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Commerce Clause "Holding v. Dictum Mess" Not So Simple

 [David Post](#) • July 3, 2012 8:17 am

[Ilya proposes](#) "a fairly simple solution" to what he calls the "holding vs. dictum mess" that [I blogged about](#) earlier:

"Just look at what the Court itself said the holding was."

That cannot be the right answer. A court's holding defines the scope of its power; holdings must be obeyed, by citizens and by other (lower) courts. Dicta is the stuff that doesn't have to be obeyed. Saying "just look at how the Court itself defined its holding" is like saying: "Just let Congress decide on the scope of its powers." Courts cannot be allowed to define the scope of their own power because if they are, they'll do what all institutions do when allowed to define the scope of its own power: expand it unmercifully. *Of course Roberts and the 4 Justices who are with him on this question would like it to be called a "holding"!* They think they're right, and they'd like to have their view on the matter obeyed by others. But the holding/dictum distinction prevents them from doing that, over and over and over again. Courts don't have to be obeyed when they propound on something they didn't have to propound upon for the purpose of deciding the case the way they decided it. To decide that the mandate is within Congress' taxing power, they didn't have to decide that it is not within its Commerce Clause power.

If there's a "mess" here, it's a mess that Roberts created by saying "My discussion of the Commerce Clause is a holding of the Court" when it clearly isn't one.

[*Tangential note:* I owe this argument entirely, as alert readers will note, to Hamilton and Madison, in the Federalist. I had the truly extraordinary experience during the last 6 weeks of working through the Federalist Papers, one by one, for the class I was teaching at Temple's Rome campus (on The Roman Republic and the Constitution). I'll have a lot more to say about that here on the VC - I'm still processing the many things I learned from having done that. But one thing that reading the Federalist does, it makes you focus on a very basic principle: No man shall be judge in his own cause. Publius repeats it over and over again. Each of the three departments will be filled with "ambitious" people, all trying to aggrandize their own power, and the system is set up (in many ingenious ways) so that they can't do that]



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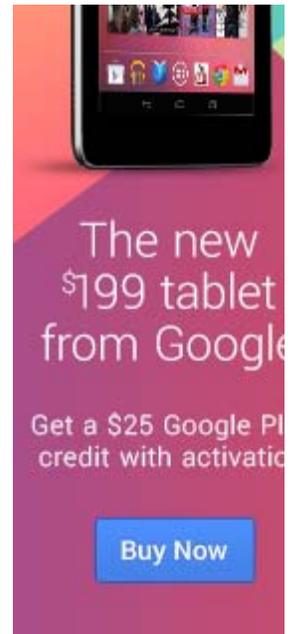
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Rastusrrr

Seems to me that someone in the media should point out that if Obama does not want the mandate to be classified as a tax, he can move for rehearing and asked Judge Roberts to vacate that holding and reconsider the commerce clause analysis. The equitable doctrine of quasi-estoppel (requiring no reliance by the party invoking it) would appear to preclude Obama from trying to claim that it is not a tax. Unfortunately, politicians are not bound by such rules.

07/05/2012 07:17 AM

Like

Rastusrrr

It seems to me that Roberts only decided whether it was a tax after concluding that it was, if deemed an exercise of the commerce clause powers, NOT constitutional. Absent that conclusion, he would not have said that principles of con law required him to then see whether there was any basis (other than the commerce clause) upon which the law could be upheld. My understanding of dicta is that it is something unnecessary to the final result. Here, the commerce clause holding was both necessary and central to the outcome, so it seems to me to be a holding.

07/05/2012 07:07 AM

Like

MHansberry

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THREE QUICK QUESTIONS

When thinking about the future of the US, which of these issues concerns you most?

U.S. v. Henry, No. 11-30181 archived on August 30, 2012

Very simply, dicta is whatever the court says it is.

Inactivity is a transaction subject to taxation if the court says it is.

A penalty is a tax if the court says it is.

Two plus two equals five if the court says it does?

07/04/2012 11:14 AM

Like

Joe Simmons

And isn't that the way we've always read it?

07/04/2012 12:19 PM

Like

in reply to MHansberry



Reader

As I think more about the issue, I find myself reaching the conclusion that what Roberts said is indeed dicta, not a holding. The reason is based on the underlying premises of the constitutional analysis, that the analysis of whether a Congressional statute lies within the taxing power or is an ultra vires penalty outside that power merely classifies the statute into a particular constitutional category without changing its statutory meaning or effect.

This issue of independence of the taxing clause analysis from statutory labels is central to the legitimacy of Roberts' holding, seems poorly understood, and deserves more attention from commentators than it's gotten. Let me try and explain. Under Roberts' analysis, the 'penalty' in the Act remains a penalty for all statutory purposes, including Tax Injunction Act purposes, but others as well. Because this is the case, his analysis didn't change the statutory meaning of the statute in any way. All Robert meant by calling the thing a 'tax' was that for constitutional purposes it falls within the constitutional taxing clause power. He simply classified the statute into a constitutional category, inside rather than outside the taxing power. That's all he did. There's no judicial rewriting of the statute going on at all.

But if we accept that when Roberts held that the Act lay within the taxing power, he wasn't changing its statutory legal effect, it seems to me that it must follow that he didn't really need to consider the Commerce Clause issue at all. If the taxing power analysis is a genuinely objective, external analysis which is genuinely not dependent on Congress' labels, then it seems to me that it follows that the analysis would reach the same result regardless of the outcome of the Commerce Clause analysis. It seems to me that the very independence of the taxing clause analysis from the labels Congress assigns for statutory purposes, which I think is the essential ingredient driving the very legitimacy of Roberts taxing clause analysis, forces the conclusion, if one thinks about it logically, that the taxing clause analysis is also independent of the commerce clause analysis.

And if the taxing clause analysis was independent of the commerce analysis, it follows that the commerce clause analysis wasn't really necessary to reach the

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U.S. v. Henry, No. 11-30184 archived on August 30, 2012

taxing clause holding. It therefore seems to me that it follows that the commerce clause analysis was dicta.

The Chief Justice might not have bothered to undertake the Taxing Clause analysis if he could have upheld it under the Commerce Clause analysis. But if he had undertaken the Taxing Clause analysis first without undertaking a Commerce Clause analysis -- which he might have if, for example, the government's lawyers had merely made it their first argument rather than their last -- he would have reached the same result. And if he had agreed with the liberal wing and upheld the statute under the Commerce Clause analysis but reached the taxing clause analysis anyway, he would still have reached the same result. It seems to me a 'necessary' element of a holding requires a logical or structural necessity. It's not clear to me that there was really a logical or structural necessity here. I also think Justice Ginsburg was correct in noting that Roberts could easily have merely said that the Commerce Clause analysis might lead to constitutional difficulties, without making any final determination that it was actually unconstitutional.

07/04/2012 07:21 AM

Like

Asher Steinberg

No, I think that's wrong. Roberts doesn't just put the statute in a different constitutional box, he reads the mandate as purely hortatory. And he says he does this in order to avoid reading the statute as unconstitutional, because of his prior conclusion that a non-hortatory mandate would be unconstitutional.

07/04/2012 07:18 AM

in reply to Reader

Like

U.S. v. Henry No. 11-30181 archived on August 30, 2012



Reader

No, the mandate isn't purely hortatory, per the statute if one doesn't buy insurance one has to pay money to the IRS. No change in what the statute requires one to do and what the consequences it imposes if one doesn't are. What Roberts held is that although the money one pays the IRS is called a 'penalty' by the statute, and functions as a penalty for statutory purposes including the Tax Injunction Act, for purposes of the constitutional taxing clause, it is sufficiently tax-like functionally for the statute to lie within rather than outside the taxing power, because under precedent whether a statutory payment requirement falls within or outside the taxing clause power depends on its functional characteristics, not the labels Congress gives it.

