



Insight

Analyzing the Convolutioned Supreme Court Ruling

ROBERT BOOK | JUNE 28, 2012

Passed by sharply divided Congress, a sharply divided Supreme Court upholds the health care reform law in a sharply divided, convolutioned way.

The individual mandate — forcing people to buy health insurance — is unconstitutional. But making people pay a tax if they don't buy insurance is a constitutional exercise of Congress' power to tax. So in practice, the mandate stands. So the Supreme Court rules against [Obama's claim that the mandate is not a tax](#), but because Obama's wrong, the law stands.

Ironically, while this outcome seems to be a surprise to everybody, it's more or less exactly what [Eugene Volokh](#) predicted over two years ago — that even though the law didn't call it a tax, and the proponents said it wasn't a tax, that it's constitutional because it COULD be thought of as a tax.

Although a 5-4 majority held the mandate constitutional AS A TAX, a different 5-4 majority (Roberts being the only one in both majorities) held it unconstitutional as an exercise of Congress' power to regulate interstate commerce. So, a “broccoli mandate” would be unconstitutional as well. But, could they tax you for not eating broccoli?

Ironically, although they held that it was a tax, they also held that the Anti-Injunction Act doesn't apply. (The Anti-Injunction Act says that the constitutionality of a tax can't be challenged in court until someone actually has to pay it — which wouldn't happen until April 2015.)

Another surprise: The only part of the law that was overturned is related to the Medicaid expansion. The law required states to substantially expanded eligibility for Medicaid, and said that if they states don't do so and pay their share of the cost, they lose ALL federal Medicaid funding. The court held that last part unconstitutional — states can't be deprived of other Medicaid funding if they refuse to implement or continue the Medicaid expansion. This was essentially the argument made in the [economists' amicus brief](#). (Disclosure: I was one of the economists who signed that brief.) While we argued for this position, I think we thought that if it was accepted the expansion itself would have to fall as well. Instead, the expansion stands but the enforcement of it does not.

More surprises: The 5-4 vote was the liberal bloc plus Chief Justice Roberts, whose appointment the Democrats nearly blocked. The “moderate” justice Anthony Kennedy — widely believed to become the swing vote — vociferously dissented: “In our view, the entire Act before us is invalid in its entirety.”

Click [here](#) for the Court's opinion — which, at 193 pages, is less than 10% as long as the Act.

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