insights

SHUMAKER
Shumaker, Loop & Kendrick, LLP

A Newsletter from Shumaker, Loop & Kendrick, LLP | Fall 2012

National Federation of Business v. Sebelius:

A Decision For The Ages

A Comment On Chief Justice Roberts' Majority Opinion

I. The Conventional Wisdom

Earlier this year, prior to the oral arguments before the United States Supreme Court (the "Court") in *National Federation of Business, et al. v. Sebelius* ("*National Federation*" case), 132 S.Ct. 2566 (2012), I gave a talk to a business group on the likely outcome of the *National Federation* case. In *National Federation*, the petitioner challenged the constitutionality of the Patient Protection and Affordable Care Act (the "Affordable Care Act"), in which Congress reformed the national market for healthcare products and services. Like many of my fellow bar members, I wanted to handicap the case, which had been the subject of an inordinate amount of publicity. If you believed the hue and cry, the case represented the "death" (pun intended) of the Republic and the establishment of socialism, tyranny, and totalitarianism. The heart of the challenge to the Affordable Care Act was an objection to its "individual mandate," which compels an individual to purchase health insurance on pain of financial penalty.

By Moses Luski

I prepared for my talk by reviewing all the federal circuit Court of Appeals cases that had ruled on the constitutionality of the Affordable Care Act, focusing specifically on their treatment of the individual mandate. I must admit that at the beginning of this exercise, I was predisposed to the conclusion that the legislation would be upheld under the Commerce Clause of the United States Constitution, U.S. Const. art. I, §8, cl. 3 ("Commerce Clause"), for the following reasons: First, an appellate court, generally, must give great deference when reviewing the constitutionality of legislation. *See generally National Federation* 132 S. Ct. at 2593. This rule of construction gives appropriate deference to the voice of the people, which is most directly expressed by the legislature and, for the most part, leaves the appellate court in the position of an umpire who rules based on established rules in the process, with minimum leverage to judicially legislate new rules. *See generally Senate Hearings 109-158, Hearings on the Nomination of John G. Roberts to be Chief Justice of the Supreme Court of the United States, 109th Cong. (Sept. 2005)*. Second, I found it inconceivable that the legislative history and related legislative fact-finding accompanying the enactment of the Affordable Care Act would not make the requisite connection between the individual mandate, its effect on the national health care market, and its subsequent effect on interstate commerce. Third and finally, while not a constitutional law expert, I knew that with the demise of *Lochner v. New York*, 198 U.S. 45 (1905), as established in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the United States Supreme Court had gotten out of the business of invalidating Congressional legislation regulating business (i.e., economic interests) on the basis of a violation of substantive due process and, by analogy, the Commerce Clause. *See generally United States vs. Lopez*, 514 U.S. 549, 603 (1995) (Souter, J.) (dissenting, discussing the relationship between substantive due process and the Commerce Clause).

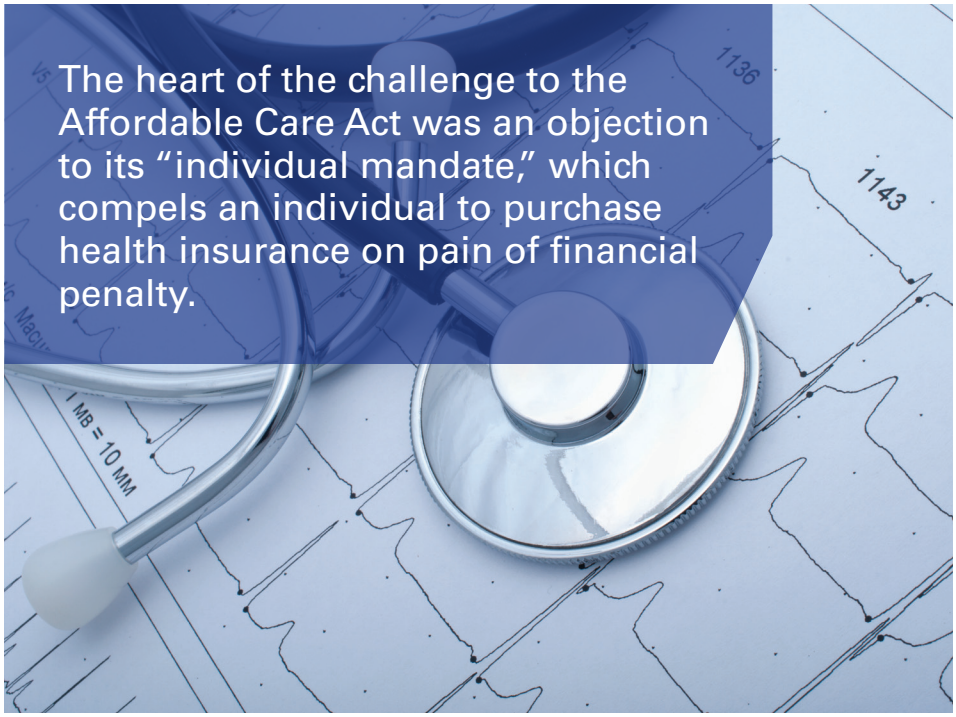
After a couple of hours of reading the cases, my suspicions were confirmed. This was not a hard case at all. Under the Court's expansive interpretation of the plenary power granted to Congress by the Commerce Clause, and as established by a line of cases commencing in 1937, the Affordable Care Act was clearly constitutional under the Commerce Clause. *See generally National Federation*, 132 S. Ct. at 2609 (Ginsberg, J., dissenting) (discussing the applicable Commerce Clause precedent).

