"Our People In General Have a High Degree Of Freedom"*

Tom Frost[1]

Abstract: This article considers the United States Supreme Court's ruling in *National Federation of Independent Business et al v Sebelius*, which questioned the constitutionality of President Obama's signature healthcare reforms of 2009, which have become colloquially known as 'Obamacare'. Although the Supreme Court upheld the Act as constitutional, this article contends that the Supreme Court's reasoning can be read as another battle in the long-standing debate in American politics over the correct size and limits of the Federal Government. In upholding the healthcare reforms as a tax, rather than under the Constitution's Commerce Clause, the Supreme Court has endorsed a view of limited government in line with the principles of classical liberalism. This has the potential to greatly restrict the scope of the Federal Government to pursue large scale expansive social welfare programmes in the future.

Key Words: Obamacare; Supreme Court; Patient Protection and Affordable Care Act.

On the final day of the 2011 term the Supreme Court delivered its judgment in the case of *National Federation of Independent Business et al v Sebelius, Secretary of Health and Human Services, et al*.[2] The anodyne case name masked the importance of the decision and issue. In an election year, the highest Court in the United States was deciding upon the constitutionality of a sitting President's signature piece of legislation, namely the Patient Protection and Affordable Care Act 2010 (PPACA).

What is widely known is that Chief Justice John G Roberts Jr., a judicial conservative selected for appointment by President George W Bush, sided with the 'liberal wing' of the Court, Justices Ruth Bader Ginsburg, Stephen G Breyer, Sonia Sotomayor and Elena Kagan, in upholding the PPACA as constitutional in a 5-4 spilt decision.

Like his predecessors, Franklin Roosevelt and Lyndon Johnson, President Obama was faced with a Supreme Court with the power to strike down a nationwide piece of social

---

* The Federal Farmer (2009) 62.

[1] Dr Tom Frost is a Lecturer in Law at Newcastle Law School, Newcastle University: tom.frost@newcastle.ac.uk

[2] 567 U.S. (2012), available at http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf. This suit was decided together with the cases of *Department of Health and Human Services et al v Florida et al*, No 11-398 and *Florida et al v Department of Health and Human Services et al*, No 11-400.

legislation. Moreover, like the decisions of the Supreme Court in the 1930's and 1960's with respect to Roosevelt's 'New Deal' and Johnson's 'Great Society' respectively, the Court's decision in the PPACA will have long-term effects in relation to how the United States Constitution is interpreted. *Sebelius* focused upon the proper interpretation of the Commerce Clause, the instrument in the Constitution which allows the Federal Government to regulate interstate commerce. The Supreme Court upheld the PPACA as a tax, rather than as the regulation of commerce.

This technical distinction is an exposition of a long-standing debate in American politics: namely the meaning of federalism, and the correct limits of the Federal Government. *Sebelius* is another round in this debate. The 'New Deal' saw the Federal Government rapidly expand; this was entrenched in the 'Great Society'. These were 'big government', centralised programs, which are common in the United Kingdom and Europe, especially in relation to health and social care, but were not common in a country like the United States with a decentralised government. Healthcare reform embodies a commitment to social justice and a central role for the Federal Government in the provision of healthcare. Its opponents evoke the principles of small government classical liberalism that have been present in the United States since its foundation. The Supreme Court decision illustrates both of these traditions – big government and small government – and how they affect the interpretation of the Constitution.

The Supreme Court decision, despite its upholding of this Progressive legislation, has the potential to lead to the end of the Court's legitimation of the 'New Deal'. Through placing limits on what the Federal Government can regulate under the Commerce Clause, the Court has begun an incremental retreat toward an era embodying classical liberalism, imposing tight constraints upon what the Federal Government is permitted to do under the Constitution, and reflecting an attitude suspicious of big, centralised government programs.

The Supreme Court Challenge

(a) Background

The PPACA was signed into law on 23rd March 2010.[3] The law, pejoratively known as 'Obamacare', and widely considered to be the most significant federal legislation in nearly 50 years (Adams 2010), provided a long-sought after reform of the American healthcare system.

[3] Patient Protection and Affordable Care Act, Pub L No 111-148, 124 Stat 119 (2010) (to be codified at 42 USC § 18001) as amended by the Health and Education reconciliation Act, Pub L No 111-152, 124 State 1029 (2010).

The New York Times saw the PPACA as "the most expansive social legislation enacted in decades" (Stolberg and Pear 2010). It was this expansive nature of the legislation which made it so controversial.

The Act sought to address the fact that millions of American citizens lack health insurance. The reasons for this are myriad, but include the cost of insurance, as well as insurance companies denying insurance coverage for certain conditions and charging higher rates for individuals with long-term conditions. This reflects the market-based efficiency underpinning the insurance system. This fact is critical in understanding both the structure of the PPACA, as well as the Supreme Court's reasoning in this case.

