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Rubik's Cube in the United States Supreme Court

By now, everyone has heard something about the decision of the United States Supreme Court in *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2002). The newspapers have touted the elevated role of Chief Justice Roberts in cobbling together a coalition that sustained the so-called individual mandate. Conservative blogs have hailed a new day dawning for states' rights by the limitation on the ability of Congress to use the "commerce" clause to exercise its powers over individuals in the states. Reading the opinion in detail, however, paints a more complex picture.

Perhaps the most difficult aspect of reading the decision of the United States Supreme Court in *National Federation of Independent Business* is figuring out who agrees with whom and who disagrees. The Chief Justice announced the judgment of the court and delivered the opinion of the Court with respect to Parts I, II and III-C. It is only those three parts of the opinion in which Justices Ginsburg, Breyer, Sotomayor and Kagan joined. The rest of the opinion states various points of view. Therefore, in understanding that significance of the decision of the Supreme Court on the controversial Patient Protection and Affordable Care Act of 2010, it is necessary first to look at those three parts of the decision which commanded a majority.

Mr. Justice Roberts is to be congratulated on his marvelous introduction explaining, like a good high school history teacher, the basic structure of the United States Constitution. The introduction explains that the national government possesses only limited powers, while the states and the people retain the remainder. The Federal government is a nation of "enumerated powers," meaning those that are specifically granted by the Constitution. The enumeration of powers is also a limitation according to Gibbons v. Ogden, 9 Wheat. 1, 195, 6 L.Ed. 23 (1824). If no "enumerated" power permits Congress to pass a law, then that law may not be enacted even if it would not violate any of the express prohibitions contained in the Bill of Rights or anywhere else in the Constitution.

An interesting observation of the Chief Justice reminds us that the states are not limited in their power in the same manner as the Federal government. The United States Constitution is not the source for the power of the states. The United States Constitution may forbid states to do certain things such as to deny equal protection of the laws. However, where specific restrictions or prohibitions on the states do not apply, state government may act under the so-called "police power." The pernicious reach of the "police power" has troubled constitutional philosophers for a long time. At one point in history, the United States Supreme Court found the "police powers" of the states very restricted and would not even permit states to enact laws prohibiting child labor, but all that has changed and now "police powers" of the states have a frightening reach.

The United States Constitution permits Congress to regulate commerce; to collect taxes; to provide for the common defense and general welfare of the United States; and to make all laws which shall be necessary and proper for carrying into execution the power set forth. Article I, Section 8, Clause 3; Article I, Section 8, Clause 1; and Article I, Section 8, Clause 18. Mr. Justice Roberts observed in his simple eloquence that a permissive reading of the general powers of the United States Constitution is not the same as abdication of the responsibility of the courts. Once the history lesson is over, the debate begins.

Section I of the opinion, with a simple 5 to 4 majority, concluded nothing in particular. That section merely explains how the Act is to function. Section II also reached a 5 to 4 majority, but first examined the authority permitted to the high court by the Anti-Injunction Act. The Anti-Injunction Act provides that no lawsuit for the purpose of restricting the collection of any tax may be maintained. Regardless of how Congress may characterize its own actions, a penalty may be treated as a tax for purposes of the Anti-Injunction Act. While the Affordable Health Care Act does not require a penalty for failure to comply with individual mandate, it may be treated as a tax for purposes of the Anti-Injunction Act. The Court then goes on to find that the penalty is a tax for purposes of determining the constitutionality of the statute.

If the public finds this confusing, lawyers are no better off. The Anti-Injunction Act has been the subject of much arcane legal literature and is understood by few. The courts have been reluctant to utilize the statute to prevent challenges to legislation enacting taxes unless Congress has made quite clear that it intends to impose a tax. Certainly Congress did not do that with respect to the Affordable Health Care Act.

In Section III-B of the opinion the Chief Justice argues that he does not believe that the "commerce" clause could possibly permit the individual mandate. "That is not the country the Framers of the Constitution envisioned." At 132 S.Ct. 2589. The Chief Justice believes that permitting the individual mandate under the "commerce" clause would fundamentally change the relationship between the citizen and the Federal Government. It can be presumed that Justices Scalia, Thomas and Alito agree with the Chief Justice, comprising four who would put the brakes on the "commerce" clause as well as the "necessary and proper" clause. Justice Kennedy's view on that, although he joins dissenters, may be less clear.

