the president, it can surely decide how to exercise its constitutional power to proffer “advice and consent” on judicial nominations. The Senate could decide not to confirm *any* nominee to *any* position (but it would then likely pay a high political price).

The process of appointing judges was not always so fraught. The increasing political gamesmanship is often blamed on a perversion of the confirmation process, more demagogic political rhetoric, or even the use of filibusters. But those are all symptoms of the underlying issue, a relatively new development but one that’s part and parcel of a much larger problem: constitutional corruption that conservative proponents of judicial restraint have aided and abetted. As government has grown, so have the laws and regulations over which the Court has power. All of a sudden, judges are deferring to Congress on what it can do with its great powers and to the executive branch on the kinds of law it can write into the Federal Register.

This is a new development. Under the founders’ Constitution, under which the country lived for its first 150 years, the Supreme Court hardly ever had to strike down a law. The Congressional Record of the 18th and 19th centuries shows a Congress discussing whether legislation was constitutional much more than whether it was a good idea. Debates focused on whether something was genuinely for the general welfare or whether it served only a particular state or locality. “Do we have the power to do this?” was the central issue with any aspect of public policy.

In 1887, Grover Cleveland vetoed an appropriation of \$10,000 for seeds to drought-stricken Texas farmers because he could find no constitutional warrant for such action. In 1907, in the case *Kansas v. Colorado*, the Supreme Court said that “the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers.” There was a stable system of unenumerated rights that went beyond those listed in the Bill of Rights to those retained by the people per the Ninth Amendment. The 10th Amendment was similarly redundant of the whole structure, reinforcing the idea that our government was one of delegated and enumerated — and therefore limited — powers.

But deferentialist judges played their part in changing all that. The idea that the general welfare clause says that the government can essentially regulate any issue as long as the legislation fits someone’s

conception of what's good — meaning, as it's understood by the majority party in Congress — emerged in the Progressive Era and was soon judicially codified. After 1937's so-called “switch in time that saved nine,” when the Supreme Court began approving grandiose legislation of the sort it had previously rejected, no federal legislation would be struck down for exceeding Congress's Article I powers until 1995. The New Deal Court is the one that politicized the Constitution, and therefore too the confirmation process, by laying the foundation for judicial mischief of every stripe — be it letting laws sail through that should be struck down or striking down laws that should be upheld.

In 1935, for example, President Franklin Roosevelt wrote to the chairman of the House Ways and Means Committee, “I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation.” Decades later, Rexford Tugwell, one of the architects of the New Deal, wrote that “to the extent that these [New Deal policies] developed, they were tortured interpretations of a document intended to prevent them.” During the 1930s and '40s, we thus had a perverse expansion of the commerce clause — with cases like *NLRB v. Jones & Laughlin Steel Corp.* (which upheld the National Labor Relations Act) and *Wickard v. Filburn* (which made private wheat-growing into interstate commerce) — which returned to center stage during the Obamacare litigation.

In that light, the recent confirmation battles — whether the hyperbole regarding Robert Bork and Clarence Thomas, the filibustering of George W. Bush's lower-court nominees, or the scrutiny of Sonia Sotomayor's “wise Latina” comment — are all a logical response to political incentives. When judges act as super-legislators, then senators, the media, and the public want to scrutinize their ideologies and treat them as if they were super-politicians with lifetime tenure, and rightfully so.

To again quote Roger Pilon, writing nearly 15 years ago in an evocative Cato Policy Analysis titled “How Constitutional Corruption Has Led to Ideological Litmus Tests for Judicial Nominees”:

Because constitutional principles limiting federal power to enumerated ends have been ignored . . . the scope of federal power and the subjects open to federal concern are determined now by politics alone. Because the rights that would limit the exercise of that power are grounded increasingly not in the Constitution's first

principles but in the subjective understandings of judges about evolving social values, they too increasingly reflect the politics of the day. Thus, the rule of law is now largely the rule of politics.

This is not the old back-and-forth about “activism” versus “restraint.” So long as we accept that judicial review is constitutional and appropriate in the first place—and it must be if we want a government that stays within its limited powers—then we should be concerned only that the Court “get it right,” regardless of whether that correct interpretation leads to the challenged law being upheld or overturned. For that matter, an honest evaluator shouldn’t care whether one party wins or another. To again hearken to John Roberts’s confirmation hearings, the “little guy” should win when he’s in the right, and the big corporation should win when it’s in the right. The dividing line, then, is not between judicial activism and judicial passivism, but between legitimate and vigorous judicial engagement and illegitimate judicial imperialism.