The provision of healthcare in the United States is a concern of national dimension.[4] Americans spent $2.5 trillion on healthcare in 2009, which amounted for 17.6 per cent of the US economy. In the next decade, spending on healthcare is projected to double.[5] The United Kingdom provides free healthcare at the point of need to all UK permanent resident through the National Health Service, paid for through general taxation. Contrarily, healthcare in the United States is provided by many distinct organisations, both public and private. Private insurance is the main funding source for the US healthcare system. Approximately 170 million Americans have private health insurance. The lack of a single-payer government-run healthcare system reflects the nature of the American state. The classical liberal tradition reflects a belief that power given to central government equates to less individual freedom. Thus centralised programs run by government which increase its reach will inevitably make people less free. It is this tradition which opponents of the PPACA reflected in their challenge.

Despite this aversion to the centralisation of power, the Federal Government covers the healthcare costs of certain groups of Americans. It does so through national entitlement programs. These are government programs which provide individuals with personal financial benefits, goods and services. The eligible beneficiaries of such programs have an enforceable legal right to these services. There are two main entitlement programs which relate to healthcare in the United States: *Medicare* and *Medicaid*. Both programs were passed in 1965 and formed part of President Johnson's 'Great Society', a move which greatly expanded the powers of the Federal Government. The *Medicare* programme is a programme funded entirely by the Federal Government, providing health insurance for people aged over 65, younger people with disabilities and people with end stage renal disease. *Medicaid* is a

[4] 567 U.S. (2012), slip. op. at 2 (Ginsburg J).
[5] Ibid, at 3.

programme funded both by the Federal Government, and by the States. It is a means-tested programme, whose eligibility is determined by the income of the individual. It generally applies to the poor, their children, and adults with certain disabilities.[6]

Despite this, 50 million Americans are uninsured. Federal and State laws, in recognition that the status quo lacks moral appeal, require hospitals and physicians to provide care when it is most needed, irrespective of the individual's ability to pay for said care.[7]

As a result of these arrangements, the uninsured are a considerable burden on the healthcare market. Healthcare providers delivered $116 billion worth of care to uninsured individuals in 2008, and received no compensation for $43 billion of that care.[8] The insurance companies pass this cost onto the Government (both State and Federal) and insured individuals. The millions of uninsured Americans who participate in the healthcare market raise costs for those with health insurance by an average of $1,000 a year.[9] The PPACA was designed to counter this cost-shifting. At the heart of the Act is a measure which attempts to deal with these problems – the individual mandate, a feature of the legislation on which counsel for both sides placed emphasis.

An individual mandate is a legal requirement that certain persons purchase or otherwise obtain a good or service. The idea of an individual mandate is not new. In relation to the American healthcare system the mandate was first proposed in 1989 in a policy paper produced by the conservative Heritage Foundation (Heritage Foundation 2009). The Heritage Foundation's rationale for proposing a mandate to purchase health insurance was to reduce the costs of catastrophic medical care for the uninsured, and to prevent cost-shifting.

Central to the PPACA is the ban on discrimination against pre-existing conditions. Insurers are no longer able to charge different rates to the sick; they cannot exclude certain conditions from coverage. If insurance companies use the healthy to subsidise the sick, then insurance premiums will go up, and the healthy will simply opt out from having coverage. To guard against this, the individual mandate requires uninsured individuals to purchase health insurance. If they do not, they will have to pay a fine.[10] To deal with the fact that people cannot be forced to purchase something they cannot afford, the PPACA directs States to expand *Medicaid*. States must offer a level of *Medicaid* insurance which would satisfy the

[6] Ibid, at 4-5.
[7] Ibid, at 5.
[8] Ibid, at 6.
[9] Ibid.
[10] 26 U.S.C. § 5000A (establishing the fine as the greater of $695 or 2.5 per cent of the taxpayer's income in excess of the threshold amount at which a tax return is required).

requirements of the individual mandate.[11] The Federal Government will pay 100 per cent of these costs until 2016. After this date, the Federal Government will not pay less than 90 per cent of the total.

The PPACA can be read as embodying a form of distributive justice. Health insurance promotes socio-economic solidarity where the healthy subsidise the care of the sick (Pasquale 2007, p.41). Specifically, the mandate – a form of solidarity insurance – asks the healthy to subsidise the chronically sick. These measures aim to extend coverage to 32 million Americans. Thus the PPACA does not institute universal coverage. If costs rise, like they are predicted to do, and insurance premiums for the healthy are higher than the fine associated with the mandate, then individuals are likely to end their coverage and pay the fine, which will ultimately undermine the intent of the legislation.

