A Dissection of the ObamaCare Ruling

The **opinion** by Chief Justice Roberts upholding the Affordable Care Act (aka Obamacare) as a valid exercise of Congress's taxing power is a sell-out of constitutional principle of the first magnitude.

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It is also fundamentally wrong on constitutional law; the doctrine of separation of powers; the meaning of a direct tax; and the idea of limited government and enumerated powers.

It also appears that the Chief may have switched his vote after the original conference and circulation of opinions. Rather than repeat all the evidence for that claim that others have noted, I'll just point you to the more insightful of the commentaries on this point. Short version: the joint dissenting opinion by Justices Scalia, Kennedy, Thomas, and Alito refers to Justice Ginsburg's concurring opinion as a "dissent," is written as though it were the majority opinion, and says that if the individual mandate were really a tax, they'd have to address the close constitutional question of whether it was a direct tax—something they don't address even though, as the case was ultimately decided, the issue was squarely presented.

See in particular **Professor Paul Campos' commentary** on this at Salon, **Ed Whelan's commentary** over at National Review, and **Lawrence Solum's commentary** at Legal Theory Blog.

If that is indeed what happened, and the Chief's motive was to prevent the Court from being "politicized" and therefore having its legitimacy undermined (in the eyes of elite opinion, that is), he has done just the opposite, both for the Court and his own here-to-for stellar reputation. Indeed, if that is what happened, the Chief should resign; he would not be fit to continue in office. As the great Chief Justice, John Marshall, recognized more than two centuries ago in *Marbury v. Madison*, it is "the very essence of judicial duty," the reason a "judge swear[s an oath] to discharge his duties agreeably to the constitution," that the judge must find "that a law repugnant to the constitution is void." Then again, in *McCulloch v. Maryland*, he added: "should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land."

We have a judiciary independent of the political process precisely so that we can withstand such political attacks and uphold the Constitution. (And oddly, it should be even easier to do so when the political opinion of the majority of the American people is so strongly opposed to the law.)

But let us for the time being give the Chief the benefit of the doubt. What, then, of his constitutional arguments?

The law is unconstitutional as an exercise of Congress's power to regulate commerce among the states, he tells us (and on this point he is joined by Justices Scalia, Kennedy, Thomas, and Alito), because Congress cannot force people into commerce in order to gain authority to regulate.

These were the grounds on which Congress passed this bill, deliberately choosing not to raise taxes as a way to fund the massive expansion in health care entitlements. The Chief's Commerce Clause holding should therefore have been the end of the matter.

Instead, the Chief manipulated the law to treat it as a tax, and then held that the taxing power is broad enough to uphold this law.

There are several problems with that. First, the President and leaders in Congress argued vociferously that the individual mandate was not a tax. Second, Congress did not impose a tax; it imposed a penalty for failure to comply with a regulatory mandate. Third, if it is a tax, the Anti-Injunction Act deprives the Court to even hear the case. Fourth, the so-called "tax" did not originate in the House of Representatives, as Article I, Section 7 of the Constitution requires. It originated in the Senate. (Yes, I know: Technically the Senate stripped down a House bill that was languishing there, and then used that bill number as the vehicle for the Obamacare legislation. To say that the bill therefore "originated" in the House is a fraud.) Fifth, the power to tax is to provide for the "general welfare," not effectuate massive transfers of wealth from one group of citizens to another. And sixth, if it were a "tax," it would be a direct tax, but one that is not apportioned according to population, as required by Article I, Section 9, clause 4 of the Constitution.

Why does this matter? Aren't these all a bunch of constitutional niceties that really don't mean much? Actually, no, if the idea of limited government envisioned by our nation's founders is to continue to have any force.

Even assuming Congress has the power to accomplish such broad and otherwise unconstitutional regulatory purposes by way of the taxing authority—a dubious proposition—the constitutional process for raising taxes is critically important. It ensures that our lawmakers are accountable to the people for their actions (the unaccountability of the King and Parliament for imposing taxes on the colonists was the principal reason we had a revolution!). The requirement that tax measures originate in the House was designed because the House is most directly accountable to the people. At the time of the founding, members of the Senate were not even elected directly by the people; that came about only after the 17th Amendment was adopted in 1913. Even today, every single member of the House has to face the voters every two years (rather than every six, as in the Senate), a pretty serious political check on raising taxes.

And the prohibition on un-apportioned direct taxes was designed to prevent the use of the taxing power to redistribute wealth. If Congress can impose a direct tax on some while exempting others, there would be a serious risk of majority tyranny—that is, the prospect that 51% of the population could simply tax the other 49%. That can't happen with a direct tax that can only be imposed if apportioned based on population. (Note: This is also the problem with a steeply progressive income tax, which allows for the same kind of majority tyranny mischief, but that's a discussion for another day.) But a direct tax with exemptions? Look out.

