The Supreme Court's PPACA Decision

# "Our Own Limited Role in Policing Those Boundaries": Taking Small Steps on Health Care

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**Abstract** The Patient Protection and Affordable Care Act ignited a political firestorm and raised intriguing new questions of constitutional law. Cutting a path between the liberals and conservatives on the US Supreme Court, Chief Justice John Roberts made small adjustments in established constitutional law to uphold key features of the act. In doing so, he not only upheld the statute but also left the landscape of constitutional law much as he had found it. He did, however, suggest that the federal courts should take a more active role in monitoring how Congress uses its constitutional powers and should not shy away from making specific determinations of whether Congress had abused its power in particular cases.

Elaborating on a well-known saying in legal circles, US Supreme Court justice Oliver Wendell Holmes once complained in dissent:

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.[1]

From the perspective of one party in a case, "bad cases" may create "bad law" in a common-law system because the fact situation and legal posture of the case at hand may be particularly unappealing. As the legal

1. *Northern Securities Co. v. United States*, 193 U.S. 197 (1903), 400.

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sociologist Mark Galanter (1974) observes, institutional litigants try to avoid these sorts of bad cases by settling them or otherwise avoiding extended litigation so that appellate courts do not have the opportunity to hear them and potentially issue adverse rulings. Strategic-minded lawyers in a litigation campaign would prefer to have a portfolio of cases from which to choose so as to put their favored legal positions in the best possible light as they advance their cause through the courts. But litigation campaigns are often messy, and lawyers do not always get their favored choice of clients and facts (Tushnet 2005). In particular, government lawyers may find themselves obliged to defend cases that are not of their choosing and legal positions that they know to be awkward (Irons 1993). The executive branch is committed to defending the constitutionality of statutes so long as there is a reasonable case to be made for them. Sometimes you have to make do with bad cases.

From a less partisan perspective, "bad cases" may create "bad law" for the reasons that Justice Holmes and other judges have suggested. Disagreeing with the Court's majority on the direction of constitutional jurisprudence on the commerce clause, Holmes suggested that great and pressing cases might lead to emotional and ill-considered decisions by judges. The importance of a case may lead judges to act rashly, whether by upholding government actions that would normally be rejected or by vetoing actions that in the fullness of time might be embraced. Ever the legal realist (and not always fond of the direction that his brethren on the Court went), Holmes was prone to suspecting that emotions might "distort" the better reasoning of judges in cases of public moment. In a period of excitement surrounding the passage of a new statute or the litigation of a particularly salient case, clever lawyers might develop reasonable-sounding arguments to help rationalize decisions that in other circumstances would not have been made. In the passions of the moment, what previously seemed clear can be made to seem doubtful. Or, as emphasized by an earlier English judge, Lord Cranworth, "hard cases," in the sense of cases with harsh consequences, "are apt to introduce bad law."[2] Cases presenting unusual situations may tempt judges to depart from established rules and as a consequence introduce eccentricities into the body of the law in an effort to deal with idiosyncratic problems that are not representative of most applications of the legal doctrine. As the chief justice of Iowa once warned, courts should be cautious of modifying "fixed and established rules to suit the cases."[3] Perhaps such considerations helped encourage

2. *Winterbottom v. Wright* (1842), 10 Meason & Welsby, 109.
3. *Small v. The C., R.I. & P.R. Co.*, 50 Iowa Rep. 338 (1879).

the US Supreme Court to suggest that its ruling in the 2000 presidential election dispute was "limited only to the present circumstances."[4] The exceptional should not become the rule.

## The PPACA and the Court

The Patient Protection and Affordable Care Act (PPACA) and the decisions by the US Supreme Court on its constitutionality raise some of these same concerns.[5] On the one hand, the US Constitution as it has been interpreted since the New Deal gives Congress and the president largely free rein over the economic and social affairs of the nation. The traditional assumptions that federal powers were few and specific and that they were islands "wrapped about . . . by an ocean of rights" were reversed over the course of the early twentieth century (Corwin 1914: 248). Congressional power hardly had to be justified after the 1930s, except to the extent that it encroached on favored individual rights. The constitutional authority to act in the national interest could simply be assumed. Although politicians and judges have increasingly questioned this view over the past several years, the New Deal framework of judicial deference to congressional power is still solidly in place. Unsurprisingly, constitutional scholars could confidently assert that the Affordable Care Act easily cleared the constitutional bar under established doctrine.

