THE NATIONAL LAW JOURNAL
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ACA at the Supreme Court: Instant commentaries

The National Law Journal
June 28, 2012

ACA: THE DECISION

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 Today's baby-splitting decision rewrites the Affordable Care Act in order to save it. It's certainly gratifying that a majority rejected the government's dangerous assertion of power to require people to engage in economic activity in order to then regulate that activity. That vindicates everything that we who have been leading the constitutional challenge have been saying: The government cannot regulate inactivity. It cannot, as Chief Justice John Roberts Jr. put it, regulate mere existence.

Justifying the individual mandate under the taxing power, however, in no way rehabilitates the government's constitutional excesses. As Justice Anthony Kennedy

said in summarizing his four-justice dissent from the bench, "Structure means liberty." If Congress can slip the Constitution's structural limits simply by "taxing" anything it doesn't like, its power is no more limited than would it be had it done so under the commerce clause. While imposing new taxes may be politically unpopular and therefore harder to do than creating new regulations, that political check does not obviate constitutional ones — and in any event, Congress avoided even that political gauntlet here by explicitly structuring the individual mandate as a commercial regulation.

Nor does the Court vindicate its constitutional sleight of hand by rewriting the Medicaid expansion to tie only new federal funding to an acceptance of burdensome and fundamentally transformative regulations. While correct on its face — and a good exposition of the spending power and what strings the federal government can attach to its funds — that analysis is relevant to a hypothetical statute, not the one that Congress actually passed. Moreover, allowing states to opt out of the new Medicaid regime while leaving the rest of Obamacare in place throws the insurance market into disarray, increases costs to individuals, and gives states a different Hobson's choice — different but no less tragic than the one it previously faced. As Kennedy wrote in dissent, while purporting to apply judicial modesty or restraint, the Court's rewriting of the law is anything but restrained or modest.

In short, we have reaped the fruits of two poisonous trees of constitutional jurisprudence: On the one (liberal activist) hand, there are no judicially administrable limits on

federal power. On the other (conservative pacifist) one, we must defer to Congress and presume (or construe) its legislation to be constitutional. It is that tired old debate that produces the Frankenstein's monster of today's ruling. What judges should be doing instead is applying the Constitution, no matter whether that leads to upholding or striking down legislation. And a correct application of the Constitution inevitably rests on the Madisonian principles of ordered liberty and limited government that the document embodies.

In any event, the ball now returns to the people, who opposed Obamacare all along and whence all legitimate power originates. It is ultimately they who must decide — or not — to rein in the out-of-control government whose unconstitutional actions have taken us to the brink of economic disaster. — **Ilya Shapiro**, *senior fellow in constitutional studies, Cato Institute, and editor-in-chief, Cato Supreme Court Review*

 **Most likely, the whole law will fall**

• *On severability:*

The most likely ruling on severability is that all of Obamacare will fall along with its fatally flawed individual mandate. While such a result would be legally correct, it would still be stunning. Perhaps even more remarkable is that the severability argument proceeded under the general assumption that the mandate would indeed be struck down. This was not a mere hypothetical situation about which the justices speculated, but rather a very

real, even probable, event. There's still a possibility that a "third way" will develop between the government's position (mandate plus "guaranteed issue" and "community rating") and that of the challengers (the whole law) — perhaps Titles I and II, as Justices Breyer and Alito mused (and as Cato's brief detailed — but the only untenable position would be to sever the mandate completely from a national regulatory scheme that obviously wouldn't work without it.

- *On Medicaid:*

The justices don't want to reach the factually complicated and legally thorny Medicaid issue. That may be another marginal factor pushing one or more of them to strike down all of Obamacare under a straightforward severability analysis and leave the "spending clause coercion" issue for another day. This was perhaps the most difficult of the four issues to predict, and having heard argument doesn't really make that task easier. A majority of the Court was troubled by the government's "your money or your life" stance, but it's not clear what standard can be applied to distinguish coercion from mere inducements. Then again, if this isn't federal coercion of the states, I'm not sure what is.

- *General post-argument reaction:*

All of my pre-argument intuitions were confirmed, and then some: The Court will easily get past the AIA, probably strike down the individual mandate, more likely than not taking with it all or most of the rest of the law (including the Medicaid expansion). Still, it was

breathtaking to be in the courtroom to see the Chief Justice and Justices Scalia, Kennedy, and Alito all on the same page. (For example, when Justice Kennedy's first question during yesterday's hearing was, "Can you create commerce in order to regulate it?" — a question hostile to the government — my heart began racing.) Much as I'd love to think that my briefs helped get them there even a little bit, ultimately it's the strength of the constitutional claims and the weakness of the government's positions that prevailed — or will prevail if the opinions that come down in three months follow along the lines set by this week's arguments. They may not of course — trying to predict the Supreme Court isn't a science — but I'm coming out of this week feeling very good. — **Ilya Shapiro,** *Cato Institute fellow and editor-in-chief of the Cato Supreme Court Review*

 **A good day for challenging the individual mandate**

From Justice Anthony Kennedy's noting that the government is fundamentally transforming the relationship of the individual to the government, to Chief Justice John Roberts Jr.'s concern that "all bets are off" if Congress can enact economic mandates, to Justice Samuel Alito Jr.'s invocation of a hypothetical burial-insurance mandate, to Justice Antonin Scalia's focusing on the "proper" prong of the necessary and proper clause — and grimacing throughout the solicitor general's argument — it was a good day for those challenging the individual mandate. Paul Clement and

Mike Carvin did a masterful job on that score, showing again and again the unprecedented and limitless nature of the government's assertion of federal power. The solicitor general meanwhile, had a shaky opening and never could quite articulate the limiting principle to the government's theory that at least four justices (and presumably the silent Justice Clarence Thomas) were seeking. While trying to predict Supreme Court decisions is a fool's game, they should take note that if this morning's argument is any indication, Obamacare is in constitutioal trouble. — **Ilya Shapiro,** *senior fellow in constitutional studies and editor-in-chief of the Cato Supreme Court Review, Cato Institute*

 **Only surprise was the 'cold' bench**

On an argument day that can best be described as the calm before the storm, it quickly became clear that the Supreme Court would reach the constitutional issues everyone cares about. That is, regardless of how the justices resolve the hyper-technical issue of whether the Anti-Injunction Act is "jurisdictional," this law — which prevents people from challenging taxes before they're assessed or collected — does not apply to the Obamacare litigation. There were also hints that the Court was skeptical of the government's backup merits argument that the individual mandate was justified under the Constitution's taxing power. Perhaps the only surprising aspect of today's hearing was how "cold" the bench was; it's rare for the justices to allow advocates to speak at length without interruption, but that's what they

generally did today. That's yet another indication that the Court will get past the AIA appetizer to the constitutional entree. — **Ilya Shapiro,** *senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the Cato Supreme Court Review*