

FROM: LEGAL THEORY BLOG

THE DECISION TO UPHOLD THE MANDATE AS TAX REPRESENTS A GESTALT SHIFT IN CONSTITUTIONAL LAW

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The Supreme Court upheld the individual mandate today on a 5-4 vote. The decisive opinion by Justice Roberts reasons that the mandate was not authorized by commerce clause, but instead upheld the mandate as a tax. Justice Roberts wrote:

Our precedent demonstrates that Congress had the power to impose the exaction in Section 5000A under the taxing power, and that Section 5000A need not be read to do more than impose a tax. This is sufficient to sustain it.

Individuals are not required to purchase insurance; instead they have the option to pay a tax instead. On the medicaid, issue Justice Roberts's opinion indicates that the Congress cannot encourage (or coerce) states to participate in the expansion of medicaid by conditioning their receipt of existing medicaid funds on their participation.

Had the Court struck down the mandate, it would have clearly represented a tectonic shift in American constitutional law. In the extraordinarily unlikely event that there had been a majority opinion authored by one of the four justices from the left wing of the Court,

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the decision would have cemented (at least for a time) the most common academic understanding of Congress's power under Article One of the Constitution. *Roughly, that understanding is that Congress has plenary legislative power, limited only by the carve outs created by the Supreme Court's decisions in Lopez and Morrison.*

This understanding shouldn't be confused with a rule of constitutional law; rather it is a *gestalt*, a holistic picture of Article One power. Constitutional doctrine is much more complex and also more contestable. The constitutional doctrine is the set of rules that can be found in the Court's opinions and that are required in order to provide a coherent set of norms that cohere with those opinions. In a complex area like Congressional power under Article One, constitutional doctrine is never fully settled because the set of legal materials that must be reflected in the doctrine is large (hundreds of Supreme Court opinions) and therefore neither fully consistent nor complete. The gestalt is simple picture that represents the core ideas that explain the shape of the doctrine.

The gestalt is shaped by all of the relevant legal materials--the constitutional text, the decisions of the Supreme Court, the practices of the political branches (especially Congress), and even the decisions of the lower federal courts. But the gestalt that represents our understanding of Congress's Article One power is mostly a product of a key set of political and judicial decisions associated with the New Deal. The political decisions were made by the President and Congress in the form legislation that massively expanded the power of the national government. The judicial decisions consisted of a series of opinions that ratified this expansion of power – mostly under the Commerce Clause and the Necessary and Proper Clause of the Constitution. The most important decisions are familiar to almost every judge, lawyer, and law student in the United States: they include *Jones and Laughlin Steel, Darby*, and *Wickard v. Filburn*. The last decision in this trio is particularly important as a symbol of the expansion of federal power, because it upheld Congress's power to regulate the "home consumption" wheat – that use of wheat by a farmer that he grew and consumed on his own farm. We now know that the Supreme Court agonized in its decision of this case. Alt-

though the justices considered writing an opinion that explicitly endorsed a rule that stated that no Congressional exercise of power pursuant to the Commerce and Necessary and Proper Clauses would every be struck down, it ultimately decided to articulate a principle that allowed Congress to regulate intrastate activity that produced a substantial cumulative effect on interstate commerce.

Although the Supreme Court has never explicitly endorsed a rule that gives Congress plenary and unlimited power under Article One, the whole pattern of Supreme Court decisions could be seen as implicitly endorsing such a rule. Between 1937 when the Court decided *Jones and Laughlin Steel*, and 1995, when the Court struck down the Gun Free School Zones Act in *United States v. Lopez*, the Court did decide a single case in which it held that Congress had exceeded its Article One powers under the Commerce and Necessary and Commerce Clauses. *Lopez* was read by many commentators as a mere blip or symbolic gesture, and many theorized that the problem in *Lopez* was that Congress had failed to make a record that established a basis for the conclusion that guns near schools could rationally be believed to have a sustantial effect on interstate commerce. That reading of *Lopez* was rejected by the Supreme Court in *United States v. Morrison*, in which the Supreme Court struck down provisions of the Violence Against Women Act, despite extensive hearings and explicit findings that connected violence against women with harmful effects on interstate commerce.