(b) <u>The Challenge</u>

The same day the law was passed, the Attorney-Generals of Virginia and Florida filed separate lawsuits challenging the constitutionality of the Act. Twelve states joined the lawsuit filed by Florida. This was the case that arrived in the Supreme Court's docket for the 2011 term. In time, seven more States as well as the National Federation of Independent Business would join the complaint.[12]

The plaintiff's challenge was directed primarily at two aspects of the Act: the individual mandate and the *Medicaid* expansions. Both the District Court, and the U.S. Court of Appeals for the Eleventh Circuit, found that the individual mandate and *Medicaid* expansions were unconstitutional.[13] The plaintiffs' case centred upon the definitive feature of the American system of government, namely the idea of a federal system with a National Government of limited powers, with the remainder retained by the States and the People.[14] The plaintiffs' case drew upon the tradition of small government liberalism, opposed to large-scale national programs. This can be seen in the many opponents of the healthcare reforms couching their opposition in terms of 'government mandated healthcare' which would reduce a patient's freedom to choose in matters relating to their healthcare (Goodman 2012). The PPACA was viewed by its opponents as instituting a centralised, controlling system which would reduce freedom.

---

[11] 567 U.S. (2012), slip. op. at 45-46 (Roberts CJ).
[12] All the States involved either had a Republican Governor or a Republican Attorney-General. No State controlled by a Democratic Governor was a party to the lawsuit.
[13] *Florida v U.S. Department of Health & Human Services*, 780 F. Supp. 2d 1256 (ND Fla. 2011); *Florida v. U.S. Department of Health & Human Services*, 648 F.3d 1235 (11th Cir. 2011).
[14] 567 U.S. (2012), slip. op. at 2 (Roberts CJ).

The plaintiffs drew upon the fact that the Federal Government is a Government of enumerated powers.[15] The Constitution's enumeration of powers to the Federal Government is also a limitation of powers – the enumeration presupposes something not enumerated.[16] The Tenth Amendment makes this point expressly: "The powers not delegated to the United States by the Constitution … are reserved to the States respectively, or to the people".[17] As there is no such restriction placed upon the States, they can perform many of the functions of government; this general power possessed by the States is the 'police power', which is not available to the Federal Government.[18] As the Supreme Court declared in *New York v United States*:

> State sovereignty is not just an end in itself. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.[19]

The plaintiffs claim was vested in federalist principles; by trying to row back the extra powers given to the Federal Government, they wanted to secure the freedoms the police power gave them.

The case before the Court focused upon two enumerated powers in the Constitution. The first is the Commerce Clause, which allows Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes".[20] The plaintiffs contended that the individual mandate exceeded Congress' powers under the Commerce Clause, as requiring individuals to buy health insurance or face a fine was not the regulation of commerce.

The second is the Taxing and Spending Clause. Congress has the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States".[21] The plaintiffs' claimed that the individual mandate could not be understood as a 'tax' and was therefore outside of the taxing power of the Constitution. In short, the Federal Government was being accused of a 'power grab' from the States and the People. The Taxing Clause also related to the plaintiffs' complaint that the *Medicaid* expansions were unconstitutionally coercive to the States. Plaintiffs' claimed that Congress coerced the States to adopt the Medicaid changes it wanted

[15] *McCulloch v Maryland*, 4 Wheat. 316, 405 (1819).
[16] *Gibbons v Ogden*, 9 Wheat. 1, 195 (1824).
[17] U.S. Constitution, Amendment 10.
[18] *United States v Morrison*, 529 U.S. 598, 618-619 (2000).
[19] 505 U.S. 144, 181 (1992).
[20] U.S. Constitution, Article 1, §8, cl. 3.
[21] U.S. Constitution, Article 1, §8, cl. 1.

by threatening to withhold all *Medicaid* funds (including existing funds) to the State if it did not comply with Congress' demands.[22] This was argued to violate the principle that the "Federal Government may not compel the States to enact or administer a federal regulatory program".[23] Again, we can see the core concern of the plaintiffs' as focusing upon the danger a powerful central Government, even a Government purporting to exercise expansive powers for good, could have to individual freedom and liberty.

The Supreme Court allowed five hours of oral argument to the challenge, the longest oral argument since the Court had restricted oral argument to thirty minutes for each side (Christy 2011). The Court mandated four questions for argument. The first asked whether Congress has the power under the Commerce Clause or the Taxing Clause to institute the individual mandate. The second asked whether the mandate was 'severable' from the Act as a whole; namely, given the centrality of the mandate to the Act, would the rest of the Act have to be struck down if the mandate was found to be unconstitutional? Thirdly, did Congress exceed its enumerated powers and principles of federalism by pressuring States into accepting the Medicaid expansion? Finally, the Court invited argument upon whether the Tax Anti-Injunction Act (TAIA) barred the suit being heard.

