The Supreme Court's Decision On The Affordable Care Act: Abrogating Article III Of The Constitution

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ABSTRACT

In National Federation of Independent Business v. Katherine Sebelius, Secretary of Health and Human Services, Case No. 11–393, the Supreme Court of the United States affirmed most of the 2010 Affordable Care Act (ACA). In holding the ACA as valid ("constitutional"), Chief Justice Roberts reasoned that the "taxing power" in the U.S. Constitution was the reason that the law was enforceable. Although a strong dissent on such reasoning was written by four other Justices, Roberts also wrote that laws "are entrusted to our nation's elected leaders, who can be thrown out of office if the people disagree with them." [1]

Roberts also wrote that the "Commerce Clause" in the U.S. Constitution did not give Congress authority to pass the ACA. Moreover, Congress could not impose unfunded mandates on the States to expand Medicaid. In so writing, Roberts disposed of the chief arguments of those in favor of the law and provided a bone to those who opposed it. But, by then holding that Congress' taxing power was sufficient to uphold the law, Roberts ignored the Federal Anti-Injunction statute and called into question the ability of the Supreme Court to hold a law passed by Congress entirely unconstitutional. By writing that, in effect, the Court should defer to Acts of Congress, Roberts attempted a finesse first exercised by Chief Justice John Marshall in Marbury v. Madison in 1803. While it may seem as if he intended to demonstrate the same legal adroitness of Marbury, instead he deferred to the wishes of Congress, going through legal gymnastics to uphold a law that many scholars saw as indefensible, and damaged the power of the Supreme Court given to it in Article III immeasurably.

Keywords: Affordable Care Act; ACA; ObamaCare; U.S. Supreme Court

INTRODUCTION

After decades of debate and policy discussion, the USA passed a National Health Insurance law on March 23, 2010.[2] On that day, President Barack Obama signed into law the Patient Protection and Affordable Care Act (the "Affordable Care Act" or "ACA") establishing a National Health Insurance system administered by the federal government. More than two years later, after numerous lawsuits contesting the law, on June 28, 2012, the Supreme Court upheld most of the law based on the Constitution's "taxing power," stating:

The Affordable Care Act is constitutional in part and unconstitutional in part. The individual mandate cannot be upheld as an exercise of Congress' power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it. In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress' power to tax.

[1] http://www.nytimes.com/interactive/2012/06/29/us/29healthcare-scotus-docs.html
[2] Pub.L. 111-148, 124 Stat. 119

As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer.

The Federal Government does not have the power to order people to buy health insurance. Section 5000A [of the Internal Revenue Code] would therefore be unconstitutional if read as a command. The Federal Government does have the power to impose a tax on those without health insurance. Section 5000A is therefore constitutional, because it can reasonably be read as a tax.[3]

LEGISLATIVE HISTORY

President Barack Obama was elected the 44th President of the United States on November 4, 2008. During the general election campaign between Obama and McCain, Obama promised that fixing health care would be one of his four priorities if he won the presidency.[123] After his inauguration, Obama announced to a joint session of Congress in February 2009 that he would begin working with Congress to construct a plan for health care reform.[124

After the House of Representations voted on a series of bills in 2009, the Senate failed to take up debate on the House bills and instead took action on a totally different bill, H.R. 3590, regarding housing tax breaks for service members.[157] Because the United States Constitution requires that all revenue-related bills originate in the House,[158] the Senate took up this bill since it was first passed by the House as a revenue-related modification to the Internal Revenue Code. The bill was then used as the Senate's vehicle for their health care reform proposal, completely revising the content of the bill.[159]

Passage in the Senate was temporarily blocked by a filibuster threat by Nebraska Senator Ben Nelson. The bill then passed by a vote of 60–39 on December 24, 2009, with all Democrats and two Independents voting for, all but one Republican voting against and one senator (Jim Bunning, R-Ky.) not voting.[161]

After a number of legislative compromises, the House passed the bill with a vote of 219 to 212 on March 21, 2010, with 34 Democrats and all 178 Republicans voting against it.[169] President Obama signed the bill into law on March 23, 2010.[171]