07/04/2012 10:19 AM

Like

in reply to Asher Steinberg

Jorge Emilio Emrys Landivar

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So then congress has the power to levy a "tax" on stealing?

Say... how about 10,000 per event?

I'm confused where the taxing power ends and starts.

07/04/2012 09:36 PM

Like

in reply to Reader



Reader

It doesn't, by the functional, label-independent analysis Roberts used. As the Supreme Court actually found in a 1922 case involving a 'tax' on employers who hire child labor, if Congress enacts a 'tax' in which the levy is too high relative to the item taxed and it behaves functionally too much like a penalty, then Court will disregard the labels and determine it to be a 'penalty' rather than a 'tax' for taxing clause purposes and hence outside the Constitutional taxing power.

I agree with Chief Justice Roberts that the logic of this precedent can reasonably apply the other way -- if Congress enacts a 'penalty' in which the levy behaves functionally like a tax, then the Court will also disregard the labels and determine it to be a 'tax' rather than a 'penalty' for taxing clause purposes and hence within the Constitutional taxing power.

The fact that the taxing power has these limits and the Commerce power doesn't have them means that the Roberts' analysis has significant bite. Congress can enact a small 'penalty' for not buying insurance. But it can't put people in jail, levy large fines, or do other coercive measures that it could do if the Commerce Clause power applied. Roberts' analysis therefore results in much greater real limits on Congressional power than the view of the Court's 4 liberals.

07/05/2012 05:45

Like

AM

in reply to Jorge

Emilio Emrys

Landivar

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U.S. v. Henry No. 11-20181 archived on August 30, 2012

jientho

Thank you for this lucid explanation. You have convinced me that an explanation I wrote in another thread (that Roberts must have meant to change "requirement" to "definition" throughout 5000A, and remove "shall") is incorrect. If, as you say, Roberts was simply moving the language into a different realm of Congressional authority (taxing), the text remains the same -- similar to "requirement that a qualified individual report all income" and "shall report all income".

(Is your last name Roberts? :-))

07/05/2012 Like
06:30 AM
in reply to
Reader

Guthrie Featherstone QC MP, This isn't legal advice, nor should i...

The 'condition precedent' to Roberts' tax analysis is a complete canard. The question is whether the tax RFD can stand without the commerce RFD. You don't need a majority of the court to concur on Commerce to allow one justice to decide on Tax with a Commerce 'condition precedent.' Said another way, [edit] you can't kick out Roberts' decision of "Commerce=no, therefore Tax is reached" by saying that it is an error of law to say that "Commerce=no" for the simple fact that the issue had not yet been decided as a matter of law at the time of the opinion's issuance. Roberts' decision doesn't rely on "Commerce=no" being correct as a matter of law - it's just the way that he reached the decision that "Tax=yes", and at the time of the decision's issuance, the Commerce issue had not yet been decided as a matter of law.

Roberts decided that it was a tax, and therefore legit. At the time of the decision's issuance, the underlying logic - that it wasn't supported by the Commerce clause - had not been decided by the Court. The court can therefore in the future hold otherwise on Commerce. Stare decisis comes from the last sentence of the opinion - the order of the Court. If a subsequently discredited element of a single Justice's opinion is enough to reverse the holding of the court, we're going to have to add an entirely new dimension to the idea of binding precedent.

07/03/2012 07:02 PM Like

Joe Simmons

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You're right that Roberts' condition precedent argument is not binding (only he applied it), the question is whether the Commerce Clause issue had to be decided at all. According to 5 justices, it did. Aside from from the fact that 4 were formally dissenting, I don't know why you would simply ignore their votes on the legal issues before the Court. If they are truly in the minority on an issue, then we can discount their views.

Imagine if 8 justices formally signed onto Roberts' Commerce Clause holding and his Tax holding. The 9th justice dissented on the Commerce Clause issue, arguing that the Commerce Clause analysis was unnecessary. You might feel, as you do now, that the Commerce Clause part of the opinion is not required. You might even complain that it is judicial overreach - but you don't get to decide it's not precedent. In the actual case, we had a majority of justices for whom resolution of the Commerce Clause issue was necessary. That need not be a doctrinal issue - I think this is a key point for understanding why the Commerce Clause holding is good precedent. It is sufficient that they felt it was necessary in this case to do so.

Maybe this opinion inspires a new way of reading precedent in which the reader decides what is logically sufficient to support the holding, no matter what the justices say. That really is what is being advocated. Justices sometimes complain in a dissent or concurrence that some particular issue need not be decided. That may be the case, but as long as a majority of the Court does decide it, as long as it is necessary to their opinions, that's all that matters.

07/04/2012 12:12 AM

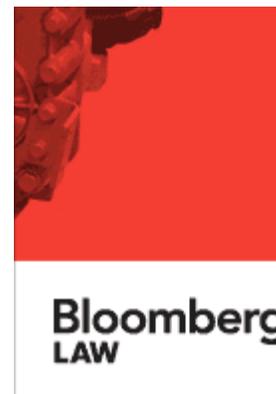
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in reply to Guthrie Featherstone QC MP

Guthrie Featherstone QC MP, This isn't legal advic...

Right, it was necessary to the opinions of a majority of the court, but the question is whether this opinion, although a majority of the court found it to be necessary to their individual opinions, is in fact necessary to support the decision and order of the court. Under a but/for analysis, there's still an argument there at first glance, since the order doesn't gain the fifth vote without imposing the condition precedent and rejecting Commerce justifications. But Roberts doesn't hold that it is permitted under Tax because it is not permitted under Commerce. The tax rationale is freestanding. First, Roberts' deciding Commerce before Tax was prudential, not compelled - since he could have skipped it, it isn't necessary to the holding.

Second, a subsidiary premise of an individual justice's holding, although a sine qua non for the order of the court, does not bind as precedent - causation is not correlation, to twist a phrase. (Eight justices could easily disagree with a subsidiary premise.) Although a majority of justices wrote in support of this idea - and normally, that would be sufficient correlation - this consensus wasn't among those whose votes caused the decision to be reached in this case, and so it doesn't bind as a result of this decision. Ultimately, the Jenga tower of the decision and order stands without the Commerce analysis.



07/04/2012 10:11 AM
in reply to Joe Simmons

Like

Joe Simmons

"But Roberts doesn't hold that it is permitted under Tax _because_ it is not permitted under Commerce."

He does though. I agree it's terrible as doctrine and doesn't make sense in light of how he decided the Tax issue, but he actually writes he would "find no basis" for upholding it under the Tax Clause, except as a "saving construction." No other justice signed onto that view, but that must mean we have a plurality decision, unless we ignore what Roberts' actually wrote.

The Tax Clause rationale could be freestanding - should be freestanding according to its logic. But Roberts' says it is not. So it is not accurate, though it is sensical, to say consideration of the Commerce Clause issue was merely prudential.

07/04/2012 12:33 PM
in reply to Guthrie
Featherstone QC MP

Like

U.S. v. Henry, No. 11-30181 archived on August 30, 2012

jientho

After seeing Roberts' quoted text below (gms1200's comment), I think you have badly mischaracterized what he said. He did NOT say he would find no basis for UPHOLDING it, he said he would find no basis for ADOPTING the alternate reasoning. Very different.

07/05/2012 06:50
AM
in reply to Joe
Simmons

Like

Guthrie Featherstone QC MP, This is...

Well, since III-C is the opinion of the Court, it isn't a plurality - we can't undercut Roberts' vote for III-C by looking at what he says in III-D, any more than we can undercut the dissenters' vote for not even mentioning it past the preface of the dissent.