The Tax Anti-Injunction Act

The TAIA was enacted in 1867, and provides that:

> No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed. [24]

The TAIA is designed to prevent pre-emptive lawsuits challenging a tax increase. Any plaintiff would have to wait until the tax was instituted and started to be collected before challenging the tax.[25] If the penalty for non-compliance with the individual mandate was deemed a tax, then the TAIA could bar the suits until the individual mandate came into effect in 2014. This would mean that the substantive questions the Court wished to answer, particularly relating to whether Congress had the power under the Taxing Clause and Commerce Clause to institute the individual mandate, would only be resolved after 2014.

[22] 567 U.S. (2012), slip. op. at 45 (Roberts CJ).
[23] *New York*, 505 U.S. at 188.
[24] 2 U.S.C. §7421(a).
[25] *Flora v United States*, 362 U.S. 145 (1960).

This fact may well have influenced the decision of the justices. The justices unanimously agreed that the TAIA did not bar the suit. To bar the suit would have led to several years of uncertainty hovering over a crucial piece of social legislation. The intent of Congress was crucial to the question of TAIA's application. Noting that TAIA makes specific mention of 'taxes', and the PPACA describes the "shared responsibility payment" imposed on those who do not purchase health insurance as a "penalty",[26] the Chief Justice stated:

> Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.[27]

Relying upon Congressional intention, the Chief Justice held that although Congress cannot change whether an exaction is a tax for constitutional purposes, the TAIA is a Congressional statute.[28] Congress will mandate, through the language it uses, which statutes are designed to be covered by the TAIA and which are not. The PPACA simply directs the Secretary of the Treasury to use the same "methodology and procedures" to collect the penalty that he uses to collect taxes. This did not mean that the penalty should be treated as a tax for the purposes of the TAIA. The language Congress used in drafting the PPACA indicated to the Court that it did not want the TAIA to apply. Thus, the Court was free to move on to deal with the merits of the case, which arguably involve more important issues.

The Individual Mandate

The Obama Administration based its primary defence of the mandate's constitutionality upon the Commerce Clause. The Commerce Clause was the Framers' response to "the central problem that gave rise to the Constitution itself".[29] The Articles of Confederation preceding the Constitution left the regulation of commerce to the States.[30] This system was unworkable as individual States failed to take action which benefitted the nation as a whole. Protectionism became the norm, and tariffs were introduced which taxed interstate commerce. The original thirteen colonies acted as thirteen protectionist States, each pursuing their own self-interest. For Alexander Hamilton, such protectionism would damage the potential economic power of the colonies. Ensuring free trade and a Union with economic power could only be done through a strong central government (Hamilton 2001a, p.49-55).

[26] 26 U.S.C. §5000A.
[27] 567 U.S. (2012), slip. op. at 12 (Roberts CJ).
[28] Ibid.
[29] *EEOC v Wyoming*, 460 U.S. 226, 244-245 (1983) (Stevens J, dissenting).
[30] 567 U.S. (2012), slip. op. at 13 (Ginsburg J).

The solution, the Commerce Clause, allowed Congress to enact economic legislation in the general interests of the Union.[31] The Court's different approaches to the Commerce Clause underscore the different views of Government at issue in this case.

The Court traditionally gave Congress a wide discretion to act under the Commerce Clause, holding that Congress could regulate economic activities which "substantially affect interstate commerce".[32] This is a broad power which the Court has held covers local activities. In *Wickard*, a regulation penalised a wheat farmer for growing wheat for sale in the interstate market and growing wheat for personal consumption at home.[33] The extra wheat did not reach the interstate market. However, the Court held that the extra wheat grown for personal consumption did affect the interstate market, as it would reduce demand and suppress prices. By growing more wheat for himself, Mr Wickard would not need to buy as much from the interstate market. Such a link was enough to engage the Commerce Clause.

As well as showing a rational basis for regulating an activity which substantially affects interstate commerce, the Court in its precedents has required Congress to show that there is a "reasonable connection between the regulatory means selected and the asserted ends".[34] Justice Ginsburg reiterated the holding in *Morrison*, where the Court held that only if Congress had acted irrationally on a "plain showing" could a statute be struck down.[35]

Based upon the breadth of the prior precedent covering the Commerce Clause, Justice Ginsburg, joined by Justices Breyer, Kagan and Sotomayor, held that the individual mandate was proper Commerce Clause legislation. Indeed, this case required only a "straightforward application" of the precedents.[36] For Justice Ginsburg, the individual mandate bore a reasonable connection to the healthcare market. Not only this, but those individuals who failed to purchase insurance substantially affect interstate commerce.[37] The uninsured drive up prices for the insured by passing on their medical cost through higher premiums; Justice Ginsburg saw these as "far-reaching" effects on interstate commerce.[38] The principle of Progressive Government was, for Justice Ginsburg, embodied in the founders own words. Justice Ginsburg specifically cited Alexander Hamilton in defending the idea of a strong central government:

---

[31] 567 U.S. (2012), slip. op. at 13 (Ginsburg J).
[32] *Gonzales v Raich*, 545 U.S. 1, 17 (2005).
[33] *Wickard v Filburn*, 317 U.S. 111 (1942).
[34] *Hodel v Indiana*, 452 U.S. 314, 323-324.
[35] *United States v Morrison*, 529 U.S. 598, 607 (2000).
[36] 567 U.S. (2012), slip. op. at 16 (Ginsburg J).
[37] Ibid.
[38] Ibid.