How does Chief Justice Roberts address this problem? Well, he ducks it. In a great bit of circular reasoning, he contends that the tax is not a direct tax because it doesn't apply to everyone. But that says nothing about whether it is a direct tax or not; it merely admits that if this is a direct tax, it is unconstitutional. So why is it a direct tax, in my view? Well, for starters, because it is not any of the other kinds of taxes authorized by the Constitution. It is not an excise (such as a tax on liquor or cigarettes); it is not an impost or duty (such as tariffs on imported goods); it is not an income tax, because it is not triggered by your income (although the size of the penalty can be effected by the amount of your income). It is a tax imposed for *not* doing something. That is the very definition of a direct tax. A good analysis of this point was published by my friend, **Rob Natelson**, over at Independence Institute. His analysis is spot on. Maybe if the Chief had had the benefit of briefing on this subject, he might not have made such a sophomoric error. But methinks he knew exactly how disingenuous this argument was, and he made it anyway.

What of the second part of the opinion, holding (by a vote of 7-2) that the threatened loss of a State's entire Medicaid funding if it declined to accept the massive expansion in Medicaid mandated by the Obamacare law was unconstitutional? Many conservative commentators over the past 24 hours, desperate to find a silver lining somewhere in the decision, have focused on this. True, this is the first time that the Court has ever held a federal spending grant to states to be so large as to be unconstitutionally coercive. The Chief called this,

quite correctly, "a gun to the head" of the States, "economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion." But that aspect of the Chief's holding is immediately rendered largely meaningless. If a State refuses to expand its Medicaid program, as Congress desired, it cannot lose existing Medicaid funding. But its citizens will still be taxed to pay for the Medicaid expansion everywhere else. Few, if any, of the States will be able to reject entry into the new program as a result. The choice will be: Pay for it, and get some money back in return to cover some of the costs of expansion; or Pay for it, and send all your money to other states to pay for the costs of their expansion. That's every bit as much a "gun to the head" (albeit a six-shooter rather than a bazooka), yet the Chief does not even discuss that coercive aspect of the Medicaid expansion, much less find it to be unconstitutional.

Justices Scalia, Kennedy, Thomas, and Alito authored a joint dissent. That, itself, is rare; normally dissents are authored by a single justice and then joined by others. As noted above, the dissent reads as though it was written as the majority opinion. We will learn whether that is true or not in the fullness of time, but likely not until one of the current justices retires, passes on, leaves their papers to a library archives, and then we get to the day those papers are unsealed and made available for public inspection. Then, we will see the initial votes of the justices that were cast on the last Friday in March, two days after the conclusion of oral argument in this case.

The dissent is a powerful defense of our Constitution's system of checks and balances, of federalism, and of the notion that our federal government is one of limited, enumerated powers, not one with unlimited power to compel action by its citizens as it sees fit. My one point of disagreement is that the joint dissent concedes too quickly that Obamacare would be valid if Congress had actually chosen to enact it as a tax. In my view, the Tax and Spend power also has limits. The signature accomplishment of the Rehnquist Court was to restore the foundational idea that the Commerce power had limits, but it has been clear for some time that accomplishment is meaningless if Congress can simply shift to the Tax and Spend power to accomplish the same unconstitutional ends.

This, then, is the greatest disappointment of yesterday's ruling. When given the opportunity to restore limits on the Tax and Spend Power, comparable to the limits his predecessor was able to restore on the Commerce Power, Chief Justice John Roberts appears to have blinked in the face of political pressure. He apparently found the exercise of the "painful duty" to tell Congress it had exceeded its authority too painful to actually exercise. Chief Justice Rehnquist had the constitutional fortitude to do his duty. A Chief Justice Mike Luttig would undoubtedly have exercised that same constitutional fortitude had he been appointed to the position instead. Those who pushed hard for his nomination, greatly concerned that John Roberts had not been tested in the fire of a landmark decision, have been vindicated. Small consolation, though, given the damage that has been done to the constitutional principle of limited government.

Is there a silver lining? Yes. But it is not simply that this issue now becomes a rallying cry for those who would seek, following the next election, to repeal Obamacare. No; it must be more than that. It must be a repudiation so strong that the Court's decision itself is repudiated. In 1798, Congress passed the Alien & Sedition Acts, making it a crime to criticize the government. There was a huge outcry against the Acts, but the lower courts upheld them as constitutional. Thomas Jefferson waged his campaign for President in the Election of 1800 largely on repudiating those Acts. He was successful, but the Acts were not just repealed (or more accurately, left to expire). They were repudiated. Jefferson pardoned every one of the conscientious objectors who had been convicted under the Acts, and the judgment of history has been that the Court decisions holding the Acts constitutional were profoundly wrong. That is the exercise of true power by a truly sovereign people. That is the mettle of which free men and women must be made if they are to remain free. That is now our charge, and our moment to take our place in the pantheon of American patriots, defenders of

freedom, is now. Will we prove ourselves worthy of the task?

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