The ACA was immediately challenged in the United States District Court in a number of states. One early case, *State of Florida v. United States Department of Health and Human Services,* declared the ACA "unconstitutional." Other federal courts in different states declared it "constitutional." After decisions from different federal courts of appeals on different aspects of the case, the Supreme Court decided to hear the case. On June 28, 2012, on the final day of the 2011-2012 calendar, the Supreme Court handed down its decision in *National Federation of Independent Business v. Katherine Sebelius, Secretary of Health and Human* Services, Case No. 11–393. [4] The U.S. Supreme Court ruled 5-4 that the Affordable Care Act is constitutional. The health insurance mandate was found to be "permissible under Congress's taxing authority."[5] The Supreme Court upheld the majority of the ACA, including the requirement that Americans must pay for health care insurance or face a penalty. The Court did determine, however, that Congress cannot require individual States to expand Medicaid without providing funds for that expansion.[6]

CONSTITUTIONALITY

Once two different federal appellate courts ruled on the constitutionality of the law, but were in conflict with each other on whether or not the ACA was valid, it was accepted by the Supreme Court to resolve the dispute. Commentators followed the bill throughout the appeal process and its oral argument in front of the Supreme Court.

[3] pp. 44-45, slip op., *National Federation of Independent Business v. Sebelius*, no. 11-393, U.S. Supreme Court (June 28, 2012)
[4] http://s3.documentcloud.org/documents/392172/supreme-court-decision-on-the-patient-protection.pdf
[5] http://yro.slashdot.org/story/12/06/28/1616240/supreme-court-affordable-care-act-is-constitutional
[6] http://www.nytimes.com/2012/06/29/us/supreme-court-lets-health-law-largely-stand.html?pagewanted=all

Discussion centered on the ideology of the Supreme Court Justices, and it was widely anticipated that the four "strict constructionists" would vote against constitutionality, that the four "activists" would vote for constitutionality and that one "moderate" would be the deciding vote.

In the final decision, Chief Justice Roberts voted for constitutionality. This itself was a huge surprise and unanticipated by most commentators. Most thought that Roberts would vote against the law and that Anthony Kennedy would be the "swing vote." Regardless, Chief Justice Roberts wrote the decision whish found the ACA constitutional, or valid.

THE DECISION

There were three issues decided by the Court. First, did the "Commerce Clause" (Article I, Section 8), give Congress the power to pass the ACA. Second, was it a "tax" and, if so, how could Congress pass a tax in violation of the federal Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), a United States federal law originally enacted in 1867. That statute, upheld by the Supreme Court, provides that with 14 specified exceptions, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." Third, can Congress pass an unfunded mandate that requires States to expand Medicaid without any additional funding from the federal government?

Most commentators thought that if the Supreme Court upheld the law, it would be under the so called "Commerce Clause" of the U.S. Constitution. That clause states:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[U.S. Constitution, Article I, Section 8]

The Supreme Court, throughout recently history, has regularly upheld laws based on this clause.

In discussing whether or not Congress could pass the ACA under its "Commerce Clause" powers, Chief Justice Roberts wrote that "Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority. Congress already possesses expansive power to regulate what people do. Upholding the Affordable Care Act under the Commerce Clause would give Congress the same license to regulate what people do not do. The Framers knew the difference between doing something and doing nothing. They gave Congress the power to regulate commerce, not to compel it. Ignoring that distinction would undermine the principle that the Federal Government is a government of limited and enumerated powers. The individual mandate thus cannot be sustained under Congress's power to "regulate Commerce." Pp. 16–27. In reality, by playing a "shell game" with labels, the Supreme Court did exactly that. Instead of stating that Congress had the power to pass the ACA under the Commerce Clause, the Supreme Court held that Congress had to power to pass the ACA as a "tax", even though the word "tax" does not appear anywhere in the ACA and the Obama Administration expressly denied that the individual mandate was a "tax."[7]

Roberts wrote, "The most straightforward reading of the individual mandate is that it commands individuals to purchase insurance. But, for the reasons explained, the Commerce Clause does not give Congress that power. It is therefore necessary to turn to the Government's alternative argument: that the mandate may be upheld as within Congress's power to "lay and collect Taxes." Art. I, §8, cl. 1. In pressing its taxing power argument, the Government asks the Court to view the mandate as imposing a tax on those who do not buy that product. Because "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality," Hooper v. California, 155 U. S. 648, 657, the question is whether it is "fairly possible" to interpret the mandate as imposing such a tax, Crowell v. Benson, 285 U. S. 22, 62. Pp. 31–32. Roberts does precisely that and is joined in that decision by Associate Justices Elena Kagan, Ruth Bader Ginsberg, Stephen G. Breyer and Sonia Sotomayor.

