Essay


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The United States Supreme Court recently upheld the Patient Protection and Affordable Care Act, also known as “Obamacare,” as a valid exercise of congressional authority. The decision, which was one of the most anxiously anticipated in years, caught many people by surprise when Chief Justice Roberts sided with the liberal wing of the Court and upheld the individual mandate as a valid exercise of congressional authority to tax. *This Essay* examines the decision in a political and legal context and provides commentary on the case. It also suggests that the Court’s holding on the unconstitutionality of the expanded Medicaid provision may provide precedent for other challenges to congressional action in areas affecting the states.
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I. INTRODUCTION

The United States Supreme Court recently upheld the Patient Protection and Affordable Care Act (“ACA” or “Act”), also known as “Obamacare,” as a valid exercise of congressional authority. The decision, which was anxiously anticipated by pundits on both sides of the political aisle, caught many people by surprise when Chief Justice Roberts sided with the liberal wing of the Court and upheld the individual mandate as a valid exercise of congressional authority to tax. While the decision appears at first glance to clash with the Chief Justice’s conservative views, this Essay suggests that the opinion actually upholds many of these views. By refusing to uphold the individual mandate under the Commerce Clause and the Necessary and Proper Clause, and by reasoning that the states could not be compelled to participate in the expanded Medicaid program under the Spending Clause, the Court, in effect, sent many of the issues back to the political arena for further debate. The decision is also significant because it places limits on the power of Congress to pass comprehensive legislation that affects the states.

II. THE ACA

In 2010, Congress passed the ACA in order to increase the number of Americans who have health insurance and to begin the process of

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5 U.S. CONST. art. I, § 8, cl. 1; see Nat’l Fed’n of Indep. Bus., 132 S. Ct. at 2608 (“[I]t 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.”).
6 U.S. CONST. art. I, § 8, cl. 3.
7 U.S. CONST. art. I, § 8, cl. 18.
8 U.S. CONST. art. I, § 8, cl. 1.
controlling the unsustainable growth in medical costs. The ACA, which was passed without any meaningful Republican support, represented an unprecedented change in the healthcare system. Individuals are now required to carry minimum health insurance coverage.\textsuperscript{8} Beginning in 2014, if an individual is not exempt and does not carry the minimum coverage, she will be required to pay a “shared responsibility payment” or “penalty” to the federal government.\textsuperscript{9} The penalty will be collected by the Internal Revenue Service with an individual’s income taxes and will be assessed and collected in the same manner.\textsuperscript{10}

The ACA expands the Medicaid program in order to provide health coverage to more individuals with lower incomes. Prior to the passage of the ACA, Medicaid offered federal funding to the states to assist the poor, needy families, the blind, the elderly, the disabled, and others to obtain healthcare.\textsuperscript{11} The decision to participate in the program by the states was voluntary, and the states had to comply with various federal requirements. The ACA, however, expands the Medicaid program and mandates that states cover all individuals under the age of sixty-five who have incomes up to 133\% of the federal poverty line.\textsuperscript{12} The ACA provides this additional federal funding to the states to insure these lower income people who are not currently covered under the program.\textsuperscript{13} The ACA has a powerful incentive to ensure that states expand their Medicaid programs. If a state fails to accept the additional Medicaid funding, then it risks losing all federal Medicaid funding.\textsuperscript{14}

Congress believed that it needed to deal with the health care system in a comprehensive manner. In order to control costs and provide universal coverage, it needed to bring everyone into the system. Those individuals who have employer-based insurance will be able to keep their policies. Employers with fifty or more employees that do not offer insurance to their employees may have to pay a penalty.\textsuperscript{15} The ACA attempts to bring more competition into the system by creating exchanges for purchasing insurance\textsuperscript{16} and by regulating how insurance is provided through employer and non-employer plans.\textsuperscript{17} Insurance companies must provide coverage to

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\item \textsuperscript{8} 26 U.S.C. § 5000A(a) (Supp. 2011).
\item \textsuperscript{9} Id. § 5000A(b)(1).
\item \textsuperscript{10} See id. §§ 5000A(c), (g)(1) (describing how the amount of the penalty is calculated).
\item \textsuperscript{11} 42 U.S.C. § 1396d(a) (2006 & Supp. 2011).
\item \textsuperscript{12} See Nat’l Fed’n of Indep. Bus., 132 S. Ct. at 2582 (outlining the details of Section 1396d(a)(10)(A)(i)(VIII)).
\item \textsuperscript{14} 42 U.S.C. § 1396c (2006 & Supp. 2011).
\item \textsuperscript{15} 26 U.S.C. § 4980H (Supp. 2011) (employer mandate).
\item \textsuperscript{16} 42 U.S.C. § 18031 (Supp. 2011) (exchanges).
\end{itemize}
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dependent children until they are twenty-six years old. The federal government will also provide subsidies to individuals and families with incomes up to 400% of the poverty level to purchase insurance.