On the other hand, the Affordable Care Act was both politically controversial and technically innovative, inviting constitutional challenge. Political scientists have emphasized that major legislation has historically been passed by large majorities (Krehbiel 1998; Mayhew 1991). Heterogeneous political parties, bicameralism, the presidential veto, and filibusters all conspire to drive legislative entrepreneurs to compromise and to form large coalitions in order to move bills through Congress. Nonetheless, the PPACA passed on a relatively narrow, largely party-line vote. With ideologically polarized parties, a Democratic president, and a sufficiently large (if temporary) Democratic majority in the Senate, the administration managed to pass health care reform into law. Even after passage, the law has yet to gain much support among Republicans but instead remains highly divisive among both political elites and the mass public (Deane et al. 2011). Such a limited base of support put the PPACA in a politically weak position, inviting ideological opponents to identify concerns with

4. *Bush v. Gore*, 531 U.S. 98 (2000).
5. *National Federation of Independent Business v. Sebelius*, 567 U.S. _ (2012).

the statute and making its repeal or nullification readily imaginable and politically palatable (Whittington forthcoming).

But politically divisive legislation is not necessarily constitutionally vulnerable. Closely fought revenue bills or appropriation bills rarely give rise to constitutional litigation, let alone serious concerns about judicial invalidation. Regulatory measures that stake out new spaces of government control or employ untried administrative mechanisms are another story. The PPACA was constitutionally innovative. Congressional use of its regulatory power under the Constitution's commerce clause has steadily expanded over time, but the PPACA nonetheless pushes boundaries. Notoriously, the PPACA mandates that individuals purchase health insurance. Although such a mandate is not unusual for state laws, the requirement that individuals actively participate in commerce is unusual for federal laws. Some effort has been made to find precedents in the US Code for federal regulation of inactivity, but the examples fall short (Yung 2012). Given the state of post–New Deal precedents regarding congressional regulatory authority, the power to regulate inactivity is certainly plausible, but for Congress to take the step in such a sweeping statute forces a direct confrontation with a question that had not previously been considered at any length in the courts or elsewhere.

The Affordable Care Act faced two primary legal challenges. The first questioned whether the "individual mandate" provision, which requires that individuals purchase health insurance, falls within the constitutional authority of Congress. The second questioned the authority of Congress to require states to expand the coverage offered through the Medicaid program, the program jointly operated by the states and the federal government to provide health care to low-income individuals.[6]

## The Individual Mandate

The general power to legislate is often called the police power. The police power is traditionally characterized by the power of the legislature to pass general laws for the sake of the health, safety, welfare, and morals of society. The state governments hold the police power within the US constitutional system; Congress does not. Instead, Congress is authorized by Article I of the US Constitution to exercise a series of enumerated

6. There were secondary legal questions raised in the litigation surrounding the PPACA that asked whether unconstitutional provisions could be severed from the broader statute and whether the Anti-Injunction Act barred federal suit against the law at this time, but these issues did not prevent the Court from reaching a conclusion on the substantive merits of the dispute.

powers. James Madison's (1987: 115) initial proposal to the Philadelphia Convention in the so-called Virginia Plan would have given Congress something like a general police power, a power "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." But the Virginia Plan ran into opposition in Philadelphia, and the framers instead agreed to a more limited scheme of enumerated powers that left all remaining legislative authority in the states, and they sold that idea to skeptical voters in the ratifying debates. Some of the powers that Congress was given proved to be both flexible and forceful. Of particular importance in the twentieth century have been the commerce clause (often bolstered by the necessary and proper clause) and the taxing and spending powers.

The government offered all three provisions as constitutional supports for the PPACA. The commerce clause provided the first line of defense, and the necessary and proper clause supplemented the commerce analysis. The clause authorizes Congress "to regulate commerce . . . among the states." Chief Justice John Marshall famously declared in *Gibbons v. Ogden* that the commerce power, though limited in its objects, is "plenary" and "absolute."[7] As conservative Justice Stephen Field summarized after the Civil War, the commerce power is "one without limitation," which "authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on."[8] Although there was some doubt, eventually resolved, over whether Congress could regulate items in commerce as a pretext for controlling social and economic affairs within the states (could, for example, Congress prohibit the interstate shipment of otherwise innocent goods made with convict or child labor?), the primary question that Congress and the courts have had to answer is whether a given regulated subject is in fact within interstate commerce. Since World War II, the Court has been generous in how it understands the scope of interstate commerce, allowing the regulation of activities that are not themselves in interstate commerce as necessary and proper means for effectively regulating activities that are a part of interstate commerce.