Thus informed, I handicapped the case as follows: (1) voting to uphold constitutionality, would be Justices Ginsburg, Breyer, Sotomayor, and Kagan (the "Liberal Wing"); (2) voting to declare unconstitutional, would be Chief Justice Roberts, and Justices Thomas, Scalia, and Alito (the "Conservative Wing"); (3) Swing Vote: Justice Kennedy, a moderate conservative, who given the overwhelming precedent in favor of upholding constitutionality under the Commerce Clause, would so vote. My conclusions fell within the conventional wisdom as to how the case would be decided.

II. Hobson's Choice

The manner in which the results of the *National Federation* case were communicated by the press was comic but telling. At first CNN reported the legislation had been declared unconstitutional. Presumably, the eager reporter scouring the opinion stopped at the portion of the opinion declaring the legislation unconstitutional under the Commerce Clause. Having continued to read on, the reporter would have found that Chief Justice Roberts found the legislation constitutional under Congress's plenary power to levy taxes. Const. art 1, §8, cl. 1. As will be discussed, in this bit of indirection lies a clue to the greatness of Chief Justice Roberts's opinion. CNN quickly corrected itself and announced that the constitutionality of the Affordable Care Act had been upheld.

When I served as a law clerk to the late Justice J. Frank Huskins of the North Carolina Supreme Court, one of our monthly rituals was to strategize about which cases we would select to be assigned to us for the writing of an opinion. As I recall, each Justice would select a case based on seniority. Justice Huskins referred to the last case as "Hobson's Choice." "A 'Hobson's Choice' is a free choice in which only one option is offered. . . The phrase is said to originate with Thomas Hobson, a livery stable owner in Cambridge, England. To rotate the use of his horses, he offered his customers the choice of either taking the horse in the stall nearest the door or taking none at all." Wikipedia, Hobson's Choice, http://en.wikipedia.org/wiki/Hobson%27s_choice (last visited October 8, 2012). Thus, as to the final case, the Justice to whom it was assigned actually had no choice at all. When we knew we had "Hobson's Choice," we carefully "vetted" our earlier picks, so that when Hobson's Choice came our way, we would get a case we wanted.



The major surprise in *National Federation* was Justice Kennedy's decision to vote in favor of declaring the legislation unconstitutional as an invalid exercise of the Commerce Clause. I contend that Justice Kennedy's decision left Chief Justice Roberts with a Hobson's Choice. I further contend that not only did Chief Justice Roberts have the wisdom to recognize he was left with a Hobson's Choice, but in turn brilliantly inflicted a Hobson's Choice of his own on the Liberal Wing that wanted to uphold the legislation.

