The Volokh Conspiracy

Ilya Shapiro: "Like Eastwood Talking to a Chair: The Good, the Bad, and the Ugly of the Obamacare Ruling"

By: Randy Barnett – February 21, 2013

No one was more involved in the challenge to the Affordable Care Act than Ilya Shapiro. Besides myself, I believe he was the only person who attended every court of appeals argument and we often sat together in the court room. Here is the abstract of his new essay on the decision in *NFIB v. Sebelius*, which was just published in the Texas Journal of Law and Public Policy:

Abstract: The constitutional challenge to Obamacare was a case that comes along once every generation, if not less often. Not because it could affect a presidential election or was otherwise politically significant, but because it reconsidered so many aspects of our constitutional first principles: the fundamental relationships between citizens and the government and between the states and the federal government; the role of the judiciary in saying what the law is and checking the political branches; and the scope of and limits to all three branches' powers. This case was not about the state of health care in America or how to fix this troubled area of public policy. It was instead about how to read our nation's basic law and whether Congress was constitutionally authorized to use the tools it used in this particular instance.

Anyone reading this article will already know at least the basic outline of the Supreme Court's ruling. As I wrote on the leading Supreme Court blog in the wake of the decision, those who challenged the law won everything but the case. That is, the Supreme Court adopted all of our legal theories regarding the scope of federal regulatory authority and yet Obamacare stands. This article explains and elaborates on those basic points, the good (Commerce Clause, Necessary & Proper Clause, Spending Clause), the bad (the taxing power), and the ugly (John Roberts's reasoning and motivations).

In sum, the Constitution's structural provisions — federalism, separation and enumeration of powers, checks and balances — aren't just a dry exercise in political theory, but a means to protect individual liberty from the concentrated power of popular majorities. Justice Kennedy said it best in summarizing the joint dissent from the bench: "Structure means liberty." If Congress can avoid the Constitution's structural limits by "taxing" inactivity, its power is no more limited and liberty no better protected than if it were allowed to regulate at will under the Commerce Clause. The ultimate lesson to draw

from this two-year legal seminar, then, is that the proper role of judges is to apply the Constitution regardless of whether it 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.

He is a lot more critical of the tax power aspect of Roberts decision than I chose to be in my piece, which was mainly emphasizing the positive. Here are his ten criticisms of that aspect of the Roberts opinion (with all the supporting reasoning omitted), which I assume constitutes the "ugly."

Roberts got this wrong for at least ten reasons.

First, Roberts misapplied the constitutional avoidance canon....

Second, Roberts managed to read the mandate as a tax for constitutional purposes after finding that it was not a tax in the context of the Anti-Injunction Act (AIA), a federal law that prevents taxpayers from challenging a tax until it has been levied or assessed....

Third, Roberts simultaneously found that there's no scienter requirement to the individual mandate, meaning no requirement of conscious or knowing violation of the law—and that people have a "choice" of whether to buy health insurance or to pay the tax....

Fourth, the fact that the payment for non-insurance is collected by the IRS through "the normal means of taxation,"[61] another of Roberts's pro-tax factors, is irrelevant....

Fifth, Roberts noted that the IRS can't punish people or attach any other "negative legal consequences" for the nonpayment of the Obamacare tax[66]—which is important because Congress can use only its regulatory authority to punish people, not its taxing power[67]—but this factor is too good to be true because money is fungible....

Sixth, Roberts conflated tax credits on ownership or activity with his new tax on inactivity....

Seventh, Roberts's correct statement that "the Constitution doesn't guarantee that individuals may avoid taxation through inactivity" is beside the point given that he goes on to rule out the precise types of taxes (capitations and other direct taxes; see the tenth point below) levied on something other than activity....

Eighth, Roberts erroneously declined to examine Congress's motive, which was clearly intended to compel behavior rather than raise revenue....

Ninth, building on the above point, Chief Justice Roberts, while thinking that he was throwing Obamacare back to the people for final judgment via the ballot box, actually allowed the political branches to escape political accountability. That is, if Congress had wanted to create a taxation system to fund Obamacare or incentivize health insurance purchases, it could've done so....

Tenth and finally (and perhaps most importantly), Roberts never explained what kind of tax he was upholding....

In short, Roberts's taxing power section simply doesn't compute. It's still unclear what the provision at issue is; even after the ruling, a debate rages over whether it's a tax or a penalty.... Roberts thus succeeded in crafting a ticket good for the Obamacare train only. He must have at some point posed to himself the conundrum of how to uphold this law without expanding federal power, and that's the result we got.

Then there is this from the ending:

The sad thing about this entire episode is that the Chief Justice didn't have to do what he did to "save the Court." For one thing, Obamacare has always been unpopular—particularly its individual mandate, which even a majority of Democrats thought was unconstitutional—so upholding it, and in such a bizarre way, has actually hurt public trust in the Court. For another, Roberts only damaged his own reputation by making this move after months of warnings from politicians—including President Obama—and pundits that striking down the law would sully the Court. (I don't at all believe that he succumbed to pressure of that sort, but many people do.) Perhaps most importantly, though, the reason we care about maintaining the Court's integrity is so it can make the tough calls in the controversial cases while letting the political chips fall where they may. Striking down Obamacare would have been just the sort of thing for which the Court needs all that accrued institutional respect and gravitas. Instead, we have a strategic decision dressed up in legal robes, judicially enacting a law Congress didn't pass.

But what was Roberts saving the Court for if not the sort of epochal case that NFIB was? In refraining from making the hard balls-and-strikes calls he discussed at his confirmation hearings, Roberts showed precisely why we don't want our judges playing politics.

You can download the whole thing from SSRN here.