> Nothing … can be more fallacious, than to infer the extent of any power proper to be lodged in the national government, from an estimate of its immediate necessities. There ought to be a CAPACITY to provide for future contingencies, as they may happen; and as these are illimitable in their nature, so it is impossible safely to limit that capacity.[39]

The expansive social welfare programmes of Presidents Roosevelt and Johnson can be seen to tap into this line of thought. A powerful central government is better placed and equipped to respond to truly national problems than the individual States. The PPACA can be read as embodying these values. In order to effectively deal with the problems in the nation's healthcare system, it was necessary to utilise the latent capacity within the Federal Government to legislate and ensure all individuals have health insurance.

However, Justice Ginsburg found herself in the minority on this point. The Chief Justice, joined in a separate, joint opinion by Justices Kennedy, Scalia, Thomas and Alito, contended that the individual mandate was an unconstitutional exercise of Congress's power under the Commerce Clause. This move, in the eyes of Justice Ginsburg, was a "novel constraint" on Congress, which "gains no force from our precedent and for that reason alone warrants disapprobation".[40] The majority's move may have been novel for Justice Ginsburg, but again it harkens to the tradition of classical liberalism within American politics, and a suspicion of centralised Government programs. Randy Barnett has argued that Alexander Hamilton was in favour of the Federal Government regulating commerce, but 'commerce' was understood only to refer to trade or exchange (Barnett 2001, p.116). Such a reading ensures that the Federal Government cannot step beyond its enumerated powers and unduly infringe upon individual liberty. This is reflected in the Chief Justice's words:

> The individual mandate … does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce.[41]

The Chief Justice saw this as opening a potentially vast domain for congressional authority to act under the Commerce Clause, and therefore to reduce individual freedom. If the Government can tell people to buy health insurance, could they not also tell people to engage

[39] Ibid, 14, citing Hamilton (2001b) 163.
[40] Ibid, 18.
[41] 567 U.S. (2012), slip. op. at 18 (Roberts CJ).

in *any* activity?[42] Would this not include telling Americans what diet to eat, and mandating that they eat vegetables in order to reduce healthcare costs?[43] The implications of this reasoning are very great indeed. A five justice majority has thus placed a potentially large limitation on the Commerce Clause and Congress' ability to legislate.

The majority's limitation on the Commerce Clause was clearly enunciated: the Clause can only be used to regulate existing commercial *activity*, not *inactivity*. To sustain the individual mandate under the Commerce Clause would be a step too far, and unjustifiably infringe upon individual liberty. Concurring with the Chief Justice, the four other conservative justices noted:

> The Government was invited, at oral argument, to suggest what federal controls over private conduct … could *not* be justified as necessary and proper for the carrying out of a general regulatory scheme … It was unable to name any.[44]

The Chief Justice also responded to the Government's contention that the power "to make all Laws which shall be necessary and proper for carrying into Execution" the powers enumerated in the Constitution allowed Congress to pass the individual mandate.[45] For the Chief Justice, the claim under the 'Necessary and Proper' Clause had to fail; if the individual mandate could not be sustained under the Commerce Clause, then there was no way its institution could be said to be 'necessary' or 'proper'.[46]

This distinction between activity and inactivity appears superficially clear, but the majority did not define what 'activity' and 'inactivity' actually meant. Justice Ginsburg saw this distinction as irrational – Congress was not telling people to buy something that they would never use, but was defining the terms on which individuals pay for something that they will all consume.[47] In the first two decades of the twentieth century the Court had attempted to impose limits upon the Commerce Clause through bright-line rules and had abandoned these attempts as unworkable.[48]

With respect to the Commerce Clause, courts will be faced with determining whether a statute regulates 'activity' or 'inactivity' with little guidance from the Supreme Court, only

---

[42] Ibid, 22-23.
[43] Ibid, 27. Justice Ginsburg chided this example as the 'broccoli horrible' 567 U.S. (2012), slip. op. at 29 (Ginsburg J).
[44] 567 U.S. (2012), slip. op. at 10 (Scalia, Kennedy, Thomas and Alito JJ).
[45] U.S. Constitution, Article 1, §8, clause 18.
[46] 567 U.S. (2012), slip. op. at 29 (Roberts CJ).
[47] 567 U.S. (2012), slip. op. at 22 (Ginsburg J).
[48] Ibid, 25.