The 'saving construction' bit has two aspects, I think. First he's saying that he doesn't reach the question unless the Commerce inquiry is fruitless. Second, he's saying that he's applying a generous standard of construction to save the legislature's intent. The first is irrelevant to whether Commerce is essential to the decision - it doesn't matter if the court reaches it via Commerce, via Necessary and Proper, or via Sheboygan - it reaches it, then decides it. The second is merely the canon of construction employed - it (1) isn't specific to Commerce, and (2) is simply a superfluous statement on how the scales were balanced in this particular instance.

The reason that it is important that considering Commerce first is a prudential, not jurisdictional restriction is that since the court wasn't compelled to decide it first, the decision in the negative doesn't attach itself doctrinally. If a court is weighing whether it likes lemonade, and a few members take it upon themselves to weigh the benefits of the lime alternative first, if they're doing it from a constitutional or statutory command, the decision in the negative becomes precedential, even if a majority doesn't mention it in their opinions. It would bind doctrinally. If, however, they were considering the lime alternative out of judicial prudence, it doesn't similarly bind.

U.S. v. Henry No. 11-3018 reached on August 30, 2012

07/04/2012 09:26

Like

PM

in reply to Joe
Simmons



Reader

One uses a functional analysis to distinguish dicta from holding rather than relying on how the judge labels things, just as one uses a functional analysis to distinguish, say, a tax from a penalty rather than relying on how Congress labels things.

07/03/2012 04:58 PM

Like

CalderonX

Dicta is the stuff that doesn't have to be obeyed.

To be repetitive of my comments (and those of other comments) in different threads, this simply isn't true in (at least some) some circuits when it comes to

Supreme Court "dicta." In those circuits, everything the S Ct says in a majority opinion has to be obeyed, and the question of whether it's dicta is irrelevant.

07/03/2012 02:52 PM

Like

David Stearns

Professor Post is exactly correct that the court does not have the authority to decide for itself what is dicta and what is a holding. That is why, obviously, Congress created the Holdings Administration, an executive agency that reviews court holdings to determine the contours of the court's power (with appropriate congressional supervision, of course). I'm sorry, but, really, who is supposed to say what is holding and what is dicta, if not the Supreme Court? And the idea that any Supreme Court is "bound" by prior cases is just silly. It never has been and never will be. As it shouldn't be.

07/03/2012 02:14 PM

Like

Leo Marvin

Correct me if I'm wrong, but my reading of the opinion isn't that the mandate is a tax, but rather that it's Constitutional because it could reasonably be construed as a tax. And ISTM that difference bears on the reasonableness of supporting the decision while claiming the mandate is a penalty. If the Court only held that the mandate could reasonably be construed as a tax, I don't see any conflict between supporting that decision and still believing the mandate is nonetheless a penalty. But if the Court declared the mandate a tax, it's harder to rationalize continuing to argue it's a penalty. Not impossible, but harder.

07/03/2012 02:06 PM

Like

gms1200

There's really at least two separate questions: (1) Is the Commerce Clause analysis necessary to Roberts' opinion, or is it merely dicta in the context of his opinion?, and (2) If it is a necessary part of Roberts' opinion, does it become a holding of the Court because the four dissenters agree with it and/or because the four liberals and Roberts jointly state that it is part of the holding?

In that regard, it is important to focus on what Roberts actually held. It is not accurate to say that Roberts simply held that the statute was a valid exercise of the taxing power. He first had to decide what the statute is: Is it a mandate-and-penalty, or is it a tax? If it is not a tax, then the taxing power would not be a source of authority. His opinion makes it clear that, absent his Commerce Clause analysis, he would have concluded that it was a mandate-and-penalty, since that was the natural reading of the statutory language. Indeed, he comes flat out and says it:

"JUSTICE GINSBURG questions the necessity of rejecting the Government's commerce power argument, given that §5000A can be upheld under the taxing

power. Post, at 37. But the statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it. It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question. And it is only because we have a duty to construe a statute to save it, if fairly possible, that §5000A can be interpreted as a tax. Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction.

So it is beyond question that, if the statute was a proper exercise of the Commerce Clause power, Roberts would not have held that it was a proper exercise of the taxing power, because *he would have concluded it was not a tax at all*. You can disagree with his reasoning all you want, but it is impossible to say that it is dicta in the sense that the Commerce Clause holding was not an essential part of Roberts' opinion.

Now, the fact that it is an essential part of Roberts' opinion does not necessarily make it part of the holding of the Court. What (arguably, and I think correctly) makes it part of the holding of the Court is (i) the fact that five justices agreed with the proposition that the mandate violated the Commerce Clause, and (ii) the four liberals agreed with Roberts' statement in his opinion that this was part of the holding.

07/03/2012 12:02 PM

Like

Joe Simmons

Well said, we've been coming at this several different ways, pointing out what truly constitutes dicta and what Roberts actually said. You've presented it in a nice concise way.

Is the ACA opinion truly that odd?

A major question I would like answered in a similarly concise a way, as asked in my post below, is on what basis are we questioning whether the Commerce Clause opinions might constitute dicta? I don't think an answer to that question is consistent with history or the words of the opinion.

07/03/2012 06:48 PM

Like

in reply to gms1200

NYlawyer

This is spot on -- I don't understand why people insist on ignoring the passage you highlight. (I think the other responses stray from the point -- Roberts cast the deciding vote and what was necessary to decide for his vote is explicitly stated.)

07/03/2012 02:03 PM

Like

in reply to gms1200

gpurcell

It is an intentional campaign to short-circuit that part of his opinion, simple as that.

07/03/2012 05:38 PM
in reply to NYlawyer

Like

K Chen

Well, hold on. A non-majority opinion doesn't have holdings or dicta. It is just information. So, you really have to ask in the first instance do the portions of the majority opinion writers opinion that just the majority opinion writer's opinion, and not the opinion of the court have any authority over lower courts under any circumstances? If so, are those circumstances met here?

I think logically you can split Roberts' opinion into two parts. One is the opinion of the Court, and the rest is Roberts' concurrence with himself. Then, a holding/dicta analysis should be applied on the remainder including the statement "The Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity." Ignoring the verb in that sentence for a moment, that line of reasoning does not in anyway impact the chain of reasoning that is within the opinion of the court (i.e., not a tax for anti-injunction purposes, is a tax for constitutional purposes, ergo constitutional) which makes it textbook dicta. Does the verb save it? I don't know, but I need some convincing.

I don't think dissenting votes matter when deciding what counts as authority, even when they agree on some principle of law with the majority. They do serve as a signal as to what might happen in the next big case, but who knows who is going to die, retire, or flip?

The holding/dicta distinction isn't purely academic either, in so far as it gives litigators and lower court judges weapons to shape how they deal with the next Commerce clause case. This isn't the big Commerce Clause case, but I think it is a prelude to the big one.

[Edited]

07/03/2012 12:17 PM
in reply to gms1200

Like

gms1200

I don't think dissenting votes matter when deciding what counts as authority, even when they agree on some principle of law with the majority.

That's is the question. There may be arguments on both sides of that issue, but it completely distinct from the question of whether or not something constitutes dicta. And if five justices

U.S. v. Henry, No. 11-30181 archived on August 30, 2012

agree on a principle of law, then they are the "majority" on that issue, even if they disagree with each other about a completely separate issue. Indeed, if five justices agree on a principle of law, and agree that the resolution of that issue is necessary (if not necessarily dispositive) to decide the case, that seems like a majority decision on that issue -- even if one of the five thinks that resolution of the issue is necessary but not dispositive.

07/03/2012 12:55 PM

Like

in reply to K Chen

K Chen

If they had joined Roberts' opinion for that portion of the analysis, sure. But they didn't, and you would think that means something. Or rather I am arguing in a case with a majority opinion, nothing else means anything. I am unaware of any authority on this point, but it seems implicit in the system of having majority opinions.