It is thus Justice Scalia who was the true “man for all seasons”—as Roberts himself acknowledged at the first, black-creped sitting of the reduced Supreme Court—a man of conscience who ignored the demands of political expediency. Indeed, to say that Scalia was simply “conservative”—whether you think that’s a good or bad thing—is to misunderstand what that means in the judicial context. “If you’re going to be a good and faithful judge,” he explained in a 2005 speech, “you have to resign yourself to the fact that you’re not always going to like the conclusions you reach. If you like them all the time, you’re probably doing something wrong.”

Perhaps the best example of Scalia’s going against his policy preferences would be in the area of criminal procedure. One would presume that a conservative of Scalia’s generation would be a “law and order” type concerned about criminals getting off on technicalities. Well, there’s been no greater supporter of those constitutional “technicalities” than Antonin Scalia. If you care about the Fourth Amendment right to be free from unreasonable searches, the Sixth Amendment right to confront witnesses testifying against you, or the right to be sentenced based only on facts found by a jury, Scalia is your justice. But even Scalia had a blind spot with respect to judicial deference, though he moved more toward his friend and colleague Justice Thomas’s purer, more constitutionally faithful approach in later years.

So sure, we can tinker around the edges of the judicial-appointment process with bipartisan commissions, or have a set term or fixed retirement age—or we could have scheduling requirements for when hearings and votes have to occur after a nomination—but all of that amounts to re-arranging the deck chairs on the Titanic. And the Titanic in this case is not the judicial-appointment procedure, but rather the ship of government. The fundamental problem is the politicization not of the process but of the product.

Ultimately judicial power is not a means to an end, be it liberal or conservative, but instead an enforcement mechanism for the strictures of the founding document. We have a republic, with a constitutional structure designed just as much to curtail the excesses of democracy as it was to empower its exercise. Any other perspective on the judicial role leads to a sort of judicial abdication and the loss of those very rights and liberties that can be vindicated only through the judicial process—which by definition is counter-majoritarian.

JUDGES SHOULD JUDGE

Four years have passed since Chief Justice Roberts made Obamacare's individual mandate a tax to save the law that created it. By recognizing that Obamacare was unconstitutional but shying away from ruling that way, Roberts struck a blow not only against sound jurisprudence and the rule of law, but against the legitimacy of our government altogether. Eight justices decided the health-care case based on competing legal theories—four finding that the Constitution limits federal power, four that constitutional structure must yield to “Congress’ capacity to meet the new problems arising constantly in our ever-developing modern economy.” But the ninth justice had other concerns on his mind.

The problem isn't that Roberts apparently changed his vote—judges do that regularly, and no ruling is final until issued—but that his opinion simply doesn't make sense. Even Justice Ruth Bader Ginsburg, who expressed skepticism about the taxing-power justification during oral arguments, was quizzical about Roberts's theory in orally summarizing her partial dissent on behalf of the no-limits-on-federal-power bloc.

The regrettable inference we are left to draw is that, for a combination of faux judicial restraint and a desire to protect the Court's reputation, Roberts decided that he needed to uphold the law while not expanding federal power. He succeeded in squaring that circle, but we're left with

a ruling that postulates a bizarre tax on inactivity: a piece of legislation no Congress would ever have passed.

It's no wonder the populace is frustrated and believes that the system is rigged. If law is irrelevant, the only thing to do is force your way through with unchecked "small-d" democracy. Benjamin Franklin admonished that we have a republic if we can keep it; 240 years is a pretty good run.

Randy Barnett, who was the intellectual godfather of the Obamacare litigation, summed up the situation at Cato's Constitution Day conference in September 2012, and his words still ring true four years later:

Should Republican presidents continue to nominate judicial conservatives who are enthralled with New Dealers' mantra of judicial restraint, or should Republican presidents nominate constitutional conservatives who believe that it is not activism for judges to be engaged in enforcing the whole Constitution? . . . For over two years, our nation was given a great lesson on constitutional law — that the enumerated powers are limits Congress cannot exceed. In June, the electorate was given a different lesson in judicial philosophy: Judicial restraint in enforcing those limits is no virtue.

If we want to have the rule of law, we need judges to interpret the Constitution faithfully and strike down laws when government exceeds its authority. Depoliticizing the judiciary is a laudable goal, but that will happen only when judges go back to judging, rather than merely ratifying the excesses of the other branches while allowing infinite intrusions into every aspect of our lives. Until that time, it's absolutely appropriate to use confirmation hearings and elections to question judicial philosophies and theories of constitutional interpretation — and to vote accordingly.

Regardless of what happens with the Garland nomination or who is president come January 2017, the battle for control of the third branch of government will continue. Whatever happens, conservatives should learn their lessons and push for judges possessed not only of the right interpretive principles but of the desire to follow those principles wherever they lead.