The challenge for the PPACA is whether someone who is inactive is nonetheless "engaged in" interstate commerce or, as recent precedents have framed the issue, engaged in an "economic activity [that] substan-

7. *Gibbons v. Ogden*, 22 U.S. 1 (1824), 197.
8. *Sherlock v. Alling*, 93 U.S. 99 (1876), 103.

tially affects interstate commerce."[9] There is no doubt that Congress could, for example, require that health insurance companies serve as the intermediary for all health care transactions or require that doctors only offer their services to patients who carry health insurance. Requiring that those who are not involved in any economic transactions take active steps to prepare for such a transaction, however, stretches those precedents. Congress can now regulate those who are actively producing goods that might enter the interstate commercial markets,[10] but regulating individuals who might in the future consume goods that are in the interstate marketplace would open a wide door for regulating individuals in any context.[11] Five justices were not willing to endorse that possibility.

The last line of defense proved more successful, at least in persuading Chief Justice Roberts. Although the four liberals on the Court were willing to uphold the individual mandate as constitutional under the commerce clause (supplemented by the necessary and proper clause), the five conservatives were not willing to do so. The liberals were willing to join with Chief Justice Roberts to uphold the mandate under the taxation provisions of the Constitution. The Court has long been deferential to congressional use of the taxation power. From before the time of the Constitution, politicians and lawyers recognized that the power to tax was the power to regulate, to discipline, and to control the behavior of individuals and organizations. Taxes were a central component of the British imperial commercial "regulations" that governed the North American colonies before 1776. Lawyers have long been skeptical of the ability of courts to distinguish the revenue-collecting function of taxes from their (incidental?) function of regulating behavior. Even so, courts have frequently threatened to rein in the taxation power when its regulatory functions and effects encroached on other constitutional values. Chief Justice John Marshall famously intoned that the "power to tax is the power to destroy," while striking down Maryland's tax on deposits in the federal bank,[12] and the early twentieth-century Court infamously struck down the federal "tax" on goods produced with child labor because the law was "solely to the

9. *United States v. Lopez*, 514 U.S. 549 (1995), 560.

10. *Gonzales v. Raich*, 545 U.S. 1 (2005).

11. As both the government attorneys and the dissenting justices pointed out, the action-inaction distinction is a slippery one. Inaction can often be redescribed as action, and judicial doctrines relying on such categories may prove difficult to apply in many circumstances. The more liberal justices and some lower courts contend that the "inactivity" of not buying health insurance is really the "activity" of self-insurance, even when individuals take no active steps to provide for their future health services.

12. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

achievement of some other purpose plainly within state power," designed to penalize and not to collect revenue.[13] But the New Deal Court placed a high bar before litigants who might wish to challenge a tax provision as unconstitutional. In upholding the taxes in the Social Security Act, Justice Felix Frankfurter emphasized that so long as the taxes collected are paid into the public treasury to be available for legislative appropriation and are not so large as to place the target under "coercion" and "duress," then any regulatory consequences could be regarded as incidental.[14]

If the government can demonstrate that the taxes collected on individuals who do not comply with the mandate to purchase health insurance can be used to defray the costs of government expenditures on health care, then the PPACA could readily fall under the same umbrella as the Social Security Act. Although the Court could have made an ad hoc judgment that this particular tax had become a penalty and had passed the point where "pressure turns into compulsion," doing so would potentially have broader implications for other federal statutes. Refusing to recognize the validity of the PPACA under the commerce clause would have had few ripple effects across the US Code because of the uniqueness of the mandate provision. Refusing to recognize the validity of the PPACA under the taxing power would have cast a shadow of numerous statutes. Five justices were unwilling to do that.

The Court's ruling on the individual mandate largely leaves the structure of federal constitutional law unchanged. Congress can continue to regulate actions that substantially affect interstate commerce, and Congress can continue to impose taxes that have substantial regulatory effects even in areas where the federal government cannot regulate. But the Court's refusal to extend the commerce power to cover these situations means that Congress has limited tools for enforcing the individual mandate. Congress can tax those who refuse to buy health insurance, but it cannot compel them to buy insurance. It cannot criminally punish those who do not comply, nor can it impose draconian fines, nor can it easily look beyond the Treasury Department to administer the mandate.

## States and Medicaid

The Court has had difficulty resolving the problem of congressional mandates to the states. Over the past two decades the Court has emphasized

13. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).
14. *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

that Congress cannot "commandeer" the instruments and offices of the state government and direct that state government officials perform federal functions or adopt federal policies.[15] Congress cannot issue directives to the "states qua states." State government officials must have the capacity to represent their own constituencies and to respond to local political pressures and preferences and not simply to perform tasks assigned to them by Congress. At the same time, the Court has left the big stick of federal spending in the hands of Congress. Congress has a great deal of leeway in putting conditions on federal funds in order to win compliance from reluctant states. In this context as well, the Court has recognized the possibility that conditional federal spending might transition from being an incentive to being a coercive force, but the justices have been unable to identify when Congress has gone too far. Congress could theoretically violate the Constitution and coerce the states by misusing the spending power, but even Chief Justice William Rehnquist was unwilling to encourage judicial intervention in these sorts of cases. The onus was on the states to resist the "blandishments" of Congress.[16]

