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The Roberts Court Defines Itself

For anyone who still thought legal conservatives are dedicated to judicial restraint, the oral arguments before the Supreme Court on the health care case should put that idea to rest. There has been no court less restrained in signaling its willingness to replace law made by Congress with law made by justices.

This should not be surprising. Republican administrations, spurred by conservative interest groups since the 1980s, handpicked each of the conservative justices to reshape or strike down law that fails to reflect conservative political ideology.

When Antonin Scalia and Anthony Kennedy were selected by the Reagan administration, the goal was to choose judges who would be eager to undo liberal precedents. By the time John Roberts Jr. and Samuel Alito Jr. were selected in the second Bush administration, judicial “restraint” was no longer an aim among conservatives. They were chosen because their professional records showed that they would advance a political ideology that limits government and promotes market freedoms, with less regard to the general welfare.

There is an enormous distinction to be made between the approaches of the Roberts court and the Warren court, which conservatives have long railed against for being an activist court. For one thing, Republican-appointed justices who led that court, Chief Justice Earl Warren and Justice William Brennan Jr., were not selected to effect constitutional change as part of their own political agenda.

During an era of major social tumult, when the public’s attitudes about racial equality, fairness in the workings of democracy and the dignity of the individual proved incompatible with old precedents, those centrists led the court to take new positions in carrying out democratic principles. Yet they were extremely mindful of the need to maintain the court’s legitimacy, and sought unanimity in major rulings. Cooper v. Aaron, the 1958 landmark case that said states are bound by Supreme Court rulings, was unanimous. So was Katzenbach v. McClung, the 1964 case upholding the constitutionality of parts of the Civil Rights Act under the commerce clause.

The four moderates on the court have a leftish bent, but they see their role as stewards of the law, balancing the responsibility to enforce the Constitution through judicial review against the duty to show deference to the will of the political branches. In that respect, they and the conservatives seem to be following entirely different rules.

That difference is playing out in the health care case. Established precedents support broad authority for Congress to regulate national commerce, and the health care market is unquestionably national in scope. Yet to Justice Kennedy the mandate requiring most Americans to obtain health insurance represents "a step beyond what our cases have allowed, the affirmative duty to act, to go into commerce." To Justice Stephen Breyer, it's clear that "if there are substantial effects on interstate commerce, Congress can act."

Likewise, Justice Scalia's willingness to delve into health care politics seems utterly alien to his moderate colleagues. On the question of what would happen if the mandate were struck down, Justice Scalia launched into a senatorial vote count: "You can't repeal the rest of the act because you're not going to get 60 votes in the Senate to repeal the rest." Justice Breyer, by contrast, said firmly: "I would stay out of politics. That's for Congress; not us."

If the conservatives decide that they can sidestep the Constitution to negate Congress's choices on crucial national policies, the court's legitimacy — and the millions of Americans who don't have insurance — will pay a very heavy price. Chief Justice Roberts has the opportunity to avoid this disastrous outcome by forging even a narrow ruling to uphold the mandate and the rest of the law. A split court striking down the act will be declaring itself virtually unfettered by the law. And if that happens along party lines, with five Republican-appointed justices supporting the challenge led by 26 Republican governors, the court will mark itself as driven by politics.