Could the Court's Conservatives Split the Difference on Obamacare?

From: Walter Dellinger | Posted Friday, June 22, 2012, at 11:28 AM ET
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Slate.com

Supreme Court Year in Review

Entry 1: Could the court's conservatives split the difference on Obamacare?

Dear Dahlia and Judge Posner,

I am both pleased and apprehensive about once again commenting with you, Dahlia, on the final days of the Supreme Court's term. The magnitude of the decisions yet to come—the Arizona immigration law, the Stolen Valor case, and, of course, health care—makes the idea of providing instant commentary somewhat daunting.

I'm also really pleased that this year we are being joined in this exchange by one of America's most thoughtful public intellectuals, Judge Richard Posner of the United States Court of Appeals for the 7th Circuit. While a pleasure, it is also a bit intimidating to be blogging with the most often cited legal scholar of the 20th century. Judge, welcome.

Now, health care. My gut tells me the court will do something that will be a partial victory for both sides of the seemingly unbridgeable chasm between supporters and opponents of Obamacare.

Nothing could be more foolish, of course, than to hazard a public prediction about a case that will be resolved in a matter of days. But, here goes, anyway: A year ago I thought the "mandate" would be upheld, that Chief Justice John Roberts would write the opinion and that the decision would not be close. Maybe, 7-2.

After an oral argument that featured hostility, often bordering on heckling, directed at the government by more justices than two, that 7-2 notion seems less than astute. Five justices seemed to believe that the "individual mandate" would work a fundamental transformation in the relationship of citizen to government, and not in a good way. That's not a favorable omen for the health care law, to put it mildly.

But will the court really strike down a law of this magnitude by a 5-4 margin? I have a hard time believing that will happen. The U.S. system for providing health care is a disaster for the economy at large and a tragedy for those who cannot see a doctor when they are sick. And this health care system is likely to get worse before it gets better, no matter what happens to Obamacare. If the court were to strike down this major reform effort, 40 years in the making, the court would own the resulting health care system for the next decade and beyond. It's a slightly highbrow version of the universal rule: "You broke it, you bought it."

Given the uncertain voice with which the Constitution speaks to the issues before the court, I can't believe that five justices want to inherit that responsibility. But what would a middle way of resolving the case look like? Perhaps something like this: The court could opine that an "individual mandate" that compelled Americans to engage in commerce with a private party is unconstitutional. But, the court could say, this law does not actually force anyone to engage in commerce. As I noted last month in Washington Post, "Given the relatively modest payment required of those who choose not to maintain insurance, no one is being forced to buy a product they don't want."

The law's challengers have responded that the mandate is a binding requirement that makes anyone who goes without insurance a lawbreaker. Here is where the court could give a theoretical victory to the challengers: By saying that if you did read the law that way—as its text seems to suggest—as making lawbreakers out of those who don't acquire health insurance, it would be unconstitutional. But we don't read it that way, the court could say. We read it as nothing more than an incentive to purchase coverage. No one is compelled to make a purchase from a private party because they can choose, instead, to pay a relatively modest penalty that never exceeds 2.5 percent. This makes the decision about whether or not to have insurance a genuine choice, not a compulsion.

At this point, a compromise-prone majority would have a couple of choices. The first would be to accept Solicitor

General Donald Verrilli's astute suggestion that the court avoid the constitutional issue by reading the law as giving a real choice to citizens: Have insurance or pay a modest penalty. Either way is compliance, not lawbreaking, the solicitor general says. Or the court could decide the text does not permit that reading but the Constitution compels it. The provision stating that everyone must obtain coverage or be a lawbreaker is unconstitutional, but the linked provision imposing modest financial incentives to have coverage is acceptable and can stand. (I advanced this thought at a recent session of the American Constitution Society and soon learned that I was not the first or only person to make this suggestion. See, for example the similar thoughts of Joey Fishkin and Jonathan Cohn.)

So a compulsory mandate would be unconstitutional but a financial incentive that leaves the choice to the individual would be OK. The practical effect would be to uphold all the operative provisions of the Affordable Care Act, while firmly planting a liberty flag that would limit future Congresses.

Such a result would not be easy to score. But in a democracy, when each side is seeking a total victory over the other, you can do a lot worse than come out with a muddled message.

There, I'm out on a limb. Come next week, the sawing can begin. I look forward to our conversation.

Walter

What Happens When the Court Itself Becomes the Headline?

From: Dahlia Lithwick | Posted Monday, June 25, 2012, at 8:57 AM ET
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Supreme Court Year in Review

Entry 2: What happens when the court itself becomes the headline?

Dear Walter and Judge Posner:

What a delight to welcome you to this year's Breakfast Table!

Walter—welcome back and thank you so very much for your many years of service to the cause of Slate. Judge Posner, it's a thrill and honor to have you with us this time. I hope you have fun. I must also send a shout-out to Paul Clement who will be much missed this year. I am trying to think of a time in all the years we've hosted this discussion when the court has been as breathlessly discussed and debated on the front pages and at family weddings as we are seeing right now. We've witnessed extraordinary decisions come down over the years, but this is the first time the court itself is being dissected, and the issue is less the constitutionality of the Affordable Care Act than the role of the Supreme Court itself.

Walter your proposal from Friday—that the mandate can be struck down with the penalty surviving has gathered some traction. I remember the Joey Fishkin version from early April and David Savage flicks at a different compromise at the L.A. Times this morning—going back to the Brett Kavanaugh argument that this was a tax and thus constitutional. It's interesting to watch the commentary come in waves. Most court watchers have gone from reasoning with the court, to pleading with it, to reconciling themselves to one outcome or another, and now we seem to be settling in around the idea that some middle ground is still achievable—a symbolic way for the court's conservatives to limit the reach of the mandate without gutting all the popular provisions of the law.

Polls continue to show that this is precisely the outcome the public seems to want; not that this matters. But I suppose it's a way for the court to do away with the unpopular piece of the law without being tagged for taking away all the good bits.

As I have suggested I've been most fascinated these past weeks by the deeply politicized discussions of the court, from Ezra Klein's ruminations on judges as politicians and his sense that the court has finally become a "polarized institution" and the heated responses it and other pieces have engendered. We're all talking about partisan politics and the courts again in a way that I recall from 2000 and that would seem familiar to FDR. This is a conversation that generally stresses out court-watchers, who prefer to believe that courts are courts (see, e.g., Akhil Amar on the possibility that his whole life has been a fraud). The chasm between the legal academy and the court on the health care cases will spawn a thousand law review articles some day. I don't know what the justices plan to do this week but I imagine they will be hugely relieved when it is all over. I am never one to put huge stock in polling about the Supreme Court but my sense is that for courts in general, all headlines are bad ones.

While we're waiting for whatever today brings, I wonder if either of you has thoughts on either last Thursday's "fleeting expletives" decision or in the SEIU case against which the New York Times has inveighed.

It does feel a bit as though we've been on the edge of our seats over health reform for so long now, we're all just about falling off our bar stools. That said, I look forward to spending the week with you both out here in cyberspace.

Yours,

Dahlia

What It Looks Like When Justices Tear Into Each Other—From Up Close

From: Dahlia Lithwick | Posted Monday, June 25, 2012, at 4:27 PM ET
| Posted Monday, June 25, 2012, at 4:27 PM ET
Slate.com

Supreme Court Year in Review

Entry 3: What it looks like when justices tear into each other—from up close.

Dear Walter, Emily, and Judge Posner,

Emily, welcome aboard, we are looking forward to your thoughts on juvenile life sentences today!

Loads to say about this morning's announcements from inside the Supreme Court chambers: Headlines include the 5-3 decision to strike three provisions (but leave one) of the Arizona immigration law, the summary reversal of the Montana Supreme Court on campaign finance, and the 5-4 decision to do away with mandatory life without parole sentences for juvenile homicide offenders.

We can digest these decisions and more as they day unfolds but I wanted to share one brief reaction to the announcements from inside the court. One thing that wasn't clear if you weren't actually inside chambers this morning is what happens when two justices disagree in close geographic proximity to each other. It makes for a very strange picture.

Justice Elena Kagan authored the majority opinion holding that the Eighth Amendment bars mandatory life without parole sentences for two 14-year-olds, and despite the fact that 29 states allow for such sentences, that judges must have the discretion to give more lenient sentences to those under 18 at the time of their crimes. She read her opinion fairly briefly. Then Justice Samuel Alito read his dissent from the bench and it was pretty brutal—more so than his actual dissent as published. He spent it all but accusing Kagan of calling the states who have currently mandatory LWOP laws "stupid" for misunderstanding their own statutes and declaring that the court has no right to impose our vision of the future on "millions of people." He then decried today's decision as proof that "our Eighth Amendment cases are no longer tied to any objective indicia of society's standards" and that "our Eighth Amendment case law is now entirely inward looking." Ouch.

Because Kagan still hasn't quite perfected the ability to look neutral while the gentleman to her immediate right is calling her an elitist who's also bad with numbers, this becomes a rather uncomfortable spectacle to witness. Indeed, this may be the first moderately compelling argument I have heard for keeping cameras out of the Supreme Court: Decision days can be far more threatening to the idea of jurists as dispassionate neutral umpires than argument days.

That impression was brought home yet more forcefully just moments later when Justice Antonin Scalia read his bench statement dissenting in Arizona v. United States, the Arizona immigration decision. Scalia explained that the states had sovereign authority to protect their borders at the founding and for a long time thereafter, then referenced the new Obama administration policy regarding immigrants who came here as children and citing the president's press conference at which he explained that this change in policy is "the right thing to do." (Perhaps the first originalist reading of a presidential press conference). Justice Scalia concluded by observing that the delegates to the Grand Convention would have "rushed to the exits of Independence Hall" on hearing the immigration law would be enforced only to the "extent the president deems appropriate." He described the decision today as one that "boggles the mind."

