

Los Angeles Times | HEALTH

Whenever you want.
Wherever you go.

LOCAL U.S. WORLD BUSINESS SPORTS ENTERTAINMENT **HEALTH** LIVING TRAVEL OPINION DEALS



BOOSTER SHOTS MEDICINE FITNESS & NUTRITION MENTAL HEALTH HEALTH REFORM CANCER HEART HEALTH

HEALTH TOPICS: THERAPY APPS | 'CINNAMON CHALLENGE' | RED MEAT | 'BOOTY LIFTER' | RESVERATROL

Search



Signs of Supreme Court activism worry Reagan administration lawyers

Advocates of judicial restraint say conservative justices should be wary of the impulse to strike down the healthcare law passed by Congress.

Comments 194 Share 1218 +1 20 Tweet 104 Recommend 268



John G. Roberts Jr., now chief justice of the Supreme Court, testifies during his Senate confirmation hearings in 2005. Some who endorsed him as a modest, careful judge now worry that the court may embark on a new era of judicial activism. (Win McNamee, Getty Images / September 15, 2005)

ALSO



Healthcare's high court test

By David G. Savage, Washington Bureau
March 31, 2012 | 5:05 p.m.

WASHINGTON — When the incoming Chief Justice John G. Roberts Jr. came before the Senate for confirmation seven years ago, President Reagan's solicitor general gave him a warm endorsement as a "careful, modest" judge.

"He's not a man on a mission," Harvard Law professor Charles Fried testified, adding that Roberts was not likely "to embark on constitutional adventures."

Recommended on Facebook Like 215k



\$640M Mega Millions jackpot hit in Maryland

1,438 people recommend this.



Trayvon Martin case: Texas student's cartoon causes controversy

437 people recommend this.



Winning Mega Millions numbers: 2, 4, 23, 38, 46 and 23

724 people recommend this.

advertisement



In Case You Missed It...



Oprah's success hasn't followed her to OWN



Gold: 800 Degrees in Westwood

new digs

'Mad Men': Don Draper's



Supreme Court again looks primed to confound a president



Supreme Court appears poised to nullify entire healthcare law



Supreme Court greets healthcare mandate with skepticism

But two years ago, the Roberts-led Supreme Court struck down the federal and state laws that for a century had barred corporations and unions from pouring money into election campaigns.

And last week, the court's conservatives, including Roberts, suggested they may well strike down President Obama's healthcare law as unconstitutional. If so, it would be the first time since 1936 that the Supreme Court voided a major federal regulatory law.

After the healthcare arguments, Fried was among those who worried aloud about the prospect of the Roberts court embarking on a new era of judicial activism.

If the court were to invalidate the healthcare law, "It would be more problematic than Bush v. Gore," Fried said in an interview, referring to the case that decided the 2000 presidential race. "It would be plainly at odds with precedent, and plainly in conflict with what several of the justices have said before."

His comments highlight a growing divide between an earlier generation of judicial conservatives who stressed a small role for the courts in deciding national controversies and many of today's conservative justices who are more inclined to rein in the government.

At the heart of last week's argument over the healthcare law was a dispute over power. Does Congress or the Supreme Court define the limits of economic regulation?

The Obama administration's lawyers, relying on 20th century precedents, said Congress has broad authority to "regulate commerce" in national markets, including health insurance. Regardless of whether the healthcare law's requirement that everyone have insurance is a smart or good regulation,

Solicitor Gen. Donald B. Verrilli Jr. said the "Constitution leaves [this] to the judgment of Congress and the democratically accountable branches of government."

The court's leading conservatives objected and spoke of their duty to enforce limits set by the Constitution. If the government can force people to enter the market and buy insurance, Justice Antonin Scalia asked, "what's left?"

"The federal government is not supposed to be a government that has all powers," he said.

Are "there any limits" on Congress if this stands? asked Justice Anthony M. Kennedy. Roberts said "all bets are off" if the government can regulate an industry by forcing people to buy a private product.