dicta that to regulate inactivity would inevitably allow the eventual regulation of "mere breathing in and out".[49] Such rhetorical tropes from the highest court in the land will undoubtedly play on federal judges in future cases. Sections of the federal judiciary could see the Chief Justice as having written an opinion with the potential to retreat on the past 70 years of New Deal jurisprudence. The Commerce Clause now has a requirement that an individual cannot be subject to regulation absent their own voluntary, affirmative acts which enter them into the interstate market.[50] The majority has ensured that the Commerce Clause protects against perceived government interference with fundamental liberties, and ensures that the police power takes precedence over any overarching programs from a central government.[51]

The Taxation Twist

However, the Chief Justice provided a twist in his judgment which caught out the news organisations reporting on the case (Hughes 2012). After joining the conservatives in holding the mandate unconstitutional under the Commerce Clause, the Chief Justice upheld the mandate under the Taxing and Spending Clause of the Constitution. On this point, he was joined by the four liberal justices.[52] This 'switch in time' may well have saved nine. The conservative wing of the Court declared that as the mandate was unconstitutional, and central to the PPACA, the entire Act would have to be struck down.[53] The ramifications of a Supreme Court striking down a signature piece of legislation in an election year should not be understated. A judgment, five months before a Presidential election, that a sitting President's major legislative success was unconstitutionally coercive, would be huge ammunition to his political foes. It has been postulated by some commentators that the political fall-out of such an act directly influenced the Chief Justice's judgment in the case (Crawford 2012).

Irrespective of the reasons, the Chief Justice accepted the Government's argument in relation to the Taxing and Spending Clause. The mandate should be read not as an order for individuals to buy insurance, but rather as imposing a tax upon those persons who did not buy health insurance.[54] The taxing power is an enumerated power of the Federal Government. By casting the mandate as a tax, the Chief Justice cast the expansive healthcare reform as another enumerated power.

[49] 567 U.S. (2012), slip. op. at 3 (Scalia, Kennedy, Thomas and Alito JJ).
[50] 567 U.S. (2012), slip. op. at 27 (Ginsburg J).
[51] Ibid; citing *Traxel v Granville*, 530 U.S. 57, 65 (2000).
[52] Ibid, 37 (Ginsburg J).
[53] 567 U.S. (2012), slip. op. at 48-63 (Scalia, Kennedy, Thomas and Alito JJ).
[54] 567 U.S. (2012), slip. op. at 31 (Roberts CJ).

In upholding the PPACA as a tax, the Chief Justice stressed that what he was doing was engaging in judicial conservatism. A statute with two possible readings, one of which was unconstitutional and the other was constitutional, should be given the constitutional reading.[55] The Chief Justice was at pains to give the PPACA a "fairly possible" interpretation, which would allow the mandate to be upheld.[56] The number of authorities the Chief Justice cited in attempting to save the PPACA is noticeable, especially in relation to the paucity of authorities cited by the Chief Justice in relation to the Commerce Clause. This point was not lost on the conservative wing of the Court, who wrote:

> The Court today decides to save a statute Congress did not write. It rules that what the statute declares to be a requirement with a penalty is instead an option subject to a tax … The Court regards its strained statutory interpretation as judicial modesty. It is not. It amounts to a vast judicial overreaching.[57]

The importance of the Chief Justice's reasoning under the TAIA now becomes apparent. In noting that the meaning of a 'tax' for the purposes of the TAIA and the Constitution were different, the Chief Justice was allowing himself room to label the 'shared responsibility payment' in the PPACA a tax for the purposes of the Constitution, and a penalty for the purposes of the TAIA.

This was a step too far for the conservative justices, one which "carries verbal wizardry too far, deep into the forbidden land of the sophists".[58] It appears that the Chief Justice was of the opinion that such sophistry had precedent. In 1922, the Court held that such a penalising payment had been ruled not to fall under the TAIA, but it did fall under the Taxing and Spending Clause of the Constitution.[59] Deferring to Congress's ability to apply the TAIA to specific payments but not others, the Chief Justice based his ruling upon the nature of the payment under the PPACA. Adopting a "functional approach", the Chief Justice noted that the penalty would not be punitive, does not require any prior fault or guilt on behalf of the individual and is collected solely through the IRS as any other tax would be.[60] The shared responsibility payment "merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance".[61]

---

[55] Ibid; citing *Parsons v Bedford*, 3 Pet. 433, 448-449 (1830).
[56] *Crowell v Benson*, 285 U.S. 22, 62 (1932).
[57] 567 U.S. (2012), slip. op. at 64 (Scalia, Kennedy, Thomas and Alito JJ).
[58] 567 U.S. (2012), slip. op. at 28 (Scalia, Kennedy, Thomas and Alito JJ).
[59] *Bailey v Drexel Furniture Co.*, 259 U.S. 20 (1922).
[60] 567 U.S. (2012), slip. op. at 35-36 (Roberts CJ).
[61] Ibid, 38.