Justice Anthony Kennedy, who sat to Scalia's left, appeared to look entirely unperturbed at having mind-boggled anyone present. If he was bothered at all, he has a much better poker face than Justice Kagan, who continued to look uneasy as Scalia went on scolding Justice Kennedy.

Nobody should be surprised that these cases engender the same kinds of passionate reactions in the justices that they do in the rest of us. But it's fantastically interesting to sit in the courtroom and listen to Justice Scalia passionately decrying the "dry legalities" of the Arizona immigration case that obscure the suffering of the citizens themselves.

When the justices are fuming that real people are being affected by their dusty decisions that should happen in person, not in dusty decisions. It does very little good to rail about the real world on paper. I'm not sure all this umbrage is something the justices want us to witness, but it's getting harder to have a conversation about the Supreme Court and its politics without actually seeing it in person.

The Justices Understand That Juveniles Aren't Like the Rest of Us

From: Emily Bazelon | Posted Monday, June 25, 2012, at 5:07 PM ET
| Posted Monday, June 25, 2012, at 5:07 PM ET
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Supreme Court Year in Review

Entry 4: The justices seem to understand that juveniles aren't like the rest of us.

Dear Dahlia, Walter, and Judge Posner,

Thank you for letting me crash your party for a quick post about the court's ruling on life without parole for juveniles who commit murder. First, though, I can't resist asking you all a few questions about today's big rulings on Arizona's immigration law and Montana's campaign finance restrictions.

Do you think, as I'm inclined to, that the Arizona decision is largely a win for the Obama administration, because Kennedy's majority opinion underscores that states can't make up their own criminal penalties to deal with immigration? And do you think it's at all surprising that the courts' four moderate-liberals didn't insist on hearing the Montana case—since it only takes four votes to grant review—even though they knew they'd lose on the merits down the line, 5-4, what would have been Citizens United, the Sequel? I know I would have bought a front-row ticket to that show.

But first, child murderers. In a 5-4 split of the usual suspects, with Kennedy on the liberal side, Justice Elena Kagan wrote for the majority that states can't impose a mandatory sentencing scheme of life without parole on juveniles who commit murder. After today, a judge can still mete out life without parole (LWOP, for short) for a juvenile killer—but only after having the chance to consider an alternate sentence. And Kagan went out of her way to say that this should make LWOP an "uncommon" sentence for a murderer who is under the age of 18 when he commits his crime.

I see this as a fairly small but still significant step in expanding the definition of cruel and unusual punishment—the Eighth Amendment standard for declaring a sentence off limits. It's incremental because two years ago, the court ruled unconstitutional mandatory LWOP for teenagers who commit crimes other than murder. Today, the court simply extended the reasoning of that ruling, Graham v. Florida, to teenage killers. Not surprising, right? Especially since the whole idea behind Graham was that minors are less culpable than adults in part because their brains aren't fully developed. Once again today, the court relied on the research of Laurence Steinberg at Temple University, whose studies of the adolescent brain have been crucial to this line of cases. Steinberg has found that teenagers tend to have less impulse control and more proclivity for risk, and as Kagan says, these findings mean the court's decisions rest "not only on common sense—on 'what any parent knows'—but on science and social science as well."

I don't want to imply, though, that Miller was a slam dunk. At oral argument, it seemed far from clear that five justices were willing to rule out mandatory LWOP for everyone up to age 18, no matter how brutal their crimes. It's one thing to say that the judge should have had a more merciful option than life in prison for Kuntrell Jackson, who was 14 when he was convicted and sentenced for robbing a video store where a clerk was fatally shot, when Jackson didn't fire the gun himself. It's another to worry about the fate of Evan Miller, who Kagan acknowledges committed a "vicious murder" at 14, when he and a friend beat a neighbor and set fire to his trailer after drinking and getting high. But Kagan makes the best of these facts by noting Miller's history of abuse and neglect at the hands of his parents.

What mattered most for the majority, as NYU law professor Rachel Barkow put it to me in an email this morning, is simply its finding that "juveniles are different." Which is interesting, because the court used to emphasize in Eighth Amendment cases that "death is different"—that the death penalty was a distinct and terrible species of punishment. The old promise was that the court wouldn't meddle with states outside the realm of capital punishment. Now we are in a world where life without parole is also being singled out as heinous, because it is hopeless.

So far, the court is concerned about hopelessness, however, only for juveniles. I wonder, though, if that limiting

principle will hold. In dissent, Chief Justice John Roberts called out today's decision as "merely a way station on the path to further judicial displacement of the legislative role in proscribing appropriate punishment for crime." Is Roberts right, do you think—does this decision open the door to others like it?

And what do you make of Roberts' key objection that the court abandoned its previous method of analysis of whether a punishment was "unusual" in light of "evolving standards of decency"? In older cases—in outlawing the execution of the mentally disabled, for example—the court totaled up the small number of states to allow such a punishment and used that as a reason to stop them. Kagan couldn't do that today because 29 states allowed mandatory life without parole for juvenile murderers. So she fancy-danced her way around that number. Roberts, however, wrote: "Mercy toward the guilty can be a form of decency, and a maturing society may abandon harsh punishments that it comes to view as unnecessary or unjust. But decency is not the same as leniency. A decent society protects the innocent from violence."

This is an old debate, of course. Who got the better of it today?

All the Best,
Emily

Why the Feds Won Big in Arizona

From: Walter Dellinger | Posted Monday, June 25, 2012, at 5:21 PM ET
| Posted Monday, June 25, 2012, at 5:21 PM ET
Slate.com

Supreme Court Year in Review

Entry 5: People are painting the Arizona immigration case as a "split verdict." Nope, the feds won big.

Dear Dahlia, Emily, and Judge Posner,

What is striking to me about the court's decision in the Arizona immigration case is what a total victory this decision was for the U.S. government and for the solicitor general. Press coverage that leads with the notion that the court upheld the "key provision" or suggesting that the overall outcome was a "split verdict" seems way off base to me. The feds won.

Here are the Arizona provisions the court struck down:

- The provision making it a crime to be present in Arizona without carrying an alien registration document
- The provision making it a crime for an "unauthorized alien" to look for work or take a job
- The provision allowing an Arizona law enforcement officer to arrest anyone that the officer believes has committed a crime that would make him deportable.

Here are the Arizona provisions the court held were valid:

- No provisions. Not any. None.

The court did hold that it was premature to invalidate the fourth provision at issue. This part of the law does two things: 1) It requires state officials to determine the immigration status of any person they stop on some other legitimate basis (if they have reason to suspect the person is in the country unlawfully), and 2) It requires that the police must have the person's immigration status determined before the person is released. The court did not pass final judgment on the first part, the mandatory status check. And it strongly indicates that the second part would be unconstitutional if it were read to allow prolonged detention. "Detaining individuals solely to verify their immigration status would raise constitutional concerns," the court says. And if—if—the the provision "only requires state officers to conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision likely would survive preemption…" "Likely would"—if read and enforced by the Arizona authorities in this more benign way. At least "absent some showing" of other adverse consequences. And subject to further civil rights challenges. Rather than uphold this provision, the court notes that "the nature and timing of this case counsel caution in evaluating [its] validity" because the law has not gone into effect and there is thus uncertainty about "what the law means and how it will be enforced."

So what does Arizona win? A temporary reprieve for one provision that will be upheld by the court only if Arizona abandons the language that requires detaining a person until their immigration status can be verified. That may be something. But not nearly as much as that which was invalidated.

More generally, the tenor of the opinion of the court is a vindication of federal authority over immigration. "Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders," and quotes from an earlier decision that "Conflict is imminent whenever two separate remedies are brought to bear on the same activity." It will take at least several days of analysis before one can confidently predict what today's decision will mean for immigration laws enacted recently by other states. But there is virtually nothing in the court's opinion that should give lawmakers in those other states any comfort whatsoever.

And that is why Justice Scalia is so upset. (Unless, Dahlia, he is being anticipatorily mad about what may happen on Thursday. You think?) I want to address Scalia's amazing dissent in a future posting. And to explore whether Chief Justice Roberts changed his vote and joined with Kennedy, Ginsburg, Breyer and Sotomayor in order to avoid a 4-4

tie. (It would not be the first time a chief justice had done that.)

More to come. Much more.

Walter

The Court's Conservatives Don't Care How Much You Hate Citizens United

From: Dahlia Lithwick | Posted Monday, June 25, 2012, at 6:30 PM ET
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Slate.com

Supreme Court Year in Review

Entry 6: The court's conservatives don't care how much you hate Citizens United.

Dear Walter, Emily, and Judge Posner,

First, Walter: I agree with you that the press was very hesitant to call Arizona any kind of a win for the White House this morning. Unless I am missing something, it was good news for Obama and a rough day for Jan Brewer. As is often the case, the first few headlines tend to slap back and forth at each other until everyone agrees about the scope of what just happened. I would love to hear your thoughts on why the chief justice joined the majority opinion—I assume the alternative was a tie which would have allowed the 9th Circuit decision to stand—but I am hearing at least some chatter suggesting that there were other factors at work here. Do tell. I dare not hazard a guess on your other point—the reason Justice Scalia's upset. I'm going to go with the old res ipsa defense. He's upset because states should be allowed to defend their borders. Tune in Thursday for more.

