Analysis of Supreme Court's Patient Protection and Affordable Care Act Cases

In a landmark ruling, the Supreme Court yesterday upheld key provisions of the Patient Protection and Affordable Care Act ("ACA"), while at the same time stressing the limits of federal regulatory authority. The most immediate and direct impact of the Court's opinion will be to spare health care providers, insurers, and insureds the task of unwinding steps they have already taken to implement the law, which many commentators believed would be held unconstitutional in whole or in part. In a sharply divided opinion with shifting majorities, the Court held that the ACA's individual mandate provision — which requires that nearly every individual obtain health insurance or pay a monetary penalty — was beyond Congress's power to regulate commerce, but could nonetheless be upheld as a valid exercise of Congress's power to lay and collect taxes. The Court also upheld the ACA's expansion of Medicaid programs, but effectively rendered participation in the expanded scope optional to the States. The Court found that a provision threatening States with the loss of *all* Medicaid funding if they did not comply with the expansion was impermissibly coercive.

The mix of rulings came as a surprise to many commentators, who had thought that the Court would strike down the individual mandate, and perhaps the whole ACA. However, the biggest surprise of the day was not the Court's ruling, but its alignment, with the Chief Justice (rather than Justice Kennedy) casting the swing vote to save key provisions of the statute. While the decision's final judgment upholds the law, the Chief Justice's opinion — in civics lesson fashion — offers a strong reaffirmation of the principles of federalism and separation of powers that limit what some on the Court see as an ever-expanding assertion of federal power. For the ACA in particular, the decision returns the debate to the political realm.

The following is a breakdown of the Court's rulings, on an issue-by-issue basis.

Anti-Injunction Act. As a threshold matter, the Court first determined that it had authority to rule on the law's constitutionality. The Anti-Injunction Act (AIA) generally prevents taxpayers from challenging a tax in court before it becomes operative. Because the individual mandate and requirement to pay a penalty to the Internal Revenue Service if one fails to obtain insurance do not become operative until 2014, the challenge to that provision was arguably premature. Employing a literal statutory analysis, the Court held that because Congress called the monetary exaction a "penalty" rather than a "tax" and did not include it among penalties that should be "deemed" taxes for purposes of the AIA, the jurisdictional bar did not apply.

The Individual Mandate. The Court then turned to the question that had captured the most public attention: whether Congress had the authority to enact the individual mandate. In briefing and during oral argument, the Court principally focused on whether Congress had the power to enact this provision pursuant to its constitutional authority to regulate interstate commerce. Since the New Deal, the Supreme Court has taken an expansive view of the Commerce Clause, permitting Congress to enact legislation in many areas, so long as it had a "substantial effect" on interstate commerce, including in agriculture, narcotics, and civil rights. However, several cases over the last two decades have imposed some limiting principles.

Thursday morning, five justices — the Chief Justice and Justices Scalia, Kennedy, Thomas, and Alito — declared a further limitation on Congress's Commerce Clause authority: Congress cannot create commerce by forcing otherwise inactive participants to enter the market. The Chief Justice wrote separately from the other four, who authored a rare joint opinion that did not indicate the author — something often reserved for when the Justices wish to signal unity on an issue. These five determined that the individual mandate was

an attempt to compel individuals who were not participating in the health insurance market to enter that market. These justices rejected the argument pressed by the government and health care and insurance industries that these individuals were already participating in the health care system because almost all were accessing (or someday would access) health care services, but were shifting the cost to others by failing to pay for insurance now. The five conservative justices held that interpreting the Commerce Clause to encompass even non-activity that has significant effects on commerce would explode any limits on the federal government's regulatory authority under our constitutional scheme. For similar reasons, these Justices concluded that the individual mandate could not be regarded as "necessary and proper" to the exercise of Commerce Clause authority because it represented a vast expansion of that power, not a mere complement to it.