As I recall, the Lemon test has been criticized, at various point, by a majority of Justices, and yet persists still, applied frequently in lower court decisions, despite having been on life support for a couple decades. Likewise, in *Burnham Stevens* agreed with two blocks of 4 justices each, and produced no authority despite apparently agreeing on a legal principal. It isn't enough for 5 justices to believe something is true, they have to actually put it in an opinion, and I believe the same opinion.

U.S. v. Henry No. 11-3018 archived on August 30, 2012

07/03/2012 01:24 PM

Like

in reply to gms1200

Ben P

It does give litigators weapons, but that's why I think this is overblown. Whether any particular rhetoric is holding or dicta doesn't matter that much, the quote and the cite still get used.

If I can plausibly argue my case's decision should be bound by a higher ruling I'm going to write that out. "The Court's ruling in this case is bound by *X v Y* where the Court held...."

If I can't argue binding precedent with a straight face, the argument only becomes "this case is very similar to *X vs Y* where the Supreme Court said"

07/03/2012 12:47 PM

Like

in reply to K Chen



A. Zarkov

Why don't written opinions have two sections: (1) Holding; (2) Dicta ? I suppose the answer is judges just don't do things that way, and there's nothing that makes them. Or the whole opinion is a fluid narrative where the holding and dicta have to be intermixed in the interests of readability. Well then how about color coding?

07/03/2012 11:49 AM

Like

JohnBstl

David Post - You should teach a course on the ANTI-Federalist papers; specifically 78-83, which expose the sham that is the Judiciary.

The whole problem isn't holdings or dicta...it's SCOTUS, itself.

Roberts, like Marshall long before him, simply confirmed what the Anti-Federalists knew all along.

07/03/2012 11:39 AM

Like

Joe Simmons

David Post,

On what basis are we questioning whether the Commerce Clause opinions might constitute dicta? I think a serious reflection on this question could be helpful. To my eye, it is indisputable that 5 justices of the Supreme Court held the mandate unconstitutional as an exercise of the Commerce Clause and that the analysis was necessary to their opinions.

As I raised in the other thread, isn't there a substantial difference between tangential statements not necessary to the holding per the logic of the Court and an argument about what the controlling opinion of the Court is? A good example used in the other thread was Bakke. I thought the question for lower courts was what constituted the controlling opinion by parsing out common agreement - not in dismissing major parts of the opinions as dicta for more formalist reasons.

If a talented lawyer wants to parse the text to show that the two opinions offer different rationales, that's merely an argument about what the case MEANS. That argument isn't being made. I don't know that anyone is seriously contending that the conservative dissenters and Roberts are offering different arguments - though they use different words.

I wonder if we would parse the meaning of another case from this past term, Coleman v. Court of Appeals of Maryland, in the same fashion. In that case, 4 Justices led by Kennedy applied a "congruency test" to the statutory remedy for an alleged violation of the 14th Amendment. Scalia concurred in the judgment, but offered a textual route, rejecting the congruency test. The 4

U.S. v. Henry No. 11-30181 archived on August 30, 2012

dissenters, led by Ginsburg, also applied the congruency test but reached a different result. I don't think we would term the application of the congruency test in that case "dicta" simply because only 4 of the deciding judges endorsed it. I suppose we could even argue that the congruency test may not have been absolutely necessary for the dissenting opinion, as Ginsburg appeared to find the potential violation well within the ambit of the 14th Amendment, contrary to Scalia's reading.

I do not think we would ever argue with a straight face that application of the congruency test in that case was mere dicta (though based on the arguments being made, some apparently would). I think it sufficient to say that 8 justices reaffirmed use of the congruency test and thus continues to be binding precedent. There is an argument that it doesn't matter because the congruency test is supported by ample precedent. But might we argue this case throws some doubt on the congruency test, especially if we argue it was not necessary to Ginsburg's opinion? This is the kind of reasoning being applied in the Commerce Clause dicta debate.

The fact that the congruency test was necessary to 4 of the justices in the majority should absolutely mean it is non-dicta (and for the same reason, Roberts' Commerce Clause argument is non-dicta), but without a majority, neither can it be controlling precedent on that point! (And isn't that the real debate?) Unless...we count the 4 dissenters. And why shouldn't we?

The reasoning of the dissenters can be called dicta insofar as it is at odds with the reasoning of the majority. Obviously, that's what makes it a dissent. It should not matter whether it is 1 or 4 justices in the majority who endorse a view that makes it dicta or not. The question of controlling precedent is whether the majority of the Court accepts a proposition.

The only question should be the extent to which opinions are consistent in order to argue what the case means for later cases. To the extent that the Roberts' opinion on the Commerce Clause and the conservative dissent are not consistent, they will not be binding. The ACA case does present some ambiguity since the 4 conservative dissenting justices couldn't bring themselves to endorse one set of language. But like Bakke, the inquiry should focus on determining what the consensus is - not throwing indispensable parts of 5 justice's opinion into the dicta bin, where they can be simply ignored.

Notwithstanding the hardship of arguing that passages in the two opinions are saying the same thing - I think those arguing the contrary have the tougher fight. If it can be argued that parts of the conservative dissent are at odds with Roberts' opinion, then those parts of the dissent can be considered dicta. Again, that's not the argument yet being made. There are broad points of agreement that should qualify as binding precedent, like regulation of inactivity through a mandate is not permitted under the Commerce Clause. Once we get into the weeds, there may be points of law that lose their persuasive effect or are not clearly supported by both opinions. But I think we still need to get there.

I offer my argument respectfully, as a young lawyer from a modest law school, yet to find a job, whose grades in constitutional law would probably merit me being barred from discussing constitutional law issues. Thank you!

U.S. v. Henry, No. 11-3018, archived on August 30, 2012

07/03/2012 11:26 AM

Like

Asher Steinberg

I don't understand; how can we count the dissenters? The question is never whether "the majority of the Court accepts a proposition." If the question were that, we could piece together holdings from 5 dicta expressed by 5 Justices in 5 different cases, or remarks in speeches for that matter. The question's whether the majority of the Court votes for a proposition, in a given case, when its doing so is necessary to the result the majority of the Court reaches in that case. Nothing the dissenters said was necessary to the result the Court reached; they would have reached a different result. Nor is Roberts's opinion the holding under Marks, because Roberts's views aren't narrower than the Ginsburg plurality's; they're broader. The narrowest grounds sufficient to support the outcome are the Ginsburg plurality's views that the statute can be read as a tax without avoidance, and upheld as a tax. That's obviously narrower than a holding about the scope of two powers.

07/03/2012 09:06 PM

Like

in reply to Joe Simmons

Joe Simmons

There is no similarity between counting the views of justices on a single case, and patching together holdings (dicta and remarks) in all different cases. I'm obviously not saying Roberts could cobble together a "majority" by relying on remarks made by the justices in other cases or in a university lecture.

The question is whether a majority of justices in one particular case agree on a point of law. If a majority do not agree on a point of law, there is not binding precedent. If they do agree on a point of law, there is binding precedent.

You assert that the Commerce Clause analysis was not necessary to the result. A majority of the court disagreed. Not the same majority, but we've never required that only a single majority agree on every aspect of a decision. The question is what are the common points of agreement. It's fine to think that the Commerce Clause analysis was not logically required. It simply doesn't matter whether it is logically required. It's not for us - or a minority of the Court - to decide.

Lawyers are going to argue whatever they can. That is their job.

But consider: A law is passed to regulate interstate commerce by imprisoning people for failure to buy health insurance.