That said, there is an interesting thread connecting the immigration case and the life without parole case Emily mentions. As you say, Emily, Justices Kagan and Kennedy have shown a special solicitude for juveniles because they are "different" in all the ways that have become familiar after Roper and Graham, the cases establishing that young people are reckless, impulsive, and vulnerable to external pressure—all qualities Alito sees as terrifying rather than worthy of special protection. The interesting common theme today is that Justice Scalia is desperately angry at the Obama administration's special solicitude for children in announcing his support for a stripped down DREAM Act. Obama was announcing a new policy toward young people brought to the United States illegally by their parents for at least some of the same reasons Kagan seeks special scrutiny for young people who commit homicides. Justice Scalia is horrified at the prospect, explaining in his dissent that this will squander limited immigration resources. "The husbanding of scarce enforcement resources can hardly be the justification for this, since those resources will be eaten up by the considerable administrative cost of conducting the nonenforcement program, which will require as many as 1.4 million background checks and biennial rulings on requests for dispensation." I don't want to make too much of the fact that both Alito and Scalia and—as you point out, Emily—the chief justice don't think that special solicitude for young people, who don't have as much control over their lives as adults, necessarily represents "evolution" in the right direction, but it's an interesting confluence today to say the least.

Which brings us to campaign finance reform. I don't imagine anyone is too terribly surprised that the Supreme Court summarily reversed the Montana Supreme Court's ruling from last winter finding that if a state supreme court just holds its ears and hops up and down and yells loud enough, it can overrule the highest court in the land through pure wishful thinking. The Montana court called into very specific question Justice Kennedy's famous claim in Citizens United that independent campaign expenditures "do not give rise to corruption or the appearance of corruption." As the five justices behind the per curiam ruling rejecting that theory today see it, "The question presented in this case is whether the holding of Citizens United applies to the Montana state law. There can be no serious doubt that it does. See US Const., Art VI, cl. 2." Not content to leave matters there, the majority tersely adds: "Montana's arguments in support of the judgment below either were already rejected in Citizens United, or fail to meaningfully distinguish that case."

So that's that.

One of the most interesting lessons here is that the sense of lingering public outrage over Citizens United—deserved or not—influenced the court not one little bit on this issue. In fact, while the big news today was the Arizona immigration ruling, a lot of liberal organizations jumped on the Montana campaign finance decision as their top story. I think they believe this is an issue that will continue to gain traction in bipartisan ways.

Why? Polling shows that Americans still hate the result in Citizens United as much as ever. They connect that holding directly to what they see as the flood of big money in this election from donors like Sheldon Adelson, who has promised to contribute millions more to the Romney campaign. Not everyone in America hates Citizens United, but it sure has had the unanticipated effect of uniting American citizens against the court. That said, there's public opinion and then there's public opinion, and nobody truly expected the court to redo its landmark campaign finance case at the whim of Montana.

Prof. Eric J. Segall, who teaches at Georgia State University College of Law, recently published Supreme Myths: Why the Supreme Court is Not a Court and Its Justices are Not Judges. He explained to me today that the summary reversal of the Montana decision "shows that the court is going to stick to its guns on its questionable assertion that political expenditures do not lead to corruption concerns." He added that all the polling in the world won't change that. As he put it, "Contrary to its normal practice, the court is displaying complete indifference to public opinion which is overwhelmingly against Citizens United. The fact that the court would not even hear arguments that the unique situation in Montana might justify modifying the Citizens United rule reflects the conservative majority's belief that it knows best about the relationships between and among money, speech, and politics, and does not care at all what the American people, or state governments, think."

All of this probably explains Justice Stephen Breyer's muted dissent from the decision. Not much point in fighting this battle anymore in-house. We will find out in the coming months whether today's decision will make a difference in how important the composition of the court becomes as an election issue. I think it may, but I wonder if you do?

My best,

Dahlia

Why the Supreme Court Ducked Citizens United the Sequel

From: Walter Dellinger | Posted Tuesday, June 26, 2012, at 11:18 AM ET
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Slate.com

Supreme Court Year in Review

Entry 7: At least the court didn't make Citizens United worse.

Dear Dahlia and Judge Posner,

I'm still pondering the court's 5-4 decision to reverse summarily Montana's 100-year-old limits on independent campaign expenditures by corporations. This decision, to overturn the judgment of all three branches of the Montana state government without agreeing to spend one hour next fall listening to oral argument from the state's attorney general, makes a mockery of the court's solicitude, expressed in many other cases, for the dignity and constitutional status of the "Sovereign States."

In Citizens United, the court opined that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." Montana argues that in its state that is not the case. But the Supreme Court gives the back of its hand to the state's argument about its own experience, and doesn't even care to hear full argument on the point.

Of course the court's majority did not want to hear argument on whether in Montana, or anywhere else, independent expenditures can give rise to an appearance of corruption, because the court's conclusion in Citizens United on this point is almost surely wrong. For the majority's point of view, the less said about that, the better.

The problem is not simply that independent expenditures can also, like direct contributions to campaigns, lead to quid pro quo payback. It's also that in significant respects, the opportunities for corruption are in fact greater with independent expenditures than with direct contributions to campaigns.

Suppose, for example, you covet an ambassadorship for which you are not remotely qualified. You are told by those close to the candidate that the going price for nomination to a lavish country embassy in a tropical country is $10 million. If you gave the amount directly to the campaign (and if the current limits were raised to $10 million) at least that contribution would be publicly disclosed. The Senate Foreign Relations Committee, informed of your largess to the winning campaign, might be expected to probe with special scrutiny whether you had any real qualification for the office in question

But here is the key fact about independent expenditures under present law: Although the campaign will certainly be informed of your wonderful gift to the "independent" group, that fact can be kept secret from the rest of the world. There is thus no external check on buying offices or other favors from government when money flows through independent committees.

All that is not to suggest that the four dissenting Justices (Breyer, Ginsburg, Sotomayor, and Kagan) were wrong in deciding not to vote to hear the case. Their four votes would have been enough to grant review, with oral argument. But they may have feared that the court would extend Citizens United even further if presented with another case. Even reaffirming Citizens United would have been unfortunate. (Justice Hugo Black told me during my clerkship that when there were only four liberals on the court in the 1940s, they would deliberately not grant review of some cases, to prevent the majority from freshly reaffirming precedents with which the four disagreed.)

Of course, the majority may not really care whether there is an appearance of corruption in campaigns now. They apparently believe that campaign finance reformers really want to "level the playing field" by limiting the greater influence the rich can have through unlimited expenditures—a goal the majority believes is unconstitutional. The majority's decisions invalidating limits on political expenditures may have less to do with the First Amendment and more to do with a notion that harkens to the conservatism of the early 20th century, which viewed any kind of redistribution of wealth as violating the due process rights of the rich. We saw some of that attitude in the questions

some justices asked during argument in the health care case. And we may see it again in the opinions when that case is handed down.

Thursday awaits.

Walter

Justices Should Use More Than Their Gut and "Brain Science" To Decide a Case

From: Richard A. Posner | Posted Tuesday, June 26, 2012, at 4:55 PM ET
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Slate.com

Supreme Court Year in Review

Entry 8: Justices should use more than their gut and "brain science" to decide a case.

Dear Walter, Dahlia, and Emily,

I've now read Miller v. Alabama, decided by the Supreme Court on Monday, which held that mandatory life imprisonment for juvenile murderers (two 14-year-olds) violates the Eighth Amendment's prohibition of "cruel and unusual punishments." I don't object to the result, but the case is a good illustration of how unmoored constitutional law has become. The analysis part of the opinion begins with two quotations from Supreme Court opinions, one that the cruel and unusual punishments clause "guarantees the right not to be subjected to excessive sanctions" and the other that the clause "flows from the basic 'precept of justice that punishment for crimes should be graduated and proportioned." These propositions have no basis in the text of the Eighth Amendment (imprisonment is not cruel, and mandatory life sentences for juvenile murderers is not unusual, at least in the United States) or the English legal history that lies behind it or punishment practices in 18th century, as the court more or less confesses in the same paragraph with a corny quotation from another Supreme Court opinion: The concept of cruel and unusual punishments is based on "the evolving standards of decency that mark the progress of a maturing society." Is the United States a maturing society? Surely not in the realm of criminal law, a real disaster area—we imprison a higher fraction of our population than any civilized nation (and than most of the uncivilized ones), many for trivial crimes involving mind-altering drugs less dangerous than alcohol or cigarettes; life sentences are imposed with abandon; prosecutorial discretion is very broad and often exercised irresponsibly; and judges' sentencing discretion, also broad, is exercised much of the time in an intellectual vacuum.

I don't object to a loose construction of the Constitution; there isn't any sensible alternative, given how old and out of touch the document is, how unrecoverable the actual thinking of its authors and ratifiers, and how vaguely worded so much of it is. But it would be nice if interpretation could be based on something more than gut. We need evidence-based law as we need evidence-based medicine. The Miller opinion cites approvingly the use of social science data in an earlier Supreme Court opinion (Roper) dealing with the application of the cruel and unusual punishments clause to minors, but those data were and are unconvincing. The court's use of them to bolster a decision reached on other, I would say emotional or ethical, grounds, illustrated what might be called "law office" social science, a counterpart to the "law office" history deployed by "originalists," and equally tendentious.

I am struck by the court's reference to "brain science." The court has learned from brain science that teenagers are immature! But we knew that. The problem with using it as a basis for distinguishing between murderers of different ages is that many adult murderers have problems with their brains, too. Why is it not cruel and unusual to sentence them to life in prison? A categorical distinction between a 17-year-old and an 18-year-old seems arbitrary, and in any event a reflection of feelings about children (if teenagers can be called children) rather than of the teachings of brain science. If the court had said—what I imagine the justices in the majority feel, that emotion dictated the outcome—that a sentence of life imprisonment (with no parole of course) imposed on a 14-year-old is extremely distasteful, it would have the considerable virtue of candor.

I would like to comment very briefly on the Montana campaign contributions decision. I think the court was right to do what it did. I don't say this because I agree with the Citizens United decision. I don't. But a presidential campaign is not the right time to revisit the issue. The prospect that the court might overrule the decision, or more likely modify it, would create enormous uncertainty at a time when the voters' and the politicians' circuits are already overloaded.

Sincerely,
Judge Richard A. Posner

Perhaps Justice Scalia is Reading the Wrong Constitution?