Supporters of the ACA say it will provide near universal coverage and slow the unsustainable growth in health care spending. Critics of the legislation, on the other hand, argue that it represents an unprecedented intrusion of the federal government into the lives of individuals by mandating that they purchase private insurance, with the inevitable result of making businesses less competitive. These critics also argue that federal and state governments cannot afford the ACA because the budget projections do not accurately state the true costs of the program. They want to repeal the legislation.

III. HISTORY OF THE CASE

After the ACA became law in 2010, twenty-six states, the National Federation of Independent Business, and a number of individuals filed suit in the United States District Court for the District of Northern Florida, attacking the constitutionality of the ACA. The district court held that the individual mandate was unconstitutional under Article I of the Constitution. The district court also held that the individual mandate could not be severed from the remainder of the ACA, and as a result, the entire Act had to be struck down. The United States Court of Appeals for the Eleventh Circuit, in affirming in part and reversing in part, held that the individual mandate was unconstitutional, but reasoned that the individual mandate could successfully be severed from the rest of the ACA. The appellate court then upheld the remainder of the Act, including the expanded Medicaid provision. The United States Supreme Court granted certiorari to decide these important issues.

IV. LEGAL BACKGROUND

The federal appellate courts came down in different ways on many issues involved in the case, including the applicability of the Anti-

22 Id. at 1305–06.
24 Id.
Injunction Act ("AIA"), the constitutionality of the individual mandate and expanded Medicaid provisions, and the severability of these provisions from the rest of the ACA. It was the split in the circuits that paved the way for the United States Supreme Court to hear the case.

While the Court had been clear in prior cases that Congress had the power under the Commerce Clause to regulate matters that had a substantial effect on interstate commerce—even if the act was solely within a single state—many argued that this case presented a case of first impression because Congress had never required an individual to purchase a private insurance product or pay a penalty. There was also the related question as to whether Congress had the power to pass the individual mandate under the Necessary and Proper Clause. Some argued that Congress had the right to pass the individual mandate under its power to tax.

Even if Congress had the ability to pass the individual mandate, the issue remained whether Congress had the power under the Spending Clause to threaten the states with the loss of current Medicaid funding if they refused to participate in the ACA. While the Court had acknowledged in South Dakota v. Dole that Congress could condition the states' receipt of federal funding upon compliance with certain directives, the power was not without limits and could not be unduly coercive.

The final issue facing the Court would depend upon whether the Court invalidated these key provisions of the ACA. If the Court invalidated any of the key provisions, then it would have to decide whether to strike only

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26 The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." 26 U.S.C. § 7421(a) (2006).
28 Wickard v. Filburn, 317 U.S. 111, 128 (1942) (upholding production quotas of wheat established by Congress under the Commerce Clause even though wheat was consumed intrastate).
31 483 U.S. 203, 211 (1987) (holding that non-coercive financial incentives are constitutional under Spending Clause).
32 Id. at 207–08, 210–11.
those parts or to invalidate the entire act. 33

V. OPINION OF THE COURT

As a threshold issue, the Court had to decide whether the AIA prohibited the suit. The AIA provides that an action involving the payment of a tax cannot be brought until the tax is actually paid. 34 If the statute were applied, the Court would lack jurisdiction to decide the case. The Court held that the provision was not applicable. 35 Chief Justice Roberts reasoned that since Congress did not define the “shared responsibility payment” as a tax, then the AIA was inapplicable. 36 The choice of words evidenced congressional intent to allow the suit to go forward. 37

The Court then turned to the question of whether the individual mandate was constitutional. The Court asked whether the Commerce Clause or the Necessary and Proper Clause authorized the passage of the individual mandate. The Court recognized that the case was one of first impression and phrased the question as whether Congress could force an individual to purchase a product from a private business, or else pay a penalty. 38 The Court reaffirmed the longstanding principle that Congress has broad powers under the Commerce Clause and the Necessary and Proper Clause and may regulate areas that substantially affect interstate commerce or are necessary and proper to effectuate a valid exercise of congressional authority. 39 On these issues, Chief Justice Roberts sided with the conservative members of the Court, with the result that the individual mandate could not be upheld under either provision. 40 The liberal members of the Court reasoned that the individual mandate was constitutional under both provisions. 41