Uninsured jailbird's lawyer argues that 5 justices, in

U.S. v. Henry, No. 11-30181 archived on August 30, 2012

Sebelius, held that the Commerce Clause can not regulate inactivity, namely the failure to buy health insurance.

Government's lawyer responds, "that's true, your honor, a majority of justices did hold that, but they weren't the justices who ultimately decided the disposition of the case."

Judge: "So what?"

Government's lawyer: "What I'm saying is that those parts of the decision weren't needed for the Court to decide the tax issue as it did in that case."

Judge: "Why do I care about the basis on which the Court decided the tax issue?"

Government's lawyer: "Because the Commerce Clause stuff is all dicta."

Judge (a very patient and thoughtful judge): "I wouldn't expect a Commerce Clause analysis to be logically connected to a Tax power analysis. That doesn't make one or the other dicta. It may be possible to logically decide one area of law without deciding another, but a majority of the Court apparently reached a different conclusion."

Government's lawyer: But they didn't have to decide that point of law!

Judge: "But they did."

Government's lawyer: But not the majority who decided the case!"

---repeat ad infinitum, maybe we'll find a more sympathetic judge---

07/04/2012 01:03 AM
in reply to Asher Steinberg

Like

Asher Steinberg

"The question is whether a majority of justices in one particular case agree on a point of law."

No, the test for whether something's a holding is always been whether a majority agree on an outcome-determinative point of law - and not just something that a majority of justices think should have been outcome-determinative if their preferred outcome were the outcome, but a point of law that actually determined the outcome. Suppose you have a case where appellant makes a statutory argument and a constitutional argument. 4 justices say the statute's unconstitutional as most naturally read, invoke avoidance, and say appellant wins on his statutory argument. One justice, concurring

U.S. v. Henry, No. 11-30181 archived on August 30, 2012

in the judgment, thinks the constitutional argument is a loser but that, even without avoidance, appellant's right on the statutory question. And four justices dissent, say the statute's not unconstitutional as most naturally read, and that the appellant's wrong on the statute too. Now I guess you would see a holding there on the constitutional question, but I see (a) a justice who never had to reach the constitutional question, so anything he says about it is dictum, and (b) four dissenters whose views, while possibly necessary to their preferred disposition of the case, are unnecessary to the disposition of the case that actually happened, and therefore irrelevant.

07/04/2012 09:27 AM
in reply to Joe Simmons

Like



Anthony

The primary purpose of dicta vs holding is in whether or not a political or lower court can expect the precedent to be upheld should the issue come before the court again; it prevents wasteful re-appeals of the same issue. Judges and politicians can count, and there were five votes for the principle that the commerce clause cannot force commerce, whether or not it was a formal holding; thus, they will be inclined to treat it as if it were a holding.

07/03/2012 09:53 AM

Like

K Chen

I'm not so sure. I don't see a surefire test for a lower court to apply so much as a general notion and some vote counting. I can definitely see the Circuits slowly developing authority and SCOTUS refusing cert until there is an untenable split to resolve.

07/03/2012 09:59 AM in reply to Anthony

Like

markbuehner

Just look at it from a functional point of view- the fact that everybody is debating it shows its going to be a controversy for other courts. Very likely the decisions will be made based on which side the courts fall out on- does anybody really see the 9th Circuit saying to itself, 'well Justice Ginsburg told us she agreed to no such thing but we really got to go with Roberts on this one.' There are two reasons this is trivia anyway- first, CC cases that test this limit are rare, and second, Roberts gave Congress a surefire method to avoid the problem anyway.

07/03/2012 08:28 AM

Like



loki_13

I'm not so sure this is trivia. First, CC cases aren't as rare as you think, either as applied or facially. *Successful* CC cases are rare. :)

Second, the continuing validity of this case will depend on whether lower courts view it as either a one-shot "no mandates" case, or a crack in the CC. The one thing that I can be reasonably certain of is that litigators will want to characterize it as the latter. And that will take years to sort out.

07/03/2012 08:58 AM

Like

in reply to markbuehner



Jorge Emilio Emrys Landivar

Successful cases to strike down any federal law are exceedingly rare.

07/04/2012 09:45 PM

Like

in reply to loki_13

markbuehner

The only thing I disagree with is the testing of this CC limit being rare- this case was indeed unique because the mandate was basically unique (at least based on the CC). Roberts holding/dicta only touches on Congress mandating individuals who haven't 'acted' in a market to do so (lets no argue over whether this is legitimate for the moment!), few laws if any to date raised the question of who is acting in the market (even in Wickard, their was some actual action taking place that a citizen could have chosen to refrain from) versus who is demonstrably not acting at all. Its not that this is a unique circumstance (as was argued) as there are many markets we will all ultimately participate in (food, shelter, clothing, burial). Its that Congress had not to date made the argument that not doing something was a form of doing something. That being that case, future laws will still step carefully on those kinds of mandates, and there is little reason to test CC when the taxation power is now so much more readily applicable.

For instance if Congress wished to force every American to buy carbon credits that they would use throughout the year (just throwing it out there) as part of a regulatory environmental scheme, they would surely not bother testing the commerce clause when a tax for non-participants is surefire.

07/03/2012 09:43 AM

Like

U.S. v. Henry, No. 11-30181 archived on August 30, 2012

in reply to loki_13



loki_13

1. First, there is the N&P analysis, which adds a heretofore unheard of "proper" wrinkle.

2. Second, the law is filled with mandates (that's why "shall" is used in legislation). While Roberts tries to cabin the opinion by stating that others were participating in markets and/or commerce, there are a number of laws where one is ordered to do things where the predicate law is, at best, loosely tied to commerce to begin with. I will guarantee that you will see challenges based on this. I don't think that they will (after the dust settles) win, but it will be used.

07/03/2012 09:53 AM

Like

in reply to markbuehner

Chris Travers, Most active developer ...

Did Prinz add the proper wrinkle?

07/03/2012 08:00 AM

Like

in reply to loki_13

U.S. v. Henry, No. 11-30181 archived on August 30, 2012

markbuehner

N&P was a difficult argument because it seems to be circular in context of the CC- a law is only proper if Congress has an enumerated power to exercise it, and hence if the law is invalid under the CC it must be improper (and that's what Roberts held). This is another example of trying to find a hole in what the Constitution is clearly trying to prevent you from doing- if the point was that Congress can do whatever it wants as long as they think it's a good idea we wouldn't need an enumeration of powers except as an exercise in legal taxonomy.

As far as the law being filled with mandates, this isn't a question of mandates in and of themselves (of which our lives are certainly full), this is a question of a mandate that forces a person to buy a product by entering into a market they had not yet entered (again, if we

retry the whole concept we're missing the point, lets just accept Roberts take for the moment). I don't know that this law has other examples of that. Nobody is arguing that Congress has the power to regulate commerce in the sense that 'when buying a policy, you shall buy one that will contain XYZ' or 'When filing your taxes, you shall do ZYX'. Those kinds of mandates are certainly regulatory of commerce and raise no objections.

07/03/2012 10:25

Like

AM

in reply to loki_13

Josh

I believe the N&P rationale of Roberts does not agree with that of the dissenters (I'm not sure I follow either rationale).

Didn't Barnett assure us the activity/inactivity distinction was crystal clear and did not implicate any existing law? I wonder if he, or others who concurred in his argument, will champion the litigation you expect.

U.S. v. Henry, No. 11-30181, archived on August 30, 2012

07/03/2012 10:09

Like

AM

in reply to loki_13



loki_13

Prof. Barnett believes that Wickard, et al, is bad law. I am fairly certain that because of this, he believes that 85%+ of the U.S.C. is unconstitutional.