Section III-C, which again commanded a 5 to 4 majority, concluded that the Affordable Health Care Act imposes a tax and is therefore proper under the Constitution. The Chief Justice throws a bone to the dissenters by pointing out that not all taxes would automatically be permitted. The "shared responsibility payment's practical characteristics pass muster as tax under our narrowest interpretations of the taxing power." At 132 S.Ct 2600.

Part IV of the opinion, found that the Medicare expansion exceeds Congress's authorization under the Spending Clause. The original program was designed to cover

medical services for certain categories of the needy. Under the Affordable Care Act, Medicaid is transformed into universal health care coverage. Nothing in the Court's opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care and **requiring** States to accept such funds to comply with conditions with respect to their use. Congress is ***not*** free to penalize States that choose not to participate in the new program by taking away their existing Medicare funding.

Justices Scalia, Kennedy, Thomas and Alito would strike down the Act in its entirety. Therefore, 5 Justices believe that neither the "commerce" clause nor the "necessary and proper" clause justify the individual mandate. The four dissenters obviously disagree with the Chief Justice's view on the reach of the taxing power. Likewise, five Justices were unwilling to accept expansion of the Medicaid program. The four dissenters would find the entire Act must fall and that the good cannot be severed from the bad.

Roberts very cleverly maintained two different majorities. He pleased the so-called liberals saying the Act is okay because it is a tax on the individual mandate and the unconstitutional part, the Medicaid expansion, is severable. On his view of restriction of the "commerce" clause and "necessary and proper" clause he snared a majority with Scalia, Kennedy, Thomas and Alito.

The question debated in legal circles is what this opinion portends for future developments in connection with the "commerce" clause and the "necessary and proper" clause. Will those provisions be broadly interpreted, as they have in the past, or thanks to the majority of five, will those provisions be subject to a more narrow interpretation than has been articulated since the establishment of the Roosevelt Court. Only time will tell.

It is difficult to say whether Chief Justice Roberts simply sees his job as letting the voters decide the wisdom of the Affordable Health Care Act or whether he is attempting to craft a new understanding of the relationship between the federal government and the states. The Chief Justice's view of the "commerce" clause does not strike out in a radically different direction. Reaching back to early precedent, the Chief Justice opined "the framers gave Congress the power to *regulate* commerce, not to *compel* it, and for over 200 years both our decisions and Congress's actions have reflected this understanding. There is no reason to depart from that understanding now." At 132 S.Ct. 2589. Chief Justice Roberts posits himself not as an instrument of eradicating the last 75 years of jurisprudence in the "commerce" clause arena, but rather as merely defining the line in the sand which was previously established separating the states from the Federal government. "…We have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce." At 132 S.Ct. 2590. In other words, the Supreme Court will not invoke the "commerce" clause where there is not interstate commerce. The "commerce" clause is not the same as the police power possessed by the states.

Neither the majority nor dissent attempts to create any broad legal ruling with respect to the "necessary and proper" clause, which is left as a sleeping dog.

Future historians may very well see *National Federation of Independent Business v. Sebelius* as a decision with very limited application addressing a great national debate, much the way *Bush v. Gore* has thus far played out. Mr. Justice Roberts' view is clearly the same as Gertrude Stein's view of roses. A tax is a tax, regardless of what else it is called. As one judge wrote in an opinion where I challenged government action, "throw the bastards out" if you don't like the laws they enact. That seems to be the Chief Judge's point of view.

The deeper question as to whether the Conservatives have now won the day with respect to the reach of the Constitution under the "commerce" clause and "necessary and proper" clause is probably a premature victory cry. It does not seem that Chief Justice Roberts has any particular agenda to trim the use of the "commerce" clause. He may not want to see it expanded to include the refusal to buy health insurance, but it does not appear that he is attempting to use this case as a vehicle to alter the reach of the enumerated powers of the Federal Constitution.

While the Supreme Court's decision in National Federation of Independent Business vs. Sebelius may not be as much fun as Rubik's Cube, it is almost as complex to try to line up the differing points of view.

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