While it is true that Chief Justice Roberts was philosophically and judicially inclined to vote with the Conservative Wing, he had no choice but to vote with the Liberal Wing and assign himself the writing of the opinion to prevent significant damage to the reputation of the Court and to preserve for future adjudication his strong interest in curbing federal intrusion into the economic affairs of businesses and individuals. In effect, by joining the majority, Chief Justice Roberts wisely decided to retreat and live to fight another day. Why do I say this? For the Court to have overruled the Affordable Care Act in the face of such obvious Commerce Clause precedent as established by numerous United States Supreme

Court cases dating back to 1937, would have brought the Supreme Court into disrepute and threatened its exercise of its crucial power of judicial review which was established by Chief Justice Marshall in the seminal case of *Marbury v. Madison*, 5 U.S. 137 (1803). "Edward Levi, distinguished lawyer, legal scholar and legal educator who served as Dean of the University of Chicago Law School once noted that the 'function of articulated judicial reasoning is to help protect the Court's moral power by giving some assurance that private views are not masquerading as public views.'" *See* Rodney A. Smolla, *Let Us Now Praise Famous Judges: Exploring the Roles of Judicial "Intuition" and "Activism" in American Law*. 4 U. of Rich. L. Rev. 39 (2005) (quoting Dean Levi). Clearly, had the Court ruled to strike down the legislation, no amount of legal reasoning would be sufficient to explain why the Court was suddenly abandoning 75 years of clear precedent to overturn the most important Congressional enactment of the new century. It would have been seen as a prime example of the dreaded "disease" of judicial activism with unforeseen consequences for the status and prestige of the Court. Further, the doctrine of judicial review, as established in *Marbury v. Madison* and which is etched on the wall of the Supreme Court Building: "It is emphatically the province and the duty of the Judicial Department to say what the law is." *Marbury v. Madison*, 5 U.S. at 177, would have been put at risk. The primacy and power of *Marbury v. Madison* would have been threatened.

As mentioned, before Chief Justice Roberts would join the majority, he inflicted a Hobson's Choice of his own on the Liberal Wing. They would have to accept insertion of language within the majority opinion indicating that the Affordable Care Act was unconstitutional under the Commerce Clause. This language is clearly a reversal of the trend of the Commerce Clause cases and will serve notice that in future cases the Court may not be as lenient in its review of economic regulation by the government. By this brilliant strategy, Chief Justice Roberts has taken the long view and pushed forward a doctrinal change which can bear fruit in future cases. Regardless of one's position on the scope of the Commerce Clause, Chief Justice Roberts is to be praised and admired for framing the issue of the limits of the Commerce Clause in a manner that can be developed in subsequent cases in a manner consistent with common-law adjudication. By framing the issue in its proper light, Chief Justice Roberts advanced his own quest to limit the exercise of government power over private economic interests; advanced the constitutional doctrine of Separation of Powers; and preserved and possibly enhanced the prestige of the Court.

III. A Masterpiece of Indirection

The seminal case of *Marbury v. Madison* has gained legendary status as a masterpiece of indirection. Richard A. Harris & Daniel J. Tichenor, *A History of the U.S. Political System: Ideas, Interests, and Institutions 44* (1st ed. 2010). In *Marbury v. Madison*, Chief Justice Marshall turned a squabble between outgoing President Adams and Chief Justice Marshall's cousin, the incoming President Jefferson, over the service of a judicial commission into an opportunity to assert the standing of the Judicial Department in the recently established tripartite constitutional system which went into effect on March 4, 1789, after ratification by the States. In this case, Chief Justice Marshall went out of his way to castigate the Executive Department (i.e., his cousin) by reminding it that ours was a government of laws and not of men (thereby enhancing the Judicial Department). More importantly, Chief Justice Marshall, by adopting the doctrine of judicial review, established the primacy of the Judicial Department in the interpretation of statutory and constitutional law. Adding to the mystique of the case is that under the facts of the case, Chief Justice Marshall, who was serving concurrently as Secretary of State under President Adams, was the individual charged with serving the disputed commission and was blocked in this attempt by his cousin, President Jefferson. Was "bad blood" behind one of the most important cases in U.S. Constitutional history? I will leave that for others to ponder.

Similarly, I believe that Chief Justice Roberts's majority opinion in *National Federation* will also be viewed as a masterpiece of indirection. At the same time he handed the forces seeking approval of the Affordable Care Act a major victory, he planted within his majority opinion the seeds of its destruction; embedding, if you will, the equivalent of a "stuxnet" virus in the heart of the opinion.