As for what he has stated, he also said that if he lost Raich, there would be no limits on the Commerce Clause. Yet he found new ones. I don't believe any words he says on this issue. He (and others like him) will be mining every word of this opinion (including "and" and "the") to find colorable grounds for new challenges. Not even good one- just ones that pass a MtD in the 5th and 11th Circuits. Or might convince a judge in Pensacola.

07/03/2012
11:20 AM
in reply to
Josh

FrankGindhart

In *Bush v. Gore* the Supreme Court said the equal protection argument, obviously crucial to its holding, was not precedential. Now, in the ACA case, it says that the commerce clause restriction, obviously not crucial to its holding, was precedential. Is this not insane?

07/03/2012 08:25 AM Like



loki_13

Technically, they said:

"Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."

This hasn't stopped other courts from citing *Bush v. Gore*.

07/03/2012 08:42 AM Like
in reply to FrankGindhart

NYlawyer

And it shouldn't -- the court did not suggest that its holding was not precedential.

07/03/2012 02:05 PM Like
in reply to loki_13



loki_13

Meh. It depends on whether you believe the backlash, the backlash to the backlash, or the backlash to the backlash to the backlash.

I certainly think that the Court suggested that the analysis was cabined to the instant facts only, in a way they do not normally indicate. And I think that indicates that they felt this was a one-shot case. And I think lower courts have rightly cited the opinion.

07/03/2012 02:13 PM Like
in reply to NYlawyer

U.S. v. Henry, No. 11-30181 archived on August 30, 2012



Thomas Wayne Wren

So, how do the teachings of Publius square with Marbury v. Madison. Was the judicial review language dicta?

07/03/2012 08:22 AM

Like

Chris Travers, Most active developer of LedgerSMB, an open sour...

'Saying "just look at how the Court itself defined its holding" is like saying: "Just let Congress decide on the scope of its powers."'

Bad analogy. Dicta/holding doesn't really follow from any provision in the Constitution.

I think a better point is to note that as all the argument here shows, dicta vs holding is a rhetorical device that courts use. Therefore whether it is dicta vs holding depends on a few things:

- 1) Whether the court is likely to be struck down for making a contrary decision,
- 2) What the judge decides the best approach is, and
- 3) How dicta vs holding and precedent vs distinguishing the cases fall into things.

Given that this can be argued both ways, I think that courts will chose the options that make their lives easiest. It will be dicta if trying to convince other courts that it doesn't matter and a holding that if the court is trying to convince other courts to follow this rule.

On a pure formalistic approach, I think that it is a holding, however. Stating that this is beyond the reach of the commerce clause and only possible through the tax clause changes what sort of as-applied challenges may be entertained later. For example, we would understand that a case challenging the minimum penalty (and wanting to pay the 2.5% instead) might challenge the difference as beyond the scope of the 16th Amendment. Since that difference was not before the court this time, whatever Roberts said about it does not seem to be binding, but the fact that it is beyond the scope of the commerce clause, and hence that cannot be a fine, would seem to be.

07/03/2012 08:14 AM 1 Like

Like



Matthew Miller

This does not seem right to me. Courts strike down or uphold laws: that's the only element of their decision which is, in any meaningful way, binding on the elective branches. The reasoning behind the decision establishes precedents for lower courts (who are, obviously, a part of the judiciary) and guidelines for the elective branches. Imagine that Roberts had gone the other way and the court determined that the whole statute was invalidated under both the commerce clause and the taxation power. Would the legislature still be free to

U.S. v. Henry No. 11-20181 archived on August 30, 2012

pass another mandate? Yes. Practically speaking, they wouldn't, but the actual "check" which judicial review imposes only takes effect after a statute is passed. If this were not so, you wouldn't see states passing abortion laws that clearly violate established precedent (I'm thinking of abortion laws). They can pass the laws, even if it violates precedent: it's up to the federal courts to invalidate them once passed. So what the Supreme Court says about the scope of government power- as opposed to what it says about the statute at hand- is only actually (as opposed to effectively) authoritative for lower courts.

Which is all to say that the Supreme Court, in deciding which part of its holding is an actual holding, is not really acting as "judge in [its] own cause".

It's simply acting as the head of its branch of government. The holding- what the constitution says about X, Y, and Z- is strictly the province of the judiciary.

07/03/2012 08:12 AM

Like

jetpacksforall

Asked this question on an earlier thread, but nobody took it up. Assume for a moment that we move beyond the dicta/holding question and find that Roberts' commerce opinion is in fact binding. A lower court is hearing a case involving a new law regulating commerce, and the challengers claim the new law violates the Roberts Rule because it "compels commerce."

How exactly is the lower court supposed to apply this precedent? In other words, a basic distinction of fact has to be made: is the law impacting people somehow involved in interstate commerce, or would the law instead "compel" commerce in order to reach those people? I ask because nowhere in Roberts' opinion or in the dissents can I discern how the court arrived at its finding of FACT (that the individual mandate compels commerce). Its finding of principle (that Congress cannot compel commerce) seems clear enough, but I can't for the life of me figure out how or where Roberts and the dissenters made the factual judgment that the uninsured, for example, are not somehow involved in commerce as passive recipients of health coverage they nonetheless neglect to pay for.

Roberts has one small paragraph saying the individual mandate's "proximity and degree to *subsequent* commercial activity is too lacking." Okay, subsequent commercial activity...but what about the government's contention that these people are passive recipients of coverage *today*? Roberts and the dissenters don't seem to ever address that question.

How then is a future court supposed to apply this rule to a future commerce case?

07/03/2012 08:04 AM

Like

NoTheoryofJurisprudence

The Court does not address the degree of deference owed to Congressional fact-findings either, at least not in any part of the opinion that I've read. We're left with "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. . . . Our deference in matters of policy cannot, however, become abdication in matters of law."

What you're discussing (whether a person is a passive recipient of health insurance) seems to be a factual matter. But the Court doesn't defer on matters of law. . . then what? Can the Court side-step factual determinations by declaring them legal issues?

07/03/2012 09:02 AM
in reply to jetpacksforall

Like

jetpacksforall

I don't see how they can. It's more accurate to say they simply ignored the question, partly by conflating it with the related question about the "inevitability" eventual entry into the health *care* market. Evidently the justices decided that by disposing of part of one question of fact, they had disposed of all other questions of fact. There's very little fact-finding of any kind in the decision. Surprising since the facts themselves were in dispute at least as much as if not more than the question of law.

07/03/2012 12:43 PM
in reply to NoTheoryofJurisprudence

Like

U.S. v. Henry, No. 11-30181 archived on August 30, 2012

NoTheoryofJurisprudence

Well that's a problem. There are several underlying unresolved issues that seems central to this entire case.

Questions like: "Is not-purchasing something an activity?" The answer might be philosophical, it could be empirical, legal, who knows. Your question: "Are people who do not purchase health care passively involved in interstate commerce?" That is either a factual or legal question depending on how phrased. Can the Court just bypass the factual response ("yes, because XX million Americans receive health care every year, and YY million can receive health care, etc.") by issuing a legal definition of "interstate commerce" that doesn't include "passively involved" people at all? Can it ignore the factual issue by stating that the result of the empirical truth is legally impossible ("if it were the case that Congress's factual conclusions were correct, there would be no limits on enumerated powers, which is an absurdity, therefore the stated facts are wrong or irrelevant...")? If so, what kind of facts does the Court defer to Congress on? How does it decide between facts that it can ignore under a legal test, and those that it

has to honor? As you've eloquently noted, it's very difficult to imagine the legal framework for making that kind of decision, which the Court hasn't helped because it simply glosses over these issues or ignores them all-together.

The only thing I can tell is that sometimes if the facts are in dispute, the Court can decide that some fact-findings by the government deserve deference, but others do not, so long as the Court can declare a factual dispute really a legal dispute.