[7] http://www.huffingtonpost.com/2012/06/28/supreme-court-health-care-decision_n_1585131.html

Because Roberts' opinion gives five votes to limiting federal regulatory authority, it could have long-term implications for the way the Courts interpret the constitution[8] Indeed, the decision could reverse over 200 years of the Supreme Court being the final decision maker on if a law is constitutional or not and could abrogate its role under Article III of the Constitution.

Marbury v. Madison

Marbury v. Madison is perhaps the most famous decision ever issued by the Supreme Court. It established the doctrine of judicial review.

The case began on March 2, 1801, when an obscure Federalist, William Marbury, was designated as a justice of the peace in the District of Columbia. Marbury and several others were appointed to government posts created by Congress in the last days of John Adams's presidency, but these last-minute appointments were never physically delivered. The new President, Thomas Jefferson, refused to deliver the appointments and did not recognize the appointments as valid. Marbury petitioned the Supreme Court to force the new Secretary of State James Madison to deliver the documents. The Court, with John Marshall as Chief Justice, found first that Madison's refusal to deliver the commission was both illegal and remediable. Nonetheless, the Court stopped short of compelling Madison to hand over Marbury's commission, instead holding that the provision of the Judiciary Act of 1789 that enabled Marbury to bring his claim to the Supreme Court was itself unconstitutional, since it purported to extend the Court's original jurisdiction beyond that which Article III established. The petition was denied in a 6 – 0 vote. This case establishes the Supreme Court's power of judicial review.

In *NFIB v. Sibelius*, Chief Justice Roberts attempted a finesse similar to that exercised by Chief Justice John Marshall in *Marbury*. By holding that the "Commerce Clause" did not give Congress authority to pass the ACA and that Congress could not impose unfunded mandates on the States to expand Medicaid, Roberts disposed of the chief argument of those in favor of the law and provided a scrap to its opponents. But by then holding that Congress' taxing power was sufficient to uphold the law, Roberts ignored the Anti-Injunction statute and called into question the ability of the Supreme Court to hold a law passed by Congress entirely unconstitutional. Inevitably, the Court's Article III power was tarnished and its ability under *Marbury* was substantially limited.

Interestingly, in a letter to the Fifth Circuit Court of Appeals a few months before the *NFIB v. Sibelius* decision, Attorney General Eric H. Holder, Jr. told a federal appeals court that President Obama and his administration do not quarrel with the authority of the federal courts to strike down an act of Congress. At the same time, however, the Attorney General emphasized that no federal court should reach out to strike down a federal law properly passed by Congress, and should never do so unless absolutely necessary.[9] That view appears to be exactly what Chief Justice Roberts adopted in the *NFIB v. Sibelius* decision. Thus, the question now appears to be does the Supreme Court retain its full Article III powers and the power of judicial review under *Marbury*? Or, does political partisanship and pressure from the White House translate to a legitimate check on the Supreme Court? Based on Holder's letter and Robert's decision, the latter appears to be the current philosophy of the Court.

CONCLUSION

In deciding the case, Chief Justice Roberts tried to craft a decision, like Chief Justice John Marshall in *Marbury v. Madison* in 1803 that would uphold the Court's historical power and authority but at the same time would not be seen as a political decision. By holding that the "Commerce Clause" did not give Congress authority to pass the ACA and that Congress could not impose unfunded mandates on the States to expand Medicaid, Roberts disposed of the chief argument of those in favor of the law, but by then holding that Congress' taxing power was sufficient to uphold the law, Roberts completely ignored the Anti-Injunction statute and called into question the ability of the Supreme Court to declare invalid a law passed by Congress. Perhaps the political pressure revealed in the Attorney General's letter was heard by the Chief Justice. Regardless of the letter, however, Chief Justice

[8] http://www.npr.org/2012/06/28/155907155/new-republic-affordable-care-act-is-constitutional
[9] http://www.scotusblog.com/2012/04/holder-reaffirms-marbury/

Roberts has been seen by many as deferring to the wishes of Congress, going through legal gymnastics to uphold a law that many scholars saw as indefensible, and damaging the integrity of the Supreme Court immeasurably.