From: Walter Dellinger | Posted Tuesday, June 26, 2012, at 6:07 PM ET
| Posted Tuesday, June 26, 2012, at 6:07 PM ET
Slate.com

Supreme Court Year in Review

Entry 9: Perhaps Justice Scalia is reading the wrong Constitution?

Dear Dahlia and Judge Posner,

Rereading Justice Scalia's amazing dissent in the Arizona immigration case brought to mind an astute observation by the statesman/humorist Sen. Al Franken. The Founding Fathers, he noted, adopted a constitution that gave all the important powers to the states, and very few to the national government. Pause. That didn't work, he says, and so a decade later they got rid of the Articles of Confederation and adopted the Constitution we have today.

Justice Scalia's exaggerated view of a sovereign-state-centric constitution sounds a lot like the one that those who met in Philadelphia in the summer of 1787 rejected and replaced with a national Constitution. As John Marshall was later to say of this new Constitution, "The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation are intrusted to its Government."

The national government, to be sure, slumbered through its first half-century. Its full potential was reached only with the Civil War, and after the passage of the 14th Amendment's sweeping limits on state prerogatives. The notion of states as fully "sovereign" seems hard to square with the reality of the American Constitution we have, especially the post-Civil War "Rebirth of Freedom" Constitution.

And yet, the one thing an advocate before the Supreme Court can never, ever do is to suggest in any way that the states are less than fully sovereign. Full state sovereignty has to be taken as an assumption, or a trap door will open beneath your feet and you will descend to some black hole deep in the basement of the court. Thus, state sovereignty is used as the premise of a question Justice Scalia asked of the solicitor general at argument in the immigration case: "[W]hat does sovereignty mean if it does not include the ability to defend your borders?" Well, what it means is that if ability to defend your borders is a key concept of sovereignty, then sovereignty is a wholly inapt description for American states. I would have thought it clear under the national Constitution that the American people are free to move throughout the country: New York simply cannot keep out people from New Jersey.

Eric Posner's insightful article elsewhere on Slate demonstrates that "Scalia's view is rooted in a nostalgic view of the U.S. Constitution that long ago ceased to reflect reality." Eric is referring to Scalia's notion that the court has no business subordinating the states to a president's policies on enforcement of the immigration laws. Only Congress can make determinations that override the states on this subject, and there is no room for the exercise of presidential prosecutorial discretion, in Justice Scalia's view.

So Justice Scalia thinks now. But Stanford Law prof. Pam Karlan, working on her greatly anticipated forward to the Harvard Law Review's Supreme Court Term issue, noted to me that Justice Scalia took a different approach in his truly classic 1998 dissent in Morrison v. Olson. Back then, he argued that "law enforcement functions" have "always and everywhere" been an exercise of executive power; that "the ultimate decision whether, after a technical violation of the law has been found, prosecution is warranted" involves "the balancing of various legal, practical, and political considerations, none of which is absolute"; and that "[t]o take this away is to remove the core of the prosecutorial function, and not merely 'some' Presidential control."

Justice Scalia had it right in Morrison v. Olson. And he got one thing right in his bench statement in this week's immigration case. "If securing its territory in this fashion is not within the power of Arizona, we should cease referring to it as a sovereign State." Motion seconded.

Walter

[Note: I need to make a correction. In discussing the Montana case, I suggested that cert was denied by the court. That is, of course, wrong. As prof. Steven Lubet of Northwestern Law School pointed out to me, the court obviously had to actually grant cert before it could summarily reverse the decision of the Montana Supreme Court. Thanks, Steve.]

There Are More Reasons Than "Brain Science" To Go Easier on Children

From: Dahlia Lithwick | Posted Wednesday, June 27, 2012, at 10:10 AM ET
| Posted Wednesday, June 27, 2012, at 10:10 AM ET
Slate.com

Supreme Court Year in Review

Entry 10: There are more reasons than "brain science" to go easier on children.

Dear Walter and Judge Posner,

A brief thought on "children" and "brain science" in response to Judge Posner's thoughts of last night. I agree that both phrases are tossed around rather sloppily in the Eighth Amendment cases. We are far too sentimental in our deployment of the word "children" and strangely rigid about what we deem appropriate "brain science." Emily made the point that Justice Kagan also engaged in a bit of stunt-counting about the number of states that provide for mandatory life without parole for juveniles—something that justifiably infuriated the dissenters. And children can commit unspeakable murders, knowingly and cruelly.

That said, one thing struck me at oral argument in Miller and Jackson, beyond just the reduced culpability of youthful murderers. Bryan Stevenson, arguing on behalf of the two 14-year-old murderers reminded the court that youth isn't just about brain science. It's also about being absolutely trapped. Stevenson put it this way: "It's not just their inherent internal attributes. It's also the external circumstances that they find themselves in. Kuntrell Jackson was born in a household where there was nothing but violence and guns and people shooting at each other. His grandmother shot his uncle. His mother shot a neighbor. His brother shot someone. They were all put to jail. But, unlike an adult, these children don't have the ability to escape." Evan Miller, the other 14-year-old defendant, was so brutalized as a child he attempted suicide four times: the first time came when he should have been in kindergarten.

This isn't just liberal weepiness. I agree that the brain science evidence is squishy, and that arguments about diminished moral reasoning, susceptibility to influence, and impulse control also map readily onto defendants who are older than 18. It all looks like a smoke bomb to deflect from what the justices are really trying to do: Draw a moral line around childhood for sentencing purposes. But one striking thing about Miller and Jackson is the extent to which they were completely trapped by the horrible circumstances of their own lives. They went, in effect, from one life sentence to another. This argument may also be unmoored from logic, but it's at least candid, and I found it quite persuasive.

I suppose we should spend the rest of the day speculating about the health care cases with no actual facts from which to work. I confess that reading tea leaves isn't all that interesting to me. I don't even like tea.

Yours,
Dahlia

Justice Scalia Is Upset About Illegal immigration. But Where Is His Evidence?

From: Richard A. Posner | Posted Wednesday, June 27, 2012, at 10:21 AM ET
| Posted Wednesday, June 27, 2012, at 10:21 AM ET
Slate.com

Supreme Court Year in Review

Entry 11: Justice Scalia is upset about illegal immigration. But where is his evidence?

Dear Walter and Dahlia,

I have read Arizona v. United States and was particularly struck by Justice Scalia's opinion dissenting from the part of the decision that invalidated several provisions of the Arizona law.

Justice Scalia is famously outspoken. Is that a good thing for a Supreme Court justice to be? Good or bad, it seems correlated with an increasing tendency of justices to engage in celebrity-type extrajudicial activities, such as presiding at mock trials of fictional and historical figures (was Hamlet temporarily insane when he killed Polonius? Should George Custer be posthumously court-martialed for blowing the Battle of the Little Big Horn?). My own view, expressed much better by professor Lawrence Douglas of Amherst, is that such activities give a mistaken impression of what trials are good for. But I would give Justice Sotomayor a pass for appearing on Sesame Street to adjudicate a dispute between two stuffed animals.

But that is to one side of Justice Scalia's opinion.

He is very concerned with the fact that the Obama administration recently announced a program suspending deportation efforts directed at more than1 million illegal immigrants under the age of 30. He quotes President Obama as having said that the program was "the right thing to do." Justice Scalia says that it "boggles the mind" to think that Arizona could be contradicting federal law by enforcing applications of federal immigration law "that the President declines to enforce." He says that the federal government "does not want to enforce the immigration laws as written, and leaves the States' borders unprotected against immigrants whom those laws would exclude." The federal government is "refus[ing] to enforce the Nation's immigration laws."

These are fighting words. The nation is in the midst of a hard-fought presidential election campaign; the outcome is in doubt. Illegal immigration is a campaign issue. It wouldn't surprise me if Justice Scalia's opinion were quoted in campaign ads. The program that appalls Justice Scalia was announced almost two months after the oral argument in the Arizona case. It seems rather a belated development to figure in an opinion in the case.

Illegal immigration is a polarizing political and social issue. Many people hate illegal immigrants. Others regard them as an indispensable part of the American labor force. There are 10 million to 11 million illegal immigrants (for rather obvious reasons no one knows the exact number), and illegal immigrants are thought to amount to about 5 percent of the total labor force. Because they tend to do jobs that few Americans want, and because their wages are below average, many (though by no means all) economists believe that the illegal immigrants actually increase the wages of Americans (including legal immigrants). The reason is that the existence of a large body of low-wage workers increases the demand for goods and services both by reducing the cost of production and by their own purchases as consumers, and increased demand for goods and services translates into increased demand for labor and hence higher wages. This is not a certainty but seems a good guess of the effect of illegal immigrants. Illegal immigrants do receive some social services, but fewer than citizens do. It is unclear whether they commit more crimes on average than citizens; they may commit fewer. Of course, some illegal immigrants are criminals, and the Obama administration has decided to focus the very limited resources of the federal immigration enforcement authorities on catching and deporting the criminals. Focusing on them and leaving the law-abiding (law-abiding except for the immigration law itself!) illegal immigrants seems a defensible policy. And certainly state and local law enforcement can assist the feds in apprehending illegal immigrants who commit crimes (being in this country without legal authorization is unlawful, but, with some exceptions, it is not criminal); nothing in the Arizona decision prevents that.

In his peroration, Justice Scalia says that "Arizona bears the brunt of the country's illegal immigration problem. Its citizens feel themselves under siege by large numbers of illegal immigrant who invade their property, strain their social services, and even place their lives in jeopardy." Arizona bears the brunt? Arizona is only one of the states that border Mexico, and if it succeeds in excluding illegal immigrants, these other states will bear the brunt, so it is unclear what the net gain to society would have been from Arizona's efforts, now partially invalidated by the Supreme Court. But the suggestion that illegal immigrants in Arizona are invading Americans' property, straining their social services, and even placing their lives in jeopardy is sufficiently inflammatory to call for a citation to some reputable source of such hyperbole. Justice Scalia cites nothing to support it.