07/03/2012 01:15 PM

Like

in reply to jetpacksforall

Economiser

I think you are conflating the market for health *insurance* with the market for health *care.* The mandate seeks to compel participation in the first market, not the second.

07/03/2012 08:11 AM

Like

in reply to jetpacksforall

jetpacksforall

Just to clarify the point a bit more, because the distinction confuses me, and even seemed to confuse many of the justices and parties to the case:

Part of the government's factual claim was that the uninsured today are passive beneficiaries of de facto insurance coverage. That is, the uninsured enjoy a right to demand medical care from any private hospital in the country. That right is analogous to the rights of a person carrying an insurance policy...in exchange for present consideration (premiums), the policyholder is entitled to make indemnity claims upon a private insurer's resources. In other words the uninsured are "covered," despite the fact that they do not pay for coverage. They enjoy a benefit today...they are able to go through their lives knowing that, should the worst happen and they fall critically ill or are catastrophically injured, private providers are required to have resources available to treat them. Meanwhile "present consideration" in the form of funds and resources held in readiness in the nation's hospitals is provided by other people: private policyholders, Medicare/Medicaid, private charity, etc. The uninsured are covered; everyone else pays the premiums to maintain that coverage.

I don't see this factual claim addressed anywhere by those justices who ruled against the Commerce Clause argument.

U.S. v. Henry, No. 11-30181 archived on August 30, 2012

07/03/2012 09:22 AM

Like

in reply to Economiser

Economiser

From an economic standpoint the market for health care in America is all screwed up. The government mandates that providers provide health care regardless of ability to pay. The government also creates huge incentives for employers to provide health insurance, and pre-paid care, in-kind to employees.

What results is a situation where virtually no one pays sticker price for health care and instead most services large and small are routed through some byzantine public or private cost pooling mechanism.

If these markets are conflated, it is because the government set it up that way over many years, by granting people a right (if you will) to health care even without the ability to pay, and by creating a health insurance behemoth that indirectly fronts the costs for those who cannot pay.

Therefore it's still the government regulating inactivity. It's as if they said:

- (1) Product X is very important for you, so we will mandate that suppliers give it to you for free
- (2) The costs of mandating that suppliers give you Product X for free will be borne by someone, and in fact they are borne indirectly by all those who buy Product X Insurance
- (3) As a result, you are deemed to be participating in the market for Product X Insurance

[Edit: Note that the subject person is standing still. He is "deemed to participate" in the market for health insurance even by taking no action. Hence, regulating inactivity.]

It's still regulating inactivity. But I agree that the Court could have spoken more on the point.

07/03/2012 09:44 AM

Like

in reply to jetpacksforall

jetpacksforall

Comments bit the dust for a while there.

Your rationale makes sense to me, though the court doesn't address it at all. In order to be

U.S. v. Henry, No. 11-30184, archived on August 30, 2012

applicable to future cases, it would have to be articulated as a rule..."passive" members of a market cannot be reached by the Commerce Clause, and you would need some more or less rigorous way to define passivity in this sense to have any hope of giving lower courts a chance to apply this rule to future challenges.

Congress could get most of the way around this rationale by requiring proof of purchase of insurance for anyone presenting at any hospital, clinic, pharmacy, blood donor drive, inoculation, etc. etc. That is, the moment anyone has an interaction with the health care system, they are at that point actively involved in the health care (and, necessarily, health insurance) markets, to a degree (and the degree might also be a matter of dispute, but regardless at that point Roberts' ruling becomes moot). (This would leave out the rare individual who has zero interaction with health care, but snare everyone else.)

This is of course much further than Congress went in enforcing the mandate in PPACA, but the fact that the remedy to the court's ruling requires so little effort indicates just how narrow and legalistic a point Roberts' commerce opinion really is.

U.S. v. Henry, No. 11-30181 archived on August 30, 2012

07/03/2012 12:13 PM Like
in reply to
Economiser

jetpacksforall

I think it's Roberts who makes that conflation. The government's position, in part, was that the uninsured are involved in the health *insurance* market by virtue of the fact that they are passively covered (for catastrophic care) via "cost-shifting." The court seems to have entirely ignored this factual claim (aside from the "concurrodissents").

[Edit: The gov't made a separate factual claim, that the uninsured are involved in the market for health *care* by virtue of the fact that their future consumption of health care is virtually inevitable. Ginsburg articulates this claim fairly clearly, I believe, and it is this "inference chain" that Roberts rejects as lacking proximity and degree to subsequent activity. He does not seem to address the separate question of coverage via cost-shifting.]

07/03/2012 08:24 AM

Like

in reply to Economiser 1 Like

hensonk

"If there's a "mess" here, it's a mess that Roberts created by saying "My discussion of the Commerce Clause is a holding of the Court" when it clearly isn't one."

The question of whether it is a holding is anything but clear.

07/03/2012 08:04 AM 1 Like

Like

Chris Newman

I thought the argument that it's a holding went something like this:

- 1) Only conclusions of reasoning necessary to reach the result are holdings.
- 2) The most straightforward reading of the statute, as well as the one consistent with the way it was described during its enactment, is that the mandate was not a tax but a regulatory mandate enforced by monetary penalties.
- 3) While the Court may construe the nature of a statute in a manner different from its obvious and proffered one in order to uphold it, the Court should not do this if there is a more straightforward ground on which to uphold it that does not require such a stretch.
- 4) Here, the most obvious asserted ground for the statute was the Commerce Clause. Upholding the statute, based on the Commerce Clause would not require the Court to construe the statute in ways that departed from its surface and officially proffered meaning.
- 5) If the statute could be upheld under the Commerce Clause, it would be improper to engage in the exercise of construction necessary to uphold it under the Taxing Power.
- 6) It was therefore necessary for the Court to conclude that the statute could not be upheld under the Commerce Clause before considering whether it could be upheld under the Taxing Power.

Now, I am not deeply enough immersed in the relevant jurisprudence to be able to say exactly how strong a norm 3) really is. But it seems to me that this is the pro-holding argument Roberts was trying to set up, and so this is the argument we should be debating. Whatever its ultimate merits, this argument does not, I think, run afoul of David's norm that a branch of government cannot have carte blanche to decide the limits of its own authority. If anything, this argument asserts that the Court's deliberations are rather tightly constrained in ways that force it to take seriously what Congress portrays itself as doing before indulging its own creative construction.

07/03/2012 08:00 AM 2 Likes

Like

Guest

1) *Only conclusions of reasoning necessary to reach the result are holdings.*

Who decides "necessity"?

07/03/2012 10:03 AM
in reply to Chris Newman

Like

NYlawyer

The deciding vote -- here, Roberts.

07/03/2012 02:06 PM
in reply to Guest

Like

 **Lee**

This makes perfect sense. In Roberts' opinion, the conclusion that the mandate is within the taxing power depends on it not being within the commerce power, hence the commerce conclusion is a necessary step on the path to the taxing conclusion, hence it's part of the holding.

The only problem is whether any of the justices, apart from Roberts, can be said to have joined in this line of reasoning.

07/03/2012 08:36 AM
in reply to Chris Newman 1 Like

Like

 **loki_13**

That only reads that way because he presents it that way. The government presented that argument in the alternative. If Roberts had listed all of the enumerated powers, and explained why they didn't support the mandate, would that also be part of the holding under the same basis? If Roberts had added in a section stating that he was compelled to put in a new First Amendment test and figure that out before reaching his decision, is that part of the holding? What about if he needed to go through the factors in determining his shopping list, and why they would apply in authorizing a search warrant?

07/03/2012 09:05 AM
in reply to Lee

Like

Chris Newman

The CC clause was presented and argued as the government's primary basis for this law. It wasn't an arbitrary choice on Roberts' part to present it that way.