Chief Justice Roberts has shifted the goalposts a bit on how Congress can use the spending power to leverage state action. In *South Dakota v. Dole* (1987), Rehnquist adhered to his view that so long as Congress was unambiguous in the conditions it imposed and the states knowingly accepted the funds with the strings attached, then the constitutional rules were satisfied.[17] For Roberts, this relationship was best viewed as a "contract." If Congress were to threaten noncompliant states with the withdrawal not only of the funds in question for one program but also funds for other programs, then the conditions were better viewed as tools of coercion than as means for accomplishing federal purposes. The states had administered the other parts of the Medicaid program in good faith and under known conditions. To Roberts, Congress was changing the rules of the game on those existing programs. By contrast, Congress had a vested interest in ensuring the safety of federal highways and offering a "relatively mild encouragement to the states to enact higher minimum drinking ages" was consistent with the underlying purposes of federal highway appropriations.[18] Withholding from the states not only the funds directly associated with the extension of Medicaid under the PPACA but

15. *New York v. United States*, 505 U.S. 144 (1992).
16. *South Dakota v. Dole*, 483 U.S. 203 (1987).
17. There were other parts to the constitutional test laid out in *Dole*, but these were not in play in *Sebelius*.
18. *South Dakota v. Dole*.

also preexisting funds associated with old Medicaid rules changed the terms of the old contract, according to Roberts, and punished states for their prior participation in the Medicaid program. Roberts framed the decision in part as a factual assessment of whether this particular spending provision had crossed the line between inducement and coercion, but in doing so he also adjusted the doctrinal rules for assessing how coercive spending conditions might be. It might be possible to distinguish ongoing entitlement programs like Medicaid, which have an established baseline of support, from discretionary spending in areas such as transportation and education. But Roberts's opinion creates the possibility that any new spending conditions imposed by Congress might be regarded as unduly burdening the "unknowing" states. The opinion still leaves Congress with lots of room to manipulate federal spending to induce states to alter their policies (and on the whole states have proven highly sensitive to these inducements), but the ruling gives some teeth to the notion that there are real limits to how far Congress can go in using the power of the purse to leverage the states.

As is often the case, the US Supreme Court was able to reach only an unstable agreement among the justices to uphold the Affordable Care Act. Four of the justices would have readily extended existing doctrine to cover this statute, and four of the justices were quite skeptical of the implications of this use of federal power. Chief Justice Roberts offered something to both the liberals and the conservatives on the Court. In doing so, he mostly upheld congressional power to adopt the PPACA, while marginally adjusting constitutional law. The Chief Justice focused his attention on the pragmatic, fact-based determinations that previous Courts had suggested might be needed but had been reluctant to pursue, drawing lines between compulsion and encouragement, activity and inactivity, that may be hard to elaborate in the future. Rather than use this "hard case" to make dramatic new law, Roberts made a more circumscribed ruling that leaves a smaller footprint on the legal terrain. It remains to be seen whether the Roberts Court will choose to hear more cases that might allow Roberts and his peers to flesh out their views on the limits of congressional power, or whether the PPACA cases will be an exception to the broader pattern of the past decade in which the Court has had little to say on these questions. There is little in Roberts's opinion that suggests that the Court will launch a new federalism offensive.

## References

Corwin, Edward S. 1914. "The Basic Doctrine of American Constitutional Law." *Michigan Law Review* 12, no. 4: 247–76.

Deane, Claudia, et al. 2011. "Public Opinion on the Affordable Care Act at One Year: Continuities and Contradictions." *California Journal of Politics and Policy* 3, no. 4: 1–15.

Galanter, M. 1974. "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change." *Law and Society Review* 9, no. 1: 95–160.

Irons, P. H. 1993. *The New Deal Lawyers*. Princeton, NJ: Princeton University Press.

Krehbiel, Keith. 1998. *Pivotal Politics: A Theory of U.S. Lawmaking*. Chicago: University of Chicago Press.

Madison, James. 1987. *Notes of Debates in the Federal Convention*. New York: W. W. Norton.

Mayhew, David R. 1991. *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946–1990*. New Haven, CT: Yale University Press.

Tushnet, M. V. 2005. *The NAACP's Legal Strategy against Segregated Education, 1925–1950*. 2nd ed. Chapel Hill: University of North Carolina Press.

Whittington, Keith E. Forthcoming. *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present*. Lawrence: University Press of Kansas.

Yung, Corey Rayburn. 2012. "The Incredible Ordinariness of Federal Penalties for Inactivity." *Wisconsin Law Review*, no. 3: 841–70.