As of last year there were estimated to be 360,000 illegal immigrants in Arizona, which is less than 6 percent of the Arizona population—below the estimated average illegal immigrant population of the United States. (So much for Arizona's bearing the brunt of illegal immigration.) Maybe Arizona's illegal immigrants are more violent, less respectful of property, worse spongers off social services, and otherwise more obnoxious than the illegal immigrants in other states, but one would like to see some evidence of that.

Sincerely,
Richard Posner

Justice Scalia's Partisanship, Judging Muppets, and the Long Wait for Health Care

From: Dahlia Lithwick | Posted Wednesday, June 27, 2012, at 3:19 PM ET
| Posted Wednesday, June 27, 2012, at 3:19 PM ET
Slate.com

Supreme Court Year in Review

Entry 12: Justice Scalia's partisanship, judging Muppets, and the long wait for health care.

Dear Walter and Judge Posner:

A few quick reactions to what's been said already, and then we can turn to health care reform. Firstly, on Arizona immigration, Walter's post from Monday calling it an all but triumph for the Obama administration met with some resistance from a lot of the civil rights groups who saw the outcome as disastrous. The notion that section 2(b) of the law—the "show me your papers" provision—will stand until it's challenged for being racially discriminatory is appalling to them because, as I wrote after the oral argument, this case is about ethnic profiling, even when it isn't.

Judge Posner, you've kind of lit up the Internet this morning with your musings about Justice Scalia's dissent in Arizona v. United States, and I am glad to hear that despite your distaste for putting Hamlet on trial, you've left some wiggle room for adjudicating amongst Muppets. I am rather partial to Muppets as well. It's hard for me to say whether Justice Scalia crossed some invisible line into partisan punditry on Monday; I felt that he'd crossed that same line during the arguments over Obamacare in March.

I was struck by one other thing in your post from yesterday on the Miller decision. You wrote, "I don't object to a loose construction of the Constitution; there isn't any sensible alternative, given how old and out of touch the document is, how unrecoverable the actual thinking of its authors and ratifiers, and how vaguely worded so much of it is." That sounds almost Brennan-like, and trust me, that is a compliment. With Professor Jack Balkin joining us either tomorrow or Friday, I wonder if you wanted to expand on your thoughts about the originalism-versus-living Constitution moment in which we find ourselves?

Finally, if I get one more email from someone predicting the outcome of tomorrow's health care cases based on a judicial speech, the timing of a dissent, or the telling flare of a judicial eyebrow, I am going to set my Out of Office response to the "fleeting expletives" setting. Truly, nobody knows what's going to happen, and the group hypnosis that convinced everyone that the mandate would be struck down on Monday—and is equally adamant that it will be upheld tomorrow—is starting to make me feel like a member of a very troubled cult. My friend Professor Barry Friedman at NYU* described it to me this way today: "Everyone keeps saying, 'The longer this goes on, the more I'm thinking X will happen.' But that's nuts; the decision was always going to come down on the last day of the term. What we're really seeing is our own anxiety about the case circling around in our heads." I agree. The only thing that has changed since March is the calendar. Walter, have you any thoughts or predictions to offer? Tea leaves to read? My Out of Office response is standing by.

Dahlia

Correction, June 27, 2012: This article originally described Barry Friedman as a professor at Columbia University. He is a professor at New York University. (Return to the corrected sentence.)

Who Lost Obamacare? Let's Evaluate the Suspects.

From: Walter Dellinger | Posted Wednesday, June 27, 2012, at 3:30 PM ET
| Posted Wednesday, June 27, 2012, at 3:30 PM ET
Slate.com

Supreme Court Year in Review

Entry 13: Who lost Obamacare? Let's evaluate the leading suspects.

Dear Dahlia and Judge Posner,

Who Lost Obamacare? As I write on Wednesday afternoon, it should be obvious that this is a premature question. But that hasn't stopped the debate over who should be blamed when/if the court strikes down the signature achievement of President Obama's first term. Nominees for blame are:

1. The Solicitor General? Wrong suspect. Any serious reading of the briefs filed by the United States or the transcript of oral argument shows Solicitor General Donald Verrilli effectively established that the "mandate" was an essential part of regulating the interstate market in health care and health insurance. Early in the argument and often during its course, he put forth a set of limiting principles, noting repeatedly that the law regulates the payment method for services that people have no choice but to use. He wove the mandate into the fabric of reforms of the insurance market that no one disputes are within Congress' constitutional competence.

Some of the criticisms of his argument border on laughable. One says he should have cited a 1792 law requiring shipowners to provide heath care for their crews. But, obviously, those shipowners were already engaged in interstate and foreign commerce. That simply doesn't address the challengers argument that individuals required to have health insurance are not in commerce.

It's worth noting that the solicitor general's argument in the Arizona immigration case also came in for some criticism, but at the end of the day, the court decided in his favor in an opinion that closely tracked the very arguments Verrilli made to the court, as Andrew Pincus points out. The critics were proven wrong.

Performance criticism of the arguments in the health care case should be directed at some of the justices who made a mockery of what could have been a good civics lesson. As Adam Liptak notes in the New York Times, Verrilli was "interrupted mercilessly." A careful study of the argument shows that Verrilli "was cut off 180 times or, on average, every 22 seconds. He was interrupted after speaking for 10 or fewer seconds more than 40 percent of the time." Justice Scalia turned into a heckler. He interrupted Verrilli 26 times, his opponent Paul Clement only twice. No wonder the argument sounded rough at times. The key points, however, were made and understood.

2. The White House? We are getting warm. Obviously, the administration's defense in the arena of public opinion has not been a success. In retrospect, as soon as the legal challenge was filed, the president himself should have publicly declared that the legal challenge brought by 25 state attorneys general, would, if successful, deprive every American of the right to buy health insurance if they have pre-existing medical conditions. He should have said that if these legal challenges prevailed, insurance companies could charge unaffordable premiums to families who have a child born with a birth defect. No one seems to know these popular provisions are on the chopping block. And almost no one knows they are free to choose to pay 2.5 percent instead of obtaining health insurance. Leaving the defense of the lawfulness of the reform to outside people (like me) was just inadequate. Only the president could have commanded the attention necessary to respond to the drumbeat of arguments that this law was unconstitutional.

3. Liberal Law Professors? Charles Lane asks in the Washington Post, "What, then, led the academics to misread this case?" I hate to sound naive, but I believe the answer is that they assumed the court would apply the law. The only challenge to the "mandate" is that it is outside the scope of the subject matter "commerce among the states." Of course it is a regulation of interstate commerce. It is a regulation of the interstate markets in insurance and health care. The question should be as hard as "Who is buried in Grant's Tomb?"

Does the mandate “run counter to the libertarian strain of the American tradition,” as Stephen Carter suggests in Lane’s story? If so, that should be irrelevant to the case actually before the court. The challengers decided against bringing a claim that the “mandate” violated substantive due process. And wisely so, because as the government reads the law, those who choose to pay the relatively modest penalty instead of having insurance are in compliance with the law. So it no more changes the relationship of citizen to government than Social Security does.

In any event, the question actually before the court is whether this regulation of commerce among the states is a regulation of commerce among the states. Academics—as well as respected conservative judges like Jeff Sutton, Lawrence Silberman, and J. Harvey Wilkinson—should not be faulted for finding this an easy question.

4. Five Justices? We have finally come to the true suspects. I don’t believe there is a legitimate justification for setting aside this product of enormous effort by the elected branches of government. And I don’t believe that will happen. But if it does, I believe it is clear who bears responsibility.

Richard, I know as a sitting federal judge you are restrained from commenting on pending cases. Shortly after ten am tomorrow, the health care cases will no longer be pending. To say that I will be interested in your reaction is an understatement.

Walter

Chief Justice Roberts' Saves Obama—As He Should

From: Emily Bazelon | Posted Thursday, June 28, 2012, at 11:56 AM ET
| Posted Thursday, June 28, 2012, at 11:56 AM ET
Slate.com

Supreme Court Year in Review

Entry 14: Chief Justice Roberts saves Obama—as he should.

Dear Dahlia, Walter, and Judge Posner,

There was always a compromise to be had—a way out of striking down the individual mandate without giving Congress the power to force people to buy health insurance (or broccoli!). A few sharp-eyed commentators pushed it. One was our own Walter. Another was Joey Fishkin on Balkinization. His idea was that the mandate was actually a choice: between buying health insurance and paying a small penalty. Which all along should have been called a tax, and would have been but for the Democrats' skittishness about using that word. Chief Justice John Roberts essentially saved the Obama administration and Congress from that political and bad semantic decision today. He upheld the individual mandate as a tax, not as an expression of Congress' Commerce Clause power. Joining him were the court's four liberal-moderates—Stephen Breyer, Ruth Bader Ginsburg, Elena Kagan, and Sonia Sotomayor.

Not among those five votes was Anthony Kennedy. Here is a closing line of the dissent he signed, along with Samuel Alito, Antonin Scalia, and Clarence Thomas: "[W]e would find the Act invalid in its entirety."

So, the Affordable Care Act came within one vote of being struck down entirely. And that missing vote was Roberts'. I would never have called that in a million years. But here is his key line: "The individ-ual mandate must be construed as imposing a tax on those who do not have health insurance, if such a construction is reasonable." This is fully in the tradition of judicial modesty and restraint: Courts are supposed to read ambiguous language in statutes to uphold them, if they can, without distorting the words beyond recognition. Because otherwise, they go too far to block the work of the directly elected branches—the definition of activism. That's the gift Roberts gave President Obama and Congress. To read "penalty" as "tax" isn't to distort. It is generous, but properly so.