Fried had confidently predicted the law would be easily upheld. He said he was taken aback by the tone of the arguments. "The vehemence they displayed was totally inappropriate. They seemed to adopt the tea party slogans," he said.

Pepperdine law professor Douglas W. Kmiec, another top Justice Department lawyer under Reagan, said he hoped the justices would "come to their senses" and uphold the law as a reasonable regulation of interstate commerce.

Among younger conservatives, Fried and Kmiec have their detractors because they endorsed Obama during the 2008 campaign. But they are not alone among Reagan-era lawyers who continue to emphasize judicial restraint.



Bringing your dog to work can ease stress

Ads by Google

Top 10 Stocks for 2012

These 10 stocks are set to crush the market in 2012.

In fact, Warren Buffett just bought 9.3 million shares of one of these stocks.



[Click here](#) for more on these stocks.

Ads by Google

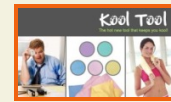
coverme

FlexCare™

Visit www.coverme.com for details

Manulife Financial

LA DEALS



\$20 for 2 Portable Cooling Towels (reg. \$40)

Most Viewed

Most Emailed

Latest News

Fighting, shelling reported in Syria despite cease-fire pledge *03/31/2012, 12:00 a.m.*

Oprah's success hasn't followed her to OWN *03/31/2012, 12:00 a.m.*

The lawyer beside Lindsay Lohan *03/31/2012, 12:00 a.m.*

Olbermann's show on Current TV canceled *03/31/2012, 12:00 a.m.*

L.A. doctor who gave daughter propofol sees license suspended *03/31/2012, 12:00 a.m.*

Videos

VIDEO: Mega Mania Rages On - watch Olga Ospina's report

The lines get longer and the hopes get higher across the Southland as the record...

Expand

Share Video: [Twitter](#) [Facebook](#) [Email](#)

In November, Judge Laurence H. Silberman, a Reagan appointee to the U.S. Court of Appeals in Washington and long a leader of the conservative legal movement, wrote an opinion upholding the healthcare law on the grounds that Congress has the power "to forge national solutions to national problems."

The Reagan-era lawyers sought to rein in what they saw as liberal judicial activism. For example, Fried and Kmiec thought the Roe vs. Wade ruling that struck down the state abortion laws was a mistake and should be overturned. However, they thought the high court should stand back and defer to Congress on matters of business and economic regulation.

But Congress is not held in very high regard by most of the justices. In public and private comments, they often speak with disdain of the politicians in the House and Senate.

Scalia mentioned the so-called Cornhusker Kickback during the healthcare arguments as an example of the kind of unsavory deal that goes into passing a law. The "kickback" — a boost in federal Medicaid funding for Nebraska — was intended to secure the vote of Ben Nelson, the state's Democratic senator, for the healthcare law. The controversial provision was quickly scrapped.

The justices' view of Congress was not improved two years ago when Obama lambasted the court's decision in Citizens United, the campaign funding case, during his State of the Union address. As he spoke, the Democrats rose to their feet and cheered and jeered as Roberts and the other justices sat silently.

Despite the oral arguments, many legal experts on the left and right say they doubt the high court will strike down the healthcare law by a 5-4 vote.

Fried said he is no longer sure. "The odds of [striking it down] have gone way up," he said.

Fried testified at Justice Samuel A. Alito Jr.'s confirmation hearing as well as the one for Roberts. "My judgment was that they were committed to the rule of law and to precedent," he said, pausing. "I hope that turns out to be true."

david.savage@latimes.com

Copyright © 2012, Los Angeles Times



 Comments

194

 Share

1218

 +1

20

 Tweet

104

 Recommend

268

FROM AROUND THE WEB

- 12 Companies that Could Go Bankrupt Very Soon | [StreetAuthority](#)

7 inventors killed by their inventions | [Mother Nature Network](#)

Mayo Clinic wins major patent case in unanimous Supreme Court ruling | [MedCity News](#)

Supremes Won't Save GOP From Itself on Obamacare | [The Daily Beast](#)