In a surprise to many legal experts, the Court held that Congress had the authority to pass the individual mandate under the Tax Clause. 42 Writing for the Court, Chief Justice Roberts sided with the liberal members of the Court. He noted that the Court should uphold the provision if it could reasonably be construed to avoid an unconstitutional finding. 43

33 See United States v. Booker, 543 U.S. 220, 258−59 (2005) (“[The Court] must retain those portions of [an otherwise unconstitutional] Act that are (1) constitutionally valid, (2) capable of “functioning independently,” and (3) consistent with Congress’ basic objectives in enacting the statute.” (citations omitted)).
35 Id. at 2583−84.
36 Id.
37 Id. at 2582−84.
38 Id. at 2584.
39 Id. at 2585−86.
40 Id. at 2591, 2593; see also id. at 2647−48 (Scalia, Kennedy, Thomas and Alito, JJ., dissenting).
41 Id. at 2615 (Ginsburg, J., dissenting).
42 Id. at 2600.
43 Id. at 2594.
While Congress called the “shared responsibility payment” a penalty,\textsuperscript{44} the choice of words was not dispositive on the constitutional question. The “shared responsibility payment” is a tax because it is not unduly burdensome, it is not based on willful violations, and it is collected by the Internal Revenue Service in the same manner as other taxes.\textsuperscript{45} The Court dismissed the argument that the tax violated the Direct Tax Clause,\textsuperscript{46} instead holding that “[a] tax on going without health insurance does not fall within any recognized category of direct tax” since it is not paid by all individuals, as a capitation is, and is not a tax on the ownership of land or personal property.\textsuperscript{47}

The Court then ruled on the states’ argument that the expanded Medicaid provisions violated the Spending Clause. Seven members of the Court decided that Congress exceeded its authority under this provision because it unduly coerces the states to accept the expanded Medicaid funding.\textsuperscript{48} While Congress has the authority to provide funds to the states and to place conditions on how the funds are spent, the states must have the ability to voluntarily accept or reject the funding.\textsuperscript{49} “In this case, the financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement’—it is a gun to the head.”\textsuperscript{50} The states really have no choice but to accept the expanded Medicaid funding because they are highly dependent upon the Medicaid funding to balance their budgets.\textsuperscript{51}

The final question facing the Court was how it would deal with the unconstitutionality of the expanded Medicaid provision. The Court did not invalidate the entire ACA; instead, the Court refused to allow the Secretary of Health and Human Services to withhold existing Medicaid funds to states that refuse to adopt the expanded Medicaid program.\textsuperscript{52} The effect of this decision was to allow each state to decide whether it wanted to accept the expanded Medicaid funding without the risk of jeopardizing its participation in the existing program.\textsuperscript{53} The Court then upheld the remaining sections of the ACA.\textsuperscript{54}

\textsuperscript{44} Id. at 2583.
\textsuperscript{45} Id. at 2593–96.
\textsuperscript{46} U.S. CONST. art. I, § 9, cl. 4 provides: “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”
\textsuperscript{47} Nat’l Fed’n of Indep. Bus., 132 S. Ct. at 2599.
\textsuperscript{48} Id. at 2666–67.
\textsuperscript{49} Id. at 2604–05.
\textsuperscript{50} Id. at 2604.
\textsuperscript{51} Id. at 2662–66.
\textsuperscript{52} Id. at 2607.
\textsuperscript{53} Id. at 2607–08; see also id. at 2641–42 (Ginsburg, J., concurring in part and dissenting in part).
\textsuperscript{54} Id. at 2608 (majority opinion).
VI. ANALYSIS OF THE OPINION

Chief Justice Roberts succeeded in preserving the status of the Court as a non-partisan institution by siding with the liberal members of the Court and upholding the ACA. Prior to the decision, many pundits believed that the Court would split upon ideological lines. Some have argued that the Chief Justice’s decision was politically based, although it is dangerous to speculate as to anyone’s intentions, especially an esteemed member of the Court. One thing is clear: the Chief Justice understood that by siding with the liberal wing of the Court and upholding the ACA, Congress and the states would ultimately have a say in whether the ACA could be successfully implemented. If the states are no longer required to participate in the expanded Medicaid program, then there is the risk that the ACA will fall apart due to its weakened foundation. As the Chief Justice wrote: “[T]he Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people.”