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REFERENCES

1. Barnes, Robert (28 June 2012). "Supreme Court upholds Obama's health-care law". *The Washington Post*. Retrieved 29 June 2012
2. Baude, W. (2011). Signing Unconstitutional Laws. *Indiana Law Journal*, 86(1), 303-333.
3. Campos, Paul (28 June 2012). "Did John Roberts switch his vote?". salon.com. Retrieved 29 June 2012
4. Cuza, Bobby (28 June 2012). "Supreme Court Upholds Obama Health Care Law". ny1.com. Retrieved 29 June 2012.
5. Gentilviso, Chris (1 July 2012). "John Roberts Health Care Decision: Supreme Court Chief Justice Switched Sides, Sources Say". *The Huffington Post*. Retrieved 2 July 2012.
6. Hatch, O. & Upton, F. (2011). Medicaid expansion in the new health law: costs to the states. Retrieved from http://energycommerce.house.gov/media/file/PDFs/030111MedicaidReport.pdf
7. Liptak, Adam (28 June 2012). "Supreme Court Upholds Health Care Law, 5-4, in Victory for Obama". *The New York Times*. Retrieved 29 June 2012.
8. Levey, Noam; Savage, David (June 30, 2011). "Appeals court declares health law constitutional". *Los Angeles Times*.
9. *National Federation of Independent Business v. Sebelius*, U.S. Sup. Ct. (June 28, 2012).
10. Rowen H. (2011, April) How the federal healthcare reform law will affect healthcare premiums, healthcare benefits and the market for coverage. *Health Lawyer*, 23(4):55-61. http://www.sdma.com/files/Publication/775c99a7-9260-4047-b178-acb5c6d8fa7f/Presentation/PublicationAttachment/c2b85f32-746c-4c55-88e1-b38d11a436f3/4-11%20-%20Health%20Lawyer.pdf
11. Pear, R. & Herszenhorn, D. (2009, November 18). Senate says health plan will cover another 31 million. *New York Times.* Retrieved from http://www.nytimes.com/2009/11/19/health/policy/19health.html
12. Pickert, Kate (28 June 2012). "Supreme Court Upholds Health Reform Law in Landmark Decision". *Time*. Retrieved 29 June 2012
13. Plummer, Brad (28 June 2012). "Supreme Court puts new limits on Commerce Clause. But will it matter?". *The Washington Post*. Retrieved 3 July 2012.
14. Sally P. Schreiber & Alistair M. Nevius, "Supreme Court Upholds Health Care Law", *Journal of Accountancy*, Aug. 2012, p. 12 (American Institute of Certified Public Accountants).
15. Smith, P. (2011, January 20). It's official: 26 states join Florida's lawsuit against ObabmaCare. *LifeSiteNews.com.* Retrieved from http://www.lifesitenews.com/news/its-official-26-states-join-floridas-lawsuit-against-obamacare
16. Staman, J., Brougher, C., Liu, E., Lunder, E., & Thomas, K. (2011, February 01). Requiring individuals to obtain health insurance: A constitutional analysis. *Congressional Research Service.* Retrieved from http://www.achp.org/themes/ACPH_Main/files/Requiring_Individuals_to_Obtain_Health_Insurance_2-1-2011.pdf
17. Stelter, Brian (June 28, 2012). "Rushing to Report the Health Ruling, and Getting It Wrong". *The New York Times*. Retrieved 29 June 2012.
18. State of Florida v. United States Department of Health and Human Services, United States District Court for the Northern District of Florida, Case No. 3:10-cv-91-RV/EMT, retrieved from http://graphics8.nytimes.com/packages/pdf/national/20110131VINSON_HEALTH.pdf
19. Thinking Progress: Ian Millhiser, "What The Heck Is The Tax Anti-Injunction Act?" March 23, 2012, accessed July 1, 2012

20. Thomas More Law Center v. Obama, 2011 U.S. App. LEXIS 13265, 2011 WL 2556039 (6th Cir. Mich. 2011). 10-2388, retrieved from http://www.ca6.uscourts.gov/opinions.pdf/11a0168p-06.pdf
21. "US Supreme Court upholds healthcare reform law". *BBC News US & Canada*. 28 June 2012. Retrieved 29 June 2012.
22. Wolverton II, J. (2010). The Constitution & Healthcare Reform: Though ObamaCare has been enacted into law, it is patently unconstitutional. The states can nullify this federal power grab within their own borders. *New American* (08856540), 26(10), 26-30.