Left to their druthers, the four justices on the left—Breyer, Ginsburg, Kagan, and Sotomayor—would have gone down the Commerce Clause road with the Obama administration. They think that Congress did have the power under the Commerce Clause, as well as its authority to tax and spend, to enact Obamacare. Roberts disagreed. He wrote. Here is the limit he set: "Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority." Also: "The Framers knew the difference between doing something and doing nothing. They gave Congress the power to regulate commerce, not to compel it." (Roberts also said that Obamacare wasn't a valid exercise of Congress' powers to enact laws that are necessary and proper to its grants of power, which I'm going to leave to one of you to parse.)

How much does it matter that the Supreme Court upheld the law as a valid use of Congress' taxing power instead of its commerce power? I'm more interested in your thoughts than mine, but to start us off, I don't think it does. It matters not at all for saving the health care law, as far as I can see with all of 10 minutes to digest. And more broadly and in the future? To me this looks like a victory for the libertarian, let's-limit-Congress reading of the Constitution that is symbolic for now and maybe not much more than that in the future. After all, future presidents and Congresses can craft legislation to heed Roberts' warning. As long as they don't regulate people for doing nothing—for not buying something, in this case—they're in the clear.

On the underlying question, I'm with the four liberals here: I don't buy the idea that not buying insurance equals not participating in the national health care market. But I don't think upholding Obamacare on alternate grounds, as lawyers say, means the court trampled all over Congress' powers to regulate commerce between the states. It looks more to me like a speed bump or an obstacle to detour around than an insurmountable wall, yes?

Off to read more, can't wait to hear your thoughts,

Emily

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Why This Is Now Chief Justice Roberts' Court

By Walter Dellinger | Posted Thursday, June 28, 2012, at 1:13 PM ET
| Posted Thursday, June 28, 2012, at 1:13 PM ET

Slate.com

Dear Judge Posner, Dahlia, and Emily,

What is most important today is not constitutional theory or presidential politics, but the enormous improvement in access to health care for millions of Americans, including increased access to preventive care such as mammograms and birth control, provisions allowing young people to stay on their parents' health insurance, provisions prohibiting insurance companies from turning down people who have pre-existing conditions or from increasing premiums to unaffordable levels for families who have a child born with a birth defect. Those are the most important winners today.

The Commerce Clause opinion looks pretty narrow. The chief justice basically just says that Congress can do many things, but it can't create commerce out of nothing (i.e., compelling commerce is not regulating commerce). I don't believe that is a reasonable characterization of the law, but no matter. His opinion seems limited to actual mandates, which (for obvious reasons) don't come around very often (i.e., once, ever).

Importantly, there were not five votes for any Commerce Clause opinion. The chief justice wrote only for himself. No other justice joined his opinion. It may be that will limit the precedential effect of the Commerce Clause decision.

Nonetheless, this is now officially the Roberts Court. And Justice Kagan plans to work with him when possible, as demonstrated by her decision to join his Medicaid decision. She will have enormous influence. Both Roberts and Kagan are playing a game of decades, not short-term politics.

There will be much to say about all these opinions, but for now I want to note what the president and the solicitor general said about justifying this as a tax. Contrary to Justice Scalia's statement at argument that the president had said it was not a tax, what the president actually rejected in the interview with George Stephanopoulos was the suggestion that it was a "tax increase." The President responded that "… for us to say that you've got to take a responsibility to get health insurance is absolutely not a tax increase."

The decision is an enormous vindication for Solicitor General Verrilli who argued forcibly that the law could be sustained under the taxing power. He spent the final eight transcript pages making the argument that persuaded the chief justice. The use of the tax power was foreshadowed during the argument over whether the litigation was barred. As I said immediately after the March oral argument in the mandate case:

Yesterday the Chief Justice said that it doesn't make much sense to say that the mandate is separate from the penalty or the tax. He seemed yesterday to have accepted the government's argument that there's a real choice here. If you don't want to have health insurance that you can pay the tax penalty.

There is much, much more to say after reading and rereading. But I'm most happy for families who will get to see a doctor when they are sick.

Walter

Read the rest of Slate's coverage on the Supreme Court upholding the Affordable Care Act.

Why It's a Historic Day for John Roberts and the Court

From: Dahlia Lithwick | Posted Thursday, June 28, 2012, at 2:02 PM ET
| Posted Thursday, June 28, 2012, at 2:02 PM ET
Slate.com

Supreme Court Year in Review

Entry 16: A historic day for John Roberts and the court.

Dear Walter, Emily, and Judge Posner,

It was all kinds of historic this morning at the high court. The whole pressroom looked like a bunch of high-school seniors waiting to see whether the mailman was bringing them a fat envelope from their first-choice college or a thin one. It turned out to be a pretty fat envelope.

There were belly dancers protesting in favor of single payer on the plaza and the now-familiar tricorn hats. When former Justice John Paul Stevens entered the room, there were whispers that he might be preparing to read his own dissent. And when the chief justice started to read his majority opinion, nobody could fail to notice that Justice Sonia Sotomayor looked exhausted, Justice Antonin Scalia looked like he wasn't very happy, and that nothing else was being telegraphed.

The first few minutes of Roberts' opinion, in which he indicated his distaste for an individual mandate that—for the first time—reaches out to regulate inactivity, sent observers down the wrong rabbit hole. I gather that some early reports even suggested the ACA was struck down. When he pivoted to explain that, per Walter, the mandate was merely a tax, and that it is the responsibility of the court to interpret the statute in a way that would allow it to stand, there was a collective head-snap. His argument that the payment looks like a tax, is administered through the IRS, and functions as a tax was as savvy a way to save the bill—and perhaps to differentiate himself from some of the court's more conservative conservatives—as he could muster.

He paid for it in the dissenters' claims that this was not only the opposite of judicial humility, it was activism of the worst sort. Reading a dissent for the conservative wing, Justice Anthony Kennedy (remember he was the guy everyone believed to be in play) accused him of making the problem even worse—particularly with regard to the Medicaid expansion and the states that choose not to accept it. Kennedy—reading a dissent jointly authored by Scalia, Thomas, Alito, and himself—described the majority opinion as "vast judicial overreaching" that will put an unaccustomed constitutional strain on the union.

Ruth Bader Ginsburg dissented and laid out the argument for upholding the mandate under the Commerce Clause power. She said the Commerce Clause limitation was a "stunning setback" that should have no staying power. Walter, there is a real question lingering about whether the decision on the scope of the Commerce Clause is limited or broad. Also, I have real questions about whether the 7-2 vote to strike down the Medicaid expansion calls into question the other federal-state partnerships, or if the proposed remedy creates a fix that renders the Medicaid portion of the decision mostly symbolic. Like Emily, I am reading furiously. Like you Walter, I am glad we live in a country in which people can get affordable care when they need it. And I think Chief Justice Roberts deserves enormous credit (see Linda Greenhouse on "embarrassing the future") for making almost everyone a little bit happy and a little bit terrified. I think he threw himself on his sword for the court in a way that would have made William Rehnquist proud.

Dahlia

Read the rest of Slate's coverage on the Supreme Court upholding the Affordable Care Act. Below, watch Dahlia Lithwick describe the scene at the Supreme Court this morning:

Why the Commerce Clause Was Clearly Enough To Uphold Health Care

From: Richard A. Posner | Posted Thursday, June 28, 2012, at 5:38 PM ET
| Posted Thursday, June 28, 2012, at 5:38 PM ET
Slate.com

Supreme Court Year in Review

Entry 17: The Commerce Clause was clearly enough to uphold the Affordable Care Act.

Dear Walter, Dahlia, and Emily,

I am not surprised that the health care law was upheld (except for the Medicaid provision, and I don't think that ruling will have much effect) by the Supreme Court. I was confident, despite the shellacking given the solicitor general at the oral argument and the Intrade odds that were so strongly predictive of invalidation, that the law would be upheld and that Chief Justice Roberts would write the majority opinion. But I thought the vote would be 6-3, with Kennedy joining Roberts and the liberal wing, and that the ground would be the commerce power. Not that there is anything wrong with upholding the law under Congress' power to tax.

The question of whether an exaction is a tax arises mainly in cases under the Tax Injunction Act, which forbids federal courts to “enjoin, suspend or restrain the assessment, levy or collection of any tax under State law,” provided that an adequate remedy is available in the state courts. I happened to write an opinion for my court a few years ago in which the issue was whether a pair of Illinois statutes that required casinos to deposit 3 percent of their revenues in a segregated state fund—the “Horse Racing Equity Trust Fund”—for disbursement to the racetracks, for the purpose of increasing winners’ and runner-ups’ purses and improve the tracks, imposed a tax within the meaning of the Tax Injunction Act, and we held that it did, even though the exaction was not called a tax. We pointed out that it was not called a tax because "tax" has become a dirty word (this I believe is one of the psychological consequences of the economic depression in which the nation finds itself), which is the same reason the tax in the health care law on people who don't buy health insurance is not called a tax.

But it is a tax. The health care case didn't involve the Tax Injunction Act, but a similar statute, the Anti-Injunction Act, applicable to federal taxes (it forbids enjoining the assessment of such taxes, thus relegating the taxpayer to a suit for refund); the court held that Congress didn't intend that act to apply to the health care law. But it upheld the penalty for failing to buy health insurance on the sensible ground, similar to the approach taken under the Tax Injunction Act, that though they called it a penalty, it is functionally a tax rather than a fine or a fee.