Chief Justice Roberts's judgment in relation to the individual mandate can be seen as a victory for the principles of the plaintiffs. By interpreting the shared responsibility payment as a tax, the Chief Justice delivered the fate of the PPACA out of the courts and into the political arena. The voters would decide the future of the individual mandate. On 6th November 2012, the voters did just that. The Presidential election was cast as a referendum on whether Americans wanted a nationalised healthcare system (DeMuth 2012). The Republican nominee for President, former Governor of Massachusetts Mitt Romney, had pledged to repeal the PPACA if he was elected (Shear and Parker 2012). President Obama won re-election, receiving 332 votes in the Electoral College and 51 per cent of the popular vote. The PPACA won a vote of approval from the electorate, and will now be implemented in President Obama's second term.

The *Medicaid* Expansion

The final issue the Court had to rule upon was the *Medicaid* expansion in the PPACA. In its response, the Court had to get to grips with two matters. The Court was split seven to two (with Justices Breyer and Kagan joining the five conservative justices) in holding that the conditions attached to the expansion of *Medicaid* funding to the States were unconstitutionally coercive. The Court then split five to four, with the Chief Justice joining Justices Ginsburg, Breyer, Sotomayor and Kagan in allowing the expansion to continue as a program which the States had the option to join or not.

In relation to the States' allegations that the *Medicaid* expansion was coercive, the Chief Justice recognised that Congress has the power to grant federal funds to the States, and can also make that money conditional on the States' "taking certain actions that Congress could not require them to take".[62] However, federalism required that the States must voluntarily enter into this agreement, akin to a contract.[63] Again, the Court's reasoning is imbued with principles of classical liberalism. The federal system of national and state governments is designed to ensure maximum freedom for the individual. If the States could not act as 'independent sovereigns' then power would coalesce in one central government, and "individual liberty would suffer".[64] Again, the emphasis upon the individual's freedom guided the Court's interpretation of the PPACA. This position was summarised neatly in the first few lines of the joint dissent of Justices Scalia, Kennedy, Thomas and Alito:

[62] *College Savings Bank v Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 686 (1999).
[63] 567 U.S. (2012), slip. op. at 46-47 (Roberts CJ); citing *Barnes v Gorman*, 536 U.S. 181, 186 (2002).
[64] Ibid, 47.

> Congress has set out to remedy the problem that the best health care is beyond the reach of many Americans who cannot afford it. It can assuredly do that, by exercising the powers accorded to it under the Constitution. The question in this case, however, is whether the complex structures and provisions of the [PPACA] go beyond those powers.[65]

Acting *ultra vires* would disturb the balance of powers between Federal and State Governments which ensure liberty is protected. Any diminution of the powers afforded to the States would affect the citizens of those States and their freedoms.

The Chief Justice decided that the threat to remove the total *Medicaid* funds to a given State which refuses the expansion would affect 10 per cent of a State's annual budget.[66] Characterising these conditions as a "gun to the head",[67] the Chief Justice held that Congress was not simply modifying an existing Government program.[68] Rather, the *Medicaid* expansion was a change in kind, not degree, and as such could be treated by the Court as a separate program. Expanding Medicaid would shift power unduly to the Federal Government, and diminish the police power held by each State.

The conservative justices concluded that as the coercive element of the *Medicaid* expansion was unconstitutional, the expansion itself could not be implemented. Citing the separation of powers, the conservative minority held that the next step regarding *Medicaid* should be decided by Congress, not the Court.[69] Writing for the five-judge majority, the Chief Justice held that the expansion was optional, and if a State opted-out it was not open for the Government to withhold all *Medicaid* funds.[70] The States, represented by their Governors, could opt-out by notifying the Secretary of Health and Human Services that they wished to do so. The principles of federalism and States Rights were thus affirmed, as well as the importance of the police power. The impact of this aspect of the ruling could be far-reaching. The *Medicaid* expansion would insure millions of uninsured Americans. Since the ruling was announced, many States with Republican Governors exercised their right to 'opt-out' of the expansion (Aizenmann and Somashekhar 2012). Many of the Governors acted in anticipation of a Republican victory in the November Presidential election. As at the start of December 2012, nine States had opted-out of the *Medicaid* expansion, seventeen States had opted-in,

[65] 567 U.S. (2012), slip. op. at 1 (Scalia, Kennedy, Thomas and Alito JJ).
[66] 567 U.S. (2012), slip. op. at 52-53 (Roberts CJ).
[67] Ibid, 51.
[68] Ibid, 53.
[69] 567 U.S. (2012), slip. op. at 48 (Scalia, Kennedy, Thomas and Alito JJ).
[70] 567 U.S. (2012), slip. op. at 56-57 (Roberts CJ).

with the remainder undecided (Kilff 2012).The long-term impact the opt-outs will have on the effectiveness of the reforms is yet to be determined.

