

# The Volokh Conspiracy » Double Deference and the House GOP's Fair-weather Federalism

<http://volokh.com/2011/05/22/double-deference-and-the-house-gops-fair-weather-federalism/>

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This morning, I have an op-ed in the Washington Examiner entitled, [Tort reform and the GOP's fair-weather federalism](#). Although I support reforming medical malpractice rules to protect doctors from false accusations and runaway jury awards at the state level, the so-called HEALTH Act now pending in the House violates the GOP's Pledge to America to justify all of its legislation by identifying its constitutional authority in the enumerated powers of Congress.

The House rule implementing this pledge requires every bill's sponsor to submit "a statement citing as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution."

Yet there was always an enormous loophole to this commitment: For 70 years, the Supreme Court has "deferred" to Congress' assessment of its powers by adopting a "presumption of constitutionality."

So, if the Supreme Court's precedents defer to Congress' assessments of its powers, but Congress is relying for "constitutional authority" on the Supreme Court's precedents, then NO ONE is actually looking at the Constitution itself to see if a bill is within Congress' enumerated powers. Call this the problem of "double deference," with each branch of government pointing to the other and no one pointing to the Constitution.

Because the Examiner has a very strict 600 word limit, and my piece is 599 words, I did not have room to fully elaborate on the problems raised by this bill, so I thought I would expand upon my analysis here.

When I first heard that the House was planning on pursuing tort reform, I was skeptical that there was a constitutional basis for this effort at the federal level, but thought maybe there is some legitimate federal power that, if cleverly deployed, could influence tort law at the state level. So I was disappointed when I read the law firm report on which the sponsors of the bill relied for "constitutional authority." The report justified the bill under the "substantial effects doctrine."

Not only does this post-New Deal doctrine extend Congress's power well beyond the regulation of interstate commerce, it does so, not by independently determining whether the activity being regulated actually has a substantial affect on interstate commerce, but instead on whether Congress had a "rational basis" for believing that it did. Thus does the Court defer to Congress, while the House Republicans — just like Congressional Democrats — defer to the Court's assessment of constitutionality.

This "double deference" is one of the secret (to the general public) tricks by which the branches of the federal government can claim to be adhering to the Constitution while actually ignoring it. It is one of the ways important passages of the Constitution's text became "[lost](#)." (The other trick is the so-called "fundamental rights doctrine," by which the Court purports to protect those liberties that are "deeply rooted in the nation's tradition and history," but then defines every claim of liberty so specifically or concretely that it can never be so grounded. See [here](#).)

But the "findings" of the bill are even worse:

## EFFECT ON INTERSTATE COMMERCE

Congress finds that the health care and insurance industries are industries affecting

interstate commerce **and the health care liability litigation systems existing throughout the United States** are activities that affect interstate commerce by contributing to the high costs of health care and premiums for health care liability insurance purchased by health care system providers.

These “findings” are based on the effects on interstate commerce, not only of the “health care and insurance industries,” but also of “health care liability litigation systems throughout the United States” — that is, on the affects on interstate commerce of state courts themselves! So Congress has the power to regulate tort law because state courts affect interstate commerce. By this principle, Congress has a general police power over any matter not adjudicated by state common law courts.

“Fair-weather federalism” refers to the common and generally accurate observation by constitutional law professors that most who profess to be committed to principles of federalism quickly abandon their commitment when federalism obstructs their policy preferences. If the House Republicans vote to pass this bill, it will certainly support this cynicism. However, if the freshman and other self-described “constitutional conservatives” in the House combine with Democrats who oppose tort reform on policy grounds to kill the bill, it will be a significant victory for federalism. And, by raising their consciousness of the problem of double deference, it may also prove to be a valuable learning experience for House Republicans. One that will influence how they evaluate future legislation.

You can read the whole column [here](#).