I thought the court would uphold the "mandate" (that is, the requirement, backed up by the tax or penalty, of buying health insurance) on the basis of the Commerce Clause because it is obvious, or at least seemed and seems obvious to me, that the requirement is within Congress' power conferred by Article I of the Constitution to regulate interstate commerce, because respected conservative lower-court judges (Judges Silberman and Sutton) had voted to uphold the mandate, and because invalidating it, necessarily on (as it seemed to me) flimsy grounds, and by a 5-4 vote (the five conservatives versus the four liberals) during an election year, would look like taking sides in the campaign. It would give President Obama an opening to run against the Supreme Court. It would confirm the widespread opinion of the "Roberts Court" as being the conservative mirror image of the Warren Court. It would be bad for the court, and a chief justice is by virtue of his position the justice most concerned with the court's power and prestige as an institution. The other justices have a greater incentive than he to trade off the court's power and prestige against their own influence and prestige, which often can be enhanced by an oppositional posture.

The health industry is of course an interstate business; there is a continuous flow of health insurance payments, health insurance reimbursements, drugs, doctors, patients, donations to hospitals, research money, etc. across state boundaries. Congress' regulatory power under the Commerce Clause is not limited to direct control of an interstate transaction; it includes the regulation of activities that affect an interstate industry, with "activities" including inactivity. The public accommodations provisions of the Civil Right Act of 1964 were upheld on the basis of the commerce power, even though the provisions required hotels and other places of public accommodation to do something—namely serve black travelers—that they didn't want to do, to force them, in short, to engage in interstate commerce they didn't want to engage in. And so it is with requiring drivers to be licensed—they would prefer not to

have to pay a license fee. Of course they can avoid the fee just by not driving, but tell Americans not to drive and you might as well tell them cut off their feet in order to escape sales tax on shoes.

The young people who refuse to buy health insurance because they don't expect to get sick and if they do go to emergency rooms—and are billed, but just try collecting!—are free riders, like draft dodgers. They increase health costs for the rest of us.

The chief justice, echoing Justice Scalia's "broccoli" comment at the oral argument, rejected (as did the four dissenters, and so that is now the view of a majority of the justices) the Commerce Clause ground for the mandate, saying that to accept that ground would mean that "Congress could address the diet problem by ordering everyone to buy vegetables." This argument, reassuring though it is to our obese population, confuses separate constitutional provisions. The Commerce Clause would empower Congress to order everyone to buy vegetables, because the market for most vegetables is interstate, but the "liberty" protected against the federal government by the Fifth Amendment would doubtless be interpreted to forbid such an imposition, just as it would be interpreted to forbid a federal law requiring everyone to be in bed with the lights out by 10 p.m. in order to economize on the use of electricity and, by doing so, reduce carbon emissions from electrical generating plants.

I am surprised, finally, by the lifelessness of the joint dissenting opinion.

Richard Posner

That Boring Old Tax Argument Was Always a Winner.

From: Jack Balkin | Posted Thursday, June 28, 2012, at 7:08 PM ET
| Posted Thursday, June 28, 2012, at 7:08 PM ET
Slate.com

Supreme Court Year in Review

Entry 18: That boring old tax argument was always a winner.

Dear Emily, Dahlia, Walter, and Judge Posner:

Even before the ACA was passed in March of 2010, I had been arguing to anyone who would listen that the simplest way to justify the individual mandate was as a tax under the General Welfare Clause. I continued to make the arguments in front of any number of audiences, most of whom just wanted to hear about broccoli.

The case's ultimate result did not surprise me. If the Commerce Clause argument couldn't command five votes, the tax power argument was always waiting in the wings. As soon as members of the court saw the individual mandate as a tax, they would almost certainly hold it constitutional. The biggest challenge was getting five of them to see it as a tax.

There were a number of obstacles standing in the way of that conclusion. The first was the strategy of the mandate opponents, who, from the outset, wanted to fight exclusively about the scope of the Commerce Clause. The second was President Obama and the Democrats in Congress, who were desperate to avoid any suggestion that they had created new taxes. The third was the Tax Anti-Injunction Act. If the mandate were a tax under the meaning of the TAIA, that would prevent any court from hearing a challenge until around 2015. The mandate opponents were not the only ones interested in a quick resolution: The Obama Administration needed to implement the many different moving parts of the Affordable Care Act in the states, and it didn't want to see the act laboring under a cloud of suspicion for many years.

The fourth obstacle, frankly, was that the tax argument seemed like a fifth wheel. Any federal district judge who thought the mandate was a constitutional tax probably also thought it was constitutional under the commerce power, and any federal district judge who thought it wasn't constitutional under the commerce power probably wasn't going to uphold it as a tax.

As a result of all these factors, almost nobody wanted to think about the mandate as a tax. (Well almost nobody. The Justice Department dutifully included the tax-power argument throughout the litigation, and I was part of an amicus team who worked specifically on tax power issues.) Depending on their ideological priors, federal courts seemed eager either to uphold the ACA or strike it down. As a result, almost all of them concluded that the mandate was not a tax—thus avoiding the obstacle of the Tax Anti-Injunction Act—and letting them move on to what everybody thought was the main event, the debate over the Commerce Clause.

Most of the coverage in the press focused on the Commerce Clause, too. Debate after debate focused relentlessly on only one ground for upholding the mandate. For the supporters of the ACA, this was pretty much like fighting a wily opponent with one hand tied behind your back. Even if you win, you are going to get bruised and battered in the process.

Essentially, the entire debate over the Affordable Care Act was played out on the turf most favorable to mandate opponents. And with an entire political party and its associated media behind the opponents' arguments, conventional wisdom quickly changed to reflect the growing view that the act would fall.

Once the case made its way to the Supreme Court, however, the calculations changed. Here it was entirely possible that either Chief Justice John Roberts or Justice Anthony Kennedy, or both, might accept the tax-power argument as a lifeline because they couldn't stomach the Commerce Clause argument. Solicitor General Donald Verrilli—improperly maligned by people who should have known better—carefully organized both the government's briefs and his oral argument to make the tax-power option clearly available to Kennedy and Roberts.

At that point, the question became whether either justice would form a five-person coalition with the liberals. Roberts ultimately did so, but his motivations are complicated.

Roberts' opinion on the tax-power issue is straightforward doctrinally. But he also got to create a five-person majority (with the four dissenters) sticking a knife in the back of the Commerce Clause argument. He got to play John Marshall in Marbury v. Madison, giving the Democrats a bottom-line political result they wanted while vindicating conservative arguments against the mandate in his opinion.

Subject to important qualifications noted below, this may turn out to be yet another exercise in symbolic federalism. If the argument about the Commerce Clause isn't dicta, it will have very little effect on what Congress does going forward, because Congress can now use the tax power instead of the commerce power. The specter of vegetables still haunts us. We may be safe from broccoli mandates, but we are not safe from broccoli taxes.

Second, Roberts opened up a brand new field for constitutional litigation about conditional federal spending programs like Medicaid. The decision says that when Congress threatens to withhold funding for program A unless states agree to program B, this can be coercive if the costs of exit from A and the reliance interest in A are too high.

In this case, Roberts argued that Old Medicaid, which protects mostly disabled and the elderly poor, is a different program than New Medicaid, which reaches everyone up to 133 percent of the poverty line. Congress cannot say to the states: "Participate in New Medicaid or we'll pull funding from Old Medicaid."

The logic of this argument depends on a court knowing that Old Medicaid is really different in kind and not merely in degree from New Medicaid. Why Congress isn't the best judge of whether the two programs are different in kind is a mystery to me. (It would also probably come as a surprise to Congress, which had changed the program's eligibility requirements before.)

It's that conclusion that will cause lots of work for lawyers going forward. (And it’s also great for authors of constitutional law textbooks like yours truly!) I will be interested to see if the same logic is used to challenge changes in conditional spending programs that conservatives favor. (Consider the Welfare Reform Act of 1996 as an example. Indeed, perhaps there are parts of the proposed Paul Ryan budget that might be vulnerable, although I haven't inspected it closely enough to tell.)

I'm also wondering what becomes of laws that threaten to withhold federal funding from all of a state's operations if the state refuses to acquiesce on a federal policy that only affects a small or distinct aspect of its operations. Is that akin to removing funding from program A because you won't play ball on program B? The Solomon Amendment, I seem to recall, withheld funding for state and private universities if their law schools did not admit military recruiters on an equal basis with other recruiters. Does the logic of this case apply to that? Does it apply to civil rights laws like Title VI and Title IX? To be sure, these cases seem distinguishable in several ways, and there is language in the various opinions that suggests that the principle will not be extended so far. Yet Chief Justice Roberts has opened the proverbial can of worms, and nobody knows where those worms will squiggle once they are loosed upon the world.

It's hard to predict what will flow from this opinion doctrinally. If President Obama manages to appoint a majority of liberal justices in his second term, most of the innovations in this case will be forgotten. The new spending clause doctrines will be confined, and the Commerce Clause language treated as dicta or made practically irrelevant. If Mitt Romney wins, on the other hand, he may be able to appoint a strong conservative majority to work with Chief Justice Roberts. Then, in hindsight, Roberts' seemingly compromised opinion won't be very compromised at all. His apparent flip-flop won't be understood as a change of mind. Instead, his opinion may turn out, in hindsight, to be the beginning of an important transformation in constitutional law. What will happen can't be deduced from the four corners of these documents. It will depend on the Supreme Court appointments of the next decade.

Jack

Chief Justice Roberts Did the Right Thing—but It's Still a Bad Law

From: Richard A. Posner | Posted Friday, June 29, 2012, at 10:47 AM ET
| Posted Friday, June 29, 2012, at 10:47 AM ET
Slate.com

Supreme Court Year in Review

Entry 19: Chief Justice Roberts did the right thing—but it's still a bad law.