Lopez and *Morrison* were part of what is sometimes called “the New Federalism,” a series of Supreme Court opinions on various topics (especially the 10th and 11th Amendments) that limited federal power. Reconciling the New Federalism cases with the New Deal gestalt was a central preoccupation of constitutional scholarship in the 1990s. Many interpretations were possible, but the prevailing view was preserved the basic idea that Congress power was *almost* unlimited, subject only to a series of carve outs. A central metaphor expressed this idea as an ocean of federal power dotted by a few isolated islands of state sovereignty. This metaphor preserved as much of the gestalt view of the New Deal cases as possible. *Lopez* and *Morrison* were limited to cases in which Congress enacted laws

that were targeted solely at noneconomic activity; Congress unlimited authority to regulate any activity that was economic in nature. This revised version of the gestalt was reinforced by the Supreme Court's decision in *Gonzales v. Raich*, which upheld the application of the Controlled Substances Act to possession of marijuana that was home grown for medical use and which never crossed state lines. Some commentators believed that *Raich* represented a return to the principle that Congress had plenary and unlimited legislative powers, but the Court itself did not overrule *Lopez* and *Morrison* or express disapproval of those decisions.

That brings us to the litigation over the Affordable Care Act. Most of the academic community was committed to some version of the prevailing gestalt view of federal power. Some believed in unlimited and plenary congressional power. Others believed that the power was virtually unlimited, subject to a minor exception (details varied) for *Lopez* and *Morrison*. If you were committed to the gestalt as your mental picture of the constitutional doctrine, then the challenge to the individual mandate was radically implausible and might even be characterized as frivolous.

Nonetheless, the lawsuits against the individual mandate did not meet with unanimous rejection by the federal courts. Instead, a number of federal judges decided that the individual mandate was unconstitutional. The key moment was the decision of the 11th Circuit to strike down the mandate: that decision meant that the United States Supreme Court would hear the constitutional questions, although there was always the possibility that the Court might be able to duck the merits. At this stage of the game, the prevailing view was that the Court would almost certainly uphold the mandate if it reached the merits. Many commentators predicted an 8-1 decision, with Justice Thomas dissenting on originalist grounds. From the point of view of the prevailing gestalt, Thomas was simply an outlier, because he did not accept the New Deal Settlement and instead endorsed a pre-New-Deal vision of real and substantial limits on Congress's enumerated powers.

But confidence in the gestalt was shaken by the decision of the court to grant six hours of argument over three days in the Health

Care Cases. This was very unusual, and it seemed inconsistent with the notion that eight justices viewed the individual mandate question as easy. Confidence was further shaken by the oral argument in which it seemed clear that four members of the Court (Roberts, Scalia, Kennedy, and Alito) took the challenge very seriously. Since Thomas's vote against the mandate was taken for granted, that meant that there was a serious chance that the ACA would be struck down as beyond Congress's power under the Commerce and Necessary and Proper Clauses.

How could this be explained? If you continued to believe in the consensus academic gestalt concerning the Congress's power, then the alternative explanation was that the Court was disregarding the law and deciding the case on purely political grounds.

But there is an alternative explanation. There is an alternative gestalt concerning the New Deal Settlement. For many years, some legal scholars had advanced an alternative reading of the key cases uphold New Deal legislation. On this alternative reading, the New Deal decisions were seen as representing the high water mark of federal power. Although the New Deal represented a massive expansion of the role of the federal government, it actually left a huge amount of legislative power to the states. On the alternative gestalt, the power of the federal government is limited to the enumerated powers in Section Eight of Article One, plus the New Deal additions. These are huge, but not plenary and unlimited.

Today, it became clear that four of the Supreme Court's nine justices reject the academic consensus. As Justice Kennedy states in his dissent joined by Scalia, Thomas, and Alito:

"In our view, the entire Act before us is invalid in its entirety."

The alternative gestalt is no longer an outlier, a theory endorsed by a few eccentric professors and one odd justice of the Supreme Court. And because Justice Roberts believes that the mandate is not a valid exercise of the commerce clause (but is valid if interpreted as a tax), he has left open the possibility that there is a fifth justice who endorses the alternative gestalt.

We are only minutes into a long process of digesting the Health Care Decision. But in my opinion, one thing is clear. Things are now “up for grabs” in a way that no one anticipated when the saga of the constitutional challenge to the Affordable Care Act began.

Update: A similar if more strident note is sounded [here](#).¹ //

¹ www.slate.com/articles/news_and_politics/scocca/2012/06/roberts_health_care_opinion_commerce_clause_the_real_reason_the_chief_justice_upheld_obamacare_.html.