U.S. v. Henry, No. 11-30181 archived on August 30, 2012

What would be wrong with a doctrine (which, for all I know, may exist) saying the Court may only uphold a law on the basis of a constitutional power actually asserted by the government? That would rule out the games you hypothesize.

07/03/2012 09:48 AM
in reply to loki_13

Like

Economiser

The government presented three arguments, including the tax power.

The joint dissent says: Fails CC and tax.

Ginsburg et al says: Passes tax; no need to analyze CC.

Roberts says: First we must analyze CC, and since it fails, let's look at tax, which it passes.

The result is that it is constitutional. The necessary steps to get there are that five justices believe it passes tax. We can stop there.

The fact that one justice (and only one justice) believes that we must first jump through the CC hoop is interesting but not necessary to get to five votes on tax. It is the embodiment of dicta.

U.S. v. Henry, No. 11-30181, archived on August 30, 2012

07/03/2012 10:07 AM
in reply to Chris Newman

Like



loki_13

It's called arguing in the alternative. No big deal. Guys in my high school used to do it all the time.

By the way, it's not a game. If you want an easy-to-understand example, think of this:

A hits B with a car.

B claims that A intentionally hit him with his car (a battery), or, in the alternative, A negligently hit him. Either way, A hit him. Different theories of liability.

Or another example. Say you're arguing someone is an employee. The court (and this happened recently) says that under a federal

law, there's a federal statutory employer/employee relationship. However, this is a state-law cause of action, so it actually has to analyze the state law agency principles, under which it also finds an employer-employee relationship.

Clear?

07/03/2012 10:05 AM
Like
in reply to Chris Newman

gpurcell

This is a good statement of the logic.

Again, its like Bakke. Of the five votes to support AA, only the opinion bases its rationale on academic freedom and the social value of diversity. The other four votes supporting AA explicitly reject that portion of his finding and argue that compensatory justice is sufficient rationale. Even though Powell's opinion was only for himself, the diversity rationale has been the legal fiction justifying AA ever since and that's why it has permeated our entire discourse.

07/03/2012 08:32 AM
in reply to Chris Newman
Like

K Chen

The problem is that if you look at the portions of Chief Justice Robert's opinion that are also the opinion of the Court, you see the following line of reasoning:

1. This is not a tax for purposes of the Anti injunction act
2. But it IS a Tax for purposes of Constitutional power
3. Therefore it is constitutional.

Which, on its own, is sufficient to make a holding. Therefore, everything else is dicta. The Chief Justice didn't get 5 votes for the rest of his opinion which establishes #2 being contingent on the Commerce Clause analysis, even if it is accepted doctrine, so it isn't part of the chain of reasoning. Or such is my argument.

07/03/2012 08:31 AM
in reply to Chris Newman 1 Like
Like

Richard

I went to a Tier 10 law school back in the '70s. I was taught the difference

between "what the court said" and "what the court did."

You can remove from all the opinions everything that was written about the Commerce clause, and the result would be the same. The madate was upheld as a tax.

07/03/2012 07:30 AM 3 Likes

Like

tparty23

As you may recall, the destruction of the tea at the Boston Tea Party was an act of non-violent protest against both the British Crown as well as to the East India Company, which held the monopoly on all the tea that the colonists were forced to buy.

There was no 'free market' in tea. The colonists were compelled to buy only the tea supplied by the Crown and its aristo-owned subsidiary, the East India Company. Thus, both the Crown and the Company profited from the monopoly.

Additionally, due to the Currency Acts of 1751, 1764, and 1773, colonial scrip was no longer used as a mechanism of payment for the tax and the tea, thus squeezing the money supply of British Pounds, gold and silver, and Spanish Dollars.

To quote Ben Franklin:

All debts public and private could only be paid with "proper" English money, but the issuance of it into circulation in the colonies was stringently controlled by the Bank of England. Benjamin Franklin described the result: "In one year, the conditions were so reversed that the era of prosperity ended, and a depression set in, to the extent that the streets of the Colonies were filled with unemployed." Source: The Silver Bomb, [McDonald & Whitestone]

The result of all this pre-Revolution taxation abuse was the inculcation into our Constitution the notion of limited taxation powers granted to Congress, in three forms only:

1. A direct tax, which must be apportioned, 2. An indirect tax [such as an excise or 'event-oriented' tax] which is voluntary, like a sales tax. and 3. by the 16th Amendment, an Income Tax.

A new tax has been invented, we can call it the Roberts Tax on politically incorrect behavior.

By judicial fiat, the Roberts Court has created and conferred an extra-Constitutional unlimited taxation power upon the Congress.

This new power is exactly like the taxing power of old; the power of applying a mandatory, non-apportioned direct tax upon all citizens, based upon an indirect-tax construct, that enriches a set of private, government-sanctioned monopolies as well as the government itself, and sets up a bureaucracy that can freely grant exceptions and immunities to politically connected favorites.

U.S. v. Henry, No. 11-20181 archived on August 30, 2012

The lawless injustice of the Roberts decision and its future destructive consequences are immeasurable.

Beyond the scope of the Affordable Care Act [ACA], is now the standing taxing authority granted to Congress to duplicate this taxing methodology to any part of human behavior that can be imagined.

The ballot box is now considered the mechanism that can be best used to reverse an out-of-control and lawless government bent upon trashing the Constitution.

But even with Conservative and principled office holders, a stretch for all, the Roberts decision would still stand, and our Republic would remain damaged and altered.

A Constitutional Amendment to correct this offense would be inadequate, since the Roberts Court has thrown the Rule of Law into the gutter. There was no- and is no- authority for Roberts to do what he did, yet he did it; and it is now considered "law".

07/03/2012 08:39 AM in reply to Richard

Like



loki_13

All of that is interesting, except that it is wrong.

Congress passed a law. A specific part of the law (the "mandate") was held to be constitutional under the enumerated taxing power. That is all.

U.S. v. Henry, No. 11-30181 archived on August 30, 2012

07/03/2012 09:14 AM

Like

in reply to tparty23

cubanbob

Perhaps you can tell us what kind of a tax is it? Income, apportioned direct tax or indirect tax? Saying its a tax doesn't tell us what kind of a tax it is.

So far, the only presumption is that the insurance premium payment is the tax and the penalty is for not paying the insurance premium invoice. So what has the court done? Turn United Health into a taxing sovereign?

07/03/2012 07:18 PM

Like

in reply to loki_13

NYlawyer

But that is false. According to Roberts, he needed to decide the commerce clause issue -- and his vote decides the matter. I can understand criticism of Roberts; but I can't understand why people are

ignoring what he held that he held.

07/03/2012 07:40 AM in reply to Richard

Like



Richard

But he didn't need to decide the commerce clause issue. If no party had ever raised or briefed or argued the commerce clause, the result would have been the same.

07/03/2012 08:57 AM

Like

in reply to NYlawyer 1 Like

NYlawyer

That's not right -- he decided that he needed to decide it. Your argument is that if you disagree with a decision, it's not precedent.

07/03/2012 02:09 PM

Like

in reply to Richard

Queen_Elizabeth_II

And the four Justices who joined the Ginsburg concurrence said the court did *not* need to decide the Commerce Clause issue, and their votes decided the matter just as much as Roberts's did.

More importantly, we have an Opinion of the Court on the Tax Clause in Section III-C. That opinion analyzes the Tax Clause on its own terms. There is absolutely no reference to construction in avoidance.

In other words, Roberts says construction in avoidance is necessary, but the opinion goes on to interpret the statute and the Tax Clause *without* using construction in avoidance. Ergo, the construction in avoidance stuff was not necessary to the holding.

07/03/2012 08:33 AM

Like

in reply to NYlawyer 1 Like

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U.S. v. Henry, No. 11-30181 archived on August 30, 2012