Dear Walter, Dahlia, Emily, and Jack,

I have a few further thoughts on the health care decision. Are they too late? I've never entirely grasped the format of our discussion; the mention of breakfast particularly baffles me. And maybe when the court ends its term, the discussants, like the participants in the trial of the Jack of Hearts at the end of Alice's Adventures in Wonderland, turn into playing cards and are scattered to the winds. But anyway, here are my further thoughts:

Professor Dellinger said in reference to the health care decision: "What is most important today is not constitutional theory or presidential politics, but the enormous improvement in access to health care for millions of Americans, including increased access to preventive care such as mammograms and birth control, provisions allowing young people to stay on their parents' health insurance, provisions prohibiting insurance companies from turning down people who have pre-existing conditions or from increasing premiums to unaffordable levels for families who have a child born with a birth defect. Those are the most important winners today." I don't agree. I am pleased that the Supreme Court upheld the law, but I don't think it's a good law.

The Washington Post has an excellent economic journalist named Robert Samuelson, and he had a column a week or two ago in which he persuasively criticized the law. There are three basic criticisms. The first is that it is so long and complex that actually no one knows what its consequences will be. It was an irresponsible enactment. Second, it was very badly timed. Creating economic uncertainty is the very last thing one wants to do during a depression, because, as Keynes argued, it is uncertainty that deepens a depression and retards recovery from it, because a rational and extremely common reaction to uncertainty is to freeze. The health care industry is the largest in the United States, and the law was bound to affect the costs of medical care (which of course include health insurance premiums) for business and for people in the labor force (whether employed or self-employed) in ways that could not be forecast. I know one is supposed to call the economic malaise in which the nation is sunk, which in a couple of months will be four years old, the "Great Recession," but I call it a depression. It is not as severe as the 1930s depression, yet it may have as profound economic and political consequences. It merited and did not receive the full attention of government.

Third, the law will increase health care costs, and hence the federal deficit, which is already staggering. I agree with liberal economists that the current deficit, though huge, is nothing much to worry about, because of the extremely low cost at which the U.S. Treasury can borrow these days (thanks to Europe's economic distress and lack of private demand for loans), even long term. I agree that the stimulus of February 2009 should have been larger, with the government borrowing heavily and using the borrowed money to finance projects that would employ lots of workers. But the deficit cannot be allowed to grow indefinitely, and the health care law will help it to grow indefinitely. There is no way the nation can add 30 million people to the private or public health insurance rolls without experiencing higher health costs. The reason is that insured people demand and receive more health care than the uninsured. That is explicit in Professor Dellinger's reference to health costs that are "unaffordable" by the uninsured. The care they will now get may improve their health. They may live longer. But the longer people live, the more medical care they need.

I think the best one can say for the law is that it has drawn attention to the manifold problems of our health care system. As a result, or partial result, of the law, some modest improvements, such as recommendations against excessive screening for rare medical problems, are in the works, although they will be resisted by most doctors, especially specialists, who are most doctors nowadays. But I think any cost savings that ensue will be swamped by the 30 million new eager health care consumers.

All this is germane to the Supreme Court's health care decision because if the court had wanted to make "policy judgments," it could have had a field day. Chief Justice Roberts in his opinion said that that's not the Supreme Court's business. A legal realist would say that most Supreme Court decisions in constitutional cases are policy judgments—inevitably, because of the Framers' and ratifiers' inexplicable failure to peer into the future and observe 20th-century American society. Where was their foresight? (I hope readers understand the sarcasm.) I think Roberts was quite right to say that "we [the Justices, but it is true of the entire American judiciary] possess neither the expertise nor the prerogative to make policy judgments." I would emphasize lack of expertise as a general problem of the American judiciary. But policy judgments are inescapable when dealing with the Constitution, and I think the best interpretation of what the court did in its health care decision was to make a prudential judgment to allow the law to stand, a judgment that I imagine is based to a significant extent on the hammering the court would have taken had it struck the law down. And, to recur to Samuelson's concern, the uncertainty created by the law would have been compounded rather than dissipated by its invalidation, because of uncertainty as to how Congress would respond, given the popularity of provisions (insurance for pre-existing conditions and coverage of kids up to age 26 by their parents' health insurance) that the mandate is intended to finance and that would have gone down the drain had the dissenters had their way, and because of the further fact that many health providers have already taken steps to comply with the law, and undoing those steps would be costly and confusing. A Donnybrook was averted.

And speaking of dissenters: Would they have had the courage of their convictions had they been able to pick up a fifth vote? Or would they have been like the dog that barks ferociously when it's behind a fence, but open the gate and it slinks away timidly?

Read the rest of Slate’s coverage on the Supreme Court upholding the Affordable Care Act.

Why Obama Won More Than a Battle

From: Walter Dellinger | Posted Friday, June 29, 2012, at 5:06 PM ET
| Posted Friday, June 29, 2012, at 5:06 PM ET
Slate.com

Dear Dahlia, Jack, Emily, and Judge Posner,

When I saw that the Honorable Richard Posner had taken issue with my positive comments about the Affordable Care Act, I immediately turned to my laptop to respond. Then I paused, recalling the advice of the late great Jim Croce, from "You Don't Mess Around With Jim," the final verse of which I believe goes like this:

You don't tug on Superman's cape
You don't spit into the wind
You don't pull the mask off that old Lone Ranger
And you don't ever debate law and economics with Richard Posner

At least, that is how I remember it. So I will leave unanswered Judge Posner's concern that people consuming expensive health care under this law will inevitably live longer and thus consume even more expensive health care. Oh, dear.

There has been much talk about the political consequences of the decision. My son Drew Dellinger quipped on his blog that Thursday was "probably the best day for the Obama re-election campaign that hasn't required Seal Team Six." Others believe that the use of the word "tax" will present a political problem for the president. But at the end of the day, the mandate penalty sustained by the court does not raise the taxes of any American by a single penny—except for those few who can afford health insurance but choose to go without it and place the risk of paying for their medical treatment on others. But really, no one knows.

Before saying farewell to this term, I want to say a few words about whether this was a long-term doctrinal victory for legal conservatives. Did the government win the battle and lose the war? I don't think so. First, this "battle" was not an ordinary skirmish over control of some provincial outpost, but a contest that determined the fate of one of the four most significant pieces of social legislation enacted in the last century. So if it was just the battle, it was a hell of an important battle.

Second, I'm not yet convinced that the decision holding that the mandate cannot be justified under the Commerce Clause is a significant doctrinal "win" for limitations on the power of Congress. The chief justice's opinion cites without express disapproval the major precedents sustaining Congress's Commerce Clause power and strikes down this incidence of its exercise only because it "creates" commerce rather than "regulates" commerce. I don't find that a persuasive distinction. But it hardly matters since such a narrow ruling is hardly a significant constraint: Even without that holding, it is likely Congress would have gone at least another 200 years before enacting another mandate, given the unpopularity of this one.

Moreover, as my young lawyer friend Babak Siavoshy said to me, even if the ACA had been upheld on Commerce Clause grounds, the ruling would have been cabined to the context of health care, which the government itself argued is sui generis. It was never likely that there would a pro-Commerce Clause decision that went beyond health care.

The limitations on the Spending Clause power are potentially more significant. The court has been warning for years that it would find some limit to Congress' power to name the tunes played by the pipers it pays in state and local governments with federal funds. It found that line crossed here. But the holding leaves Congress with ample power to enact and enforce conditions on programs it funds with federal appropriations.

More troubling is the almost inscrutable section of the chief justice's opinion that seems to give a significantly limited reading to Congress' authority under the Necessary and Proper Clause. The vague suggestion is made that the mandate falls as "improper." This passage, and others in the opinions of the four conservatives and Chief Justice Roberts, suggest that at least some of these justices are drawn to notions of substantive due process of a kind we

haven’t seen since the early part of the 20th century—liberty interests in maintaining the power of wealth and privilege.

If there were a lurking desire to return to a time of judicially imposed economic due process placing limits on social justice legislation, that undercurrent would be there with or without the Affordable Care Act opinions. Thus, on the last day of the term, the government won more than it lost—far, far more.

I would say more about the chief justice’s performance in this case, but it is impossible to improve on Linda Greenhouse’s assessment. She concludes that Roberts “navigated the Supreme Court through a perilous election-year landscape, saving it from the appearance of open partisanship while setting down markers for the game that resumes in October and for the long years ahead.”

I hope we will all be writing for some terms to come. It has certainly been a pleasure this year.

Walter

Some Final Thoughts From the Breakfast Table.

From: Dahlia Lithwick | Posted Friday, June 29, 2012, at 5:57 PM ET
| Posted Friday, June 29, 2012, at 5:57 PM ET

Slate.com

Supreme Court Year in Review

Entry 21: Final thoughts from the Breakfast Table.

Dear Walter, Emily, Jack, and Judge Posner:

I have spent much of the last 24 hours trying to determine what, if anything, actually happened to the Commerce Clause yesterday. Some commentators (and Justice Ginsburg's concurrence) suggest there was a serious realignment of doctrine that happened here. Ginsburg writes that "both the court's commerce and spending clause jurisprudence has been set awry." Others, like Walter and Judge Posner, believe it was rather a narrow holding. I think I agree with Jack that the chief justice uses this case as a marker to suggest that the Commerce Clause times may be a-changing, which may or may not be true depending on who wins the next election. This might be a good time to point out again that four of the current nine justices will be 80 by the next election. The court we see today will change profoundly in the next few years.

I would say the same thing about all the whispering over whether the dissent was really a dissent or a majority opinion that lost its way. It depends on what you want to believe that matters. We don't know. We may not know for years. I might even say the same thing about the many articles celebrating John Roberts as the new John Marshall and the articles condemning him as a traitor. A day later, the ACA decision reads more like a Rorschach test than a clear statement of law. Ultimately, the early reaction to National Federation of Independent Business v. Sebelius seems to say more about what the rest of us want to think and believe about the court than about the opinion itself. I'd hazard that nobody is happier than Chief Justice John Roberts that Tom Cruise and Katie Holmes have chased him off the front pages already.

I want to echo Walter in thanking all of you for sharing your thoughts and reflections with Slate's readers this week. It's been a privilege and a joy to end the 2011 term with you all.

Dahlia