Justice Ginsburg, in an opinion joined by Justices Breyer, Sotomayor, and Kagan, penned a vigorous defense of the individual mandate's validity under the Court's Commerce Clause jurisprudence. She rejected the activity/inactivity dichotomy as unsupported by precedent or the facts of this case. She stressed that nearly all people will be active in the health care market at some time, and those who choose not to buy insurance are taking an active step to "self-insure." She likened the contrary view to the long-discredited *Lochner* era, in which the Supreme Court regularly struck down economic regulation. She urged that the Court should avoid unnecessarily constraining Congress's "capacity to meet the new problems arising constantly in our ever-developing modern economy."

Despite all the ink spilled over the commerce power, the mandate's fate was decided, in the end, without reliance on the Commerce Clause. The Chief Justice was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan in ruling that the law was valid under Congress's power to levy taxes. In something of a semantic twist — which the dissenters lambasted as sophistry — the majority held that the individual mandate could be saved by construing its penalty as a constitutionally authorized "tax," despite the fact that the same penalty did not constitute a "tax" for statutory purposes under the AIA in the context of the threshold jurisdictional inquiry. The question the Court addressed was whether it was "fairly possible" to read the individual mandate's provisions not as making it unlawful for an individual to fail to obtain insurance, and imposing a penalty for this unlawful act, but instead as exacting a "tax," the condition of which is that the person does not have insurance. The majority concluded that the latter construction was "fairly possible." In reaching this conclusion, the Court employed a functional analysis, and relied on the fact that the exaction is collected by the Internal Revenue Service as part of tax returns, is relatively small and calculated with reference to income and tax status, and is imposed without regard to criminal scienter.

Medicaid Expansion. The second issue on center stage before the Court yesterday was the ACA's expansion of Medicaid coverage. Starting in 2014, the ACA increases eligibility for Medicaid, by requiring all States to cover people under 65 with individual or family incomes up to 133% of the federal poverty level. Although the federal government entirely pays for the expansion for the first two years, it will gradually reduce its payments and only cover 90% by 2020. Another provision of the ACA authorized the Secretary of Health and Human Services (HHS) to withdraw *all* of a State's Medicaid funding should the State fail to comply with the expansion provisions. The question facing the Court was whether the Secretary's ability to deprive a State of so significant a percentage of a State's revenue made the expansion unconstitutionally coercive.

The Supreme Court has from time to time discussed limits on Congress's power to spend and tax, but it had not found that Congress overstepped those limits since 1936. In yesterday's ruling, seven members of the Court (all but Justices Ginsburg and Sotomayor) for the first time declared that conditional federal spending unconstitutionally coerced the States. Chief Justice Roberts wasted no euphemisms, characterizing Congress as pointing "a gun to the head" of each State. Moreover, he concluded that the expansion of Medicaid to cover all persons with income below 133% of the poverty line constituted a change in kind, rather than degree, to the existing Medicaid program.

But Chief Justice Roberts (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan) ultimately saved Medicaid expansion by limiting its holding to the unconstitutional applications that the Court had identified. In other words, the decision precludes the Secretary only from withdrawing funds under the extant Medicaid program from those States that decline to participate in, or fail to comply with, the expansion provisions. It remains to be seen what practical issues may arise as the Secretary attempts to administer two versions of the Medicaid program, one for States participating in the expanded program and the other for States that reject the new provisions.

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While proponents of the ACA are surely celebrating its constitutional vindication, the Justices' multiple opinions exposed deep ideological rifts and foreshadow fissures that are likely to expand in future cases dealing with the scope of federal legislative power. Indeed, four Justices would have struck down the ACA in whole, and yesterday's opinions indicate that a majority of the Justices presently on the Court have a relatively restrictive view of Congress's commerce and spending powers. While these two powers have expanded without much impediment since the New Deal, a majority of Justices have made it clear, at the least, that federal regulation of commercial inactivity and large monetary grants to the States with onerous conditions will be viewed through a jaundiced eye.

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