Conclusion

Whilst this is a victory for President Obama, the PPACA ruling, and the Chief Justice's judgment, can be seen as a vindication of the principles of classical liberalism that underpinned the plaintiffs' case. This has led the Court to constrain the Commerce Clause and place the final word on the PPACA in the people's hands. The Chief Justice read the PPACA as setting up a choice for citizens:

> Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.[71]

Sebelius appears to signal an incremental retreat from the New Deal era of 'Big Government' solutions to national problems. The Federal Courts now have Supreme Court precedent empowering them to ensure the Federal Government is a government of limited powers. The police power vested by the States is once again affirmed as a vital tool in ensuring individual liberties and freedoms are protected. Sixteen years after President Clinton's declaration, the era of big government could well be over (Clinton 1996).

Newcastle Law School,
21-24 Windsor Terrace,
Newcastle-upon-Tyne,
NE1 7RU.

[71] 567 U.S. (2012), slip. op. at 6 (Roberts CJ).

References

Adams, Richard. 2010. Joe Biden: 'This is a big fucking deal'. *The Guardian*. http://www.guardian.co.uk/world/richard-adamsblog/2010/mar/23/joe-biden-obama-big-fucking-deal-overheard. Accessed 12 December 2012.

Aizenmann, N.C. and Sandhya Somashekhar. 2012. More state leaders considering opting out of Medicaid expansion. *The Washington Post*. http://www.washingtonpost.com/national/health-science/more-state-leaders-considering-opting-out-of-medicaid-expansion/2012/07/03/gJQADvMsLW_story.html. Accessed 12 December 2012.

Barnett, Randy E. 2001. The Original Meaning of the Commerce Clause. *University of Chicago Law Review*. 68:101-147.

Christy, Andrew. 2011. 'Obamacare' Will Rank Among The Longest Supreme Court Arguments Ever. *NPR*. http://www.npr.org/blogs/itsallpolitics/2011/11/15/142363047/obamacare-will-rank-among-the-longest-supreme-court-arguments-ever. Accessed 12 December 2012.

Clinton, Bill. 1996. The era of big government is over. *CNN*. http://edition.cnn.com/US/9601/budget/01-27/clinton_radio/. Accessed 12 December 2012.

Crawford, Jan. 2012. Roberts switched views to uphold healthcare law. *CBS News*. http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/. Accessed 12 December 2012.

DeMuth, Christopher. 2012. A Referendum on ObamaCare and Liberty. *The Wall Street Journal*. http://online.wsj.com/article/SB10001424052970203707604578094731650301360.html. Accessed 12 December 2012.

Goodman, John. 2012. Personalized Healthcare Choice Vs. Government Mandated Obamacare – Part 1. *Forbes*. http://www.forbes.com/sites/johngoodman/2012/09/18/personalized-healthcare-choice-vs-government-mandated-obamacare-part-1/. Accessed 12 December 2012.

Hamilton, Alexander. 2001a. The Federalist No. 11. In: *The Federalist*. Alexander Hamilton, John Jay and James Madison. Indianapolis: Liberty Fund.

Hamilton, Alexander. 2001b. The Federalist No. 34. In: *The Federalist*. Alexander Hamilton, John Jay and James Madison. Indianapolis: Liberty Fund.

Heritage Foundation. 1989. Assuring Affordable Health Care for All Americans.. http://www.heritage.org/research/lecture/assuring-affordable-health-care-for-all-americans. Accessed 12 December 2012.

Hughes, Mark. 2012. CNN and Fox News announce wrong 'Obamacare' verdict. *The Telegraph*. http://www.telegraph.co.uk/news/worldnews/us-election/9363218/CNN-and-Fox-News-announce-wrong-Obamacare-verdict.html. Accessed 12 December 2012.

Kliff, Sarah. 2012. Medicaid expansion scorecard: 17 states say yes, 9 say no. *The Washington Post*. http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/07/medicaid-expansion-scorecard-17-states-say-yes-9-say-no/. Accessed 12 December 2012.

Pasquale, Frank. 2007. The Three Faces of Retainer Care: Crafting a Tailored Regulatory Response. *Yale Journal of Health Policy & Ethics* 7: 39-91.

Shear, Michael D and Ashley Parker. 2012. Romney Says He Will 'Repeal Obamacare' if Elected. *The New York Times*. http://thecaucus.blogs.nytimes.com/2012/06/28/romney-says-he-will-repeal-obamacare-if-elected/. Accessed 12 December 2012.

Stolberg, Sheryl Gay and Robert Pear. 2010. Obama Signs Health Care Overhaul Bill, With a Flourish. *The New York Times*. http://www.nytimes.com/2010/03/24/health/policy/24health.html?_r=0. Accessed 12 December 2012.

The Federal Farmer. 2009. Letter dated December 25th, 1787. In: *The Anti-Federalist Writings of the Melancton Smith Circle*. eds. Michael P Zuckert and Derek K Webb. Indianapolis: Liberty Fund.