While many conservatives feel that Chief Justice Roberts abandoned his conservative values by upholding the law, it is important to note that his opinion affirms many of these core principles. He upheld the individual mandate under the arguably narrower basis of Congress’s power to tax. He sided with the conservative members of the Court when he wrote that Congress lacked the power under the Commerce Clause to force individuals to buy private insurance or pay a tax. He also agreed that Congress exceeded its authority when it tied the receipt of existing Medicaid funds to the adoption of the expanded Medicaid provision. The Court’s decision places limits on the power of Congress to pass legislation under the Spending Clause, which will inevitably be cited by the Court in future decisions. Congress will now need to be more thoughtful whenever it passes comprehensive legislation with direct funding to the states.

57 Id. at 2591.
58 Id. at 2593, 2606–07.
59 It is the last point that may be one of the most significant for the Court in the future. This decision provides precedent to review other federal spending programs as being unduly coercive under the Spending Clause. The question is how much coercion is too much. The Court refused to set a line in the sand and did not articulate any new principles to reconcile the prior cases. Seven Justices agreed that Congress had gone too far in this case, because the states had no real choice but to accept the funds in order to balance their budgets. The language that the Court used leaves open the possibility that other federal programs might now be open to challenge on similar grounds. See, e.g., Damian M. Schiff, NFIB v. Sebelius, Coercion, and the Unconstitutional Conditions Doctrine, SCOTUSREPORT (Aug. 6, 2012), http://www.scotusreport.com/2012/08/06/nfib-v-sebelius-coercion-and-the-unconstitutional-conditions-doctrine/ (discussing a Texas lawsuit relying on the Court’s coercion analysis to challenge provisions of the Clean Air Act). Since the states are highly dependent on federal
The Court’s opinion presents two potentially troubling consequences moving forward. First, the decision places the Court in the difficult position of writing that Congress lacks the power to pass the individual mandate under the Commerce Clause, but that it has the power to obtain the same result indirectly by imposing a tax upon a person for failing to buy an insurance product. Inactivity becomes the basis for taxation. Taken to its logical extreme, Congress will be able to force a person to buy a product, or pay a tax, provided there is a rational basis, the tax is small, and the tax is collected by the Internal Revenue Service in the same manner as an individual’s income taxes. It is far from clear what limits exist on the taxing power and what types of taxes are permissible. The Court will also need to define more clearly what constitutes a direct tax. Second, the Court’s decision not to invalidate the entire ACA after finding that the expanded Medicaid provision was unconstitutional also makes it increasingly difficult to predict when the Court will invalidate other acts in the future. Since Congress acknowledged that each part of the statute was interrelated and that all of the provisions worked together to bring about the Act’s goals of near universal coverage and cost control, it is far from clear that Congress would have passed the ACA if it had known that the states might not have to participate. Nevertheless, the Court upheld the rest of the statute. If the Court would not invalidate this statute, then, as the dissent argues, it is hard to know when it will in the future.60

While the Court has finally decided the immediate questions related to the constitutionality of the ACA, it cannot settle the ongoing political battle. Advocates on both sides of the issue are passionate about health care. By ruling that the ACA was constitutional, but allowing each state to make a decision regarding participation, the Court has brought into question whether the legislation can function as Congress intended. Over the past year, the Congressional Budget Office and others have had differing opinions as to the expected costs of the Act.61 Many people fear that larger employers will choose to eliminate their health insurance plans

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and instead pay the penalty. Some of the twenty-six states that brought the underlying lawsuit may decide not to accept the expanded Medicaid program. Some have opined that the states and the federal government may not be able to set up the insurance exchanges contemplated by the Act. Any of these potential developments could undermine the Act’s goals of near universal coverage and cost containment. The ACA is clear that the “shared responsibility” system requires all of the interrelated pieces to work together in order to meet its goals. Only in time will we learn what happens to this historic piece of legislation. Like most things in life, it is doubtful that it will turn out the way anyone expects.

VII. CONCLUSION

The Court has finally provided clarity on the constitutional issues affecting the ACA. The Court has ruled that the individual mandate is constitutional as a tax and that the states will have the ability to decide whether they want to participate in the expanded Medicaid program. Chief Justice Roberts succeeded in preserving the status of the Court as a non-partisan institution by siding with the liberal members of the Court and upholding the ACA while at the same time placing limits on Congress’s ability to enact comprehensive legislation affecting the states. It is now up to the people and our elected officials to decide what happens next with the ACA. Since states are now free to decide whether they want to participate in the expanded Medicaid program, it is unclear if the Act can continue to operate as Congress intended, especially if a significant number of states refuse to participate in the expanded Medicaid program. Congress may need to amend the statute in order to fulfill its original goals of near-universal health coverage and contained health care costs.

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62 See supra note 16 (providing for the establishment of insurance exchanges under the Act).