Untouchable Pensions May Be Tested in California | [The New York Times](#)

[what's this]

Ads by Google

Health Records Management

Become a Nationally Certified HIM Professional with Online Training! cd-ed.com/Study-HIM-Online

ImagineNation Challenge

Have a healthcare e-solution? \$1 million in awards imagineNationchallenge.ca

Odd Destinations »



Feel like taking the road less traveled? Consider these offbeat destinations around the world.

chitchat98765 at 9:48 PM March 31, 2012

apart from the judges, wait until you see future internet activism. our legal system has been working in the back rooms, but when the sunshine starts hitting i suspect a few changes are going to be made.

dannythomas at 9:47 PM March 31, 2012

Normal o false false false EN-US X-NONE X-NONE /* Style Definitions */
table.MsoNormalTable{mso-style-name:"Table Normal";mso-tstyle-rowband-size:0;mso-tstyle-colband-size:0;mso-style-noshow:yes;mso-style-priority:99;mso-style-qformat:yes;mso-style-parent:"";mso-padding-alt:0in 5.4pt 0in 5.4pt;mso-para-margin:0in;mso-para-margin-bottom:0.0001pt;mso-pagination:widow-orphan;font-size:11.0pt;font-family:"Calibri","sans-serif";mso-ascii-font-family:Calibri;mso-ascii-theme-font:minor-latin;mso-fareast-font-family:"Times New Roman";mso-fareast-theme-font:minor-fareast;mso-hansi-font-family:Calibri;mso-hansi-theme-font:minor-latin;mso-bidi-font-family:"Times New Roman";mso-bidi-theme-font:minor-bidi;}
In defending his "Massachusetts mandate" as a conservative model for national health-care legislation, former governor Mitt Romney editorialized in 2009 that by imposing tax penalties on people who choose to remain uninsured, an individual mandate "encourages 'free riders' to take responsibilities for themselves rather than pass their medical costs on to others." And, as Romney noted, conservatives have never been inclined to favor freeloaders.

Koala Meh at 9:47 PM March 31, 2012

Did these critics of "judicial activism" within this 9-member Supreme Court panel yell foul when 1-member judicial activists of various state courts overturned the majority of their entire state populations concerning gay marriage and other liberal agendas?

Comments are filtered for language and registration is required. The Times makes no guarantee of comments' factual accuracy. Readers may report inappropriate comments by clicking the Report Abuse link next to a comment. Here are the full [legal terms](#) you agree to by using this comment form.

Booster Shots

BPA and health: What the science does and doesn't yet say

FDA denies petition to ban bisphenol A

Diabetes drug metformin may double as cancer-fighting medicine

This week: Science serves up the perfect snack

Teens' 'cinnamon challenge': Dangerous, not innocent



L.A. for less than the price of sunblock. Only 99¢ for the first four weeks.

In Case You Missed It...



Spike Lee settles with family forced to flee home



Best Buy to downsize stores after profit drops



Romney is no Mr. Excitement on Leno



Pesticides suspected in mass die-off of bees



Photos: 'Game of Thrones' costumes

[More spotlights...](#)

[Corrections](#)[Horoscopes](#)[Media Kit](#)[About Us](#)[Contact Us](#)[Site Map](#)

Los Angeles Times

[Burbank Leader](#) | [Coastline Pilot](#) | [Daily Pilot](#) | [Huntington Beach Independent](#) | [News Press](#) | [Pasadena Sun](#) | [Valley Sun](#) | [KTLA](#) | [Hoy](#) | [Los Angeles Times Magazine](#)
[Baltimore Sun](#) | [Chicago Tribune](#) | [Daily Press](#) | [Hartford Courant](#) | [Los Angeles Times](#) | [Orlando Sentinel](#) | [Sun Sentinel](#) | [The Morning Call](#)

[Terms of Service](#) | [Privacy Policy](#) | [About Our Ads](#) | Los Angeles Times, 202 West 1st Street, Los Angeles, California, 90012 | Copyright 2012

A Tribune Newspaper website