CASE NOTE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS V SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES SUPREME COURT OF THE UNITED STATES OF AMERICA
28 JUNE 2012, 567 US___, 132 S CT 2566, 183 L ED 450 (2012)

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To resolve conflicting decisions among the United States Court of Appeals for the Eleventh, Sixth, Fourth and District of Columbia judicial districts concerning the validity of recently enacted Federal legislation relating to health care,[1] the United States Supreme Court on 28 June 2012 upheld key provisions of the Patient Protection and Affordable Care Act of 2010[2] (the Affordable Care Act or ACA). In the popular press, this law was known as Obamacare – a national healthcare plan for the United States. But the reality is something far more complex: a 150-page decision that reflects a deeply divided court and a complex law in which key provisions have been upheld on the narrowest of grounds, and with one central provision declared unconstitutional. Of the nine sitting justices, it is fair to say that the only member of the Court satisfied with all aspects of the decision was Chief Justice Roberts, who was the author of the majority position on key issues and was the only member of the court aligned with a majority on all of the matters decided.

The ACA dramatically alters the health care landscape in the US while preserving the primary reliance on the private sector for funding medical services. Prior to its enactment, health care in the US was provided by a complex arrangement of Federal and State governments, private insurance companies and individuals. In a nutshell: the Federal government funds Medicare which provides comprehensive health care benefits to Americans 65 years and older. Medicaid is a complex Federal-State arrangement, dating back to the Nixon Administration, by which the Federal and State Governments fund, and the States administer, health care for disadvantaged children and families with children. It does not provide benefits for unattached indigent adults. The majority of Americans, approximately 170 million in 2009, obtain health cover through private insurance plans either provided by employers or through private purchase.[3] While Medicare, Medicaid, and private cover provided health care benefits

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1 *Florida v United States HHS*, 648 F.3d 1235 (11th Cor Fl 2011); *Thomas Moore Law Center v Obama*, 651 F 3d 529 (6th Cir 2011); *Liberty University, Inc v Geithner*, 671 F 3d 391 (4th Cir 2011); *Seven-Sky v Holder*, 661 F 3d 1 (DC Cir 2011).

2 *The Patient Protection and Affordable Care Act*, Pub. L. 111 – 148, 124 Stat. 119 – 124 (2010).

3 *National Federation of Independent Business v Kathleen Sebelius, Secretary of Health and Human Services*, 132 S Ct 2566, 2610 – 2611 (Ginsberg, J) ('*National Federation v Sebelius*).

to a large majority of citizens, there were many millions of people, perhaps as high as 50 million, who did not have health insurance because they were either not eligible for government benefits or could not afford private cover.[4]

Health care in the United States is very costly. For example, in 2010 the average American incurred $7000 in medical expenses.[5] Health care is a major component of the American economy, costing $2.5 trillion in 2009.[6] By way of example, the cost of treating a heart attack for the first three months exceeded $20,000.[7] On the other hand, the health care that can be delivered is frequently exceptional and the American commitment to medical research is unparalleled in the world. For example, spending on medical research amounted to about $140 billion in 2009[8] which, on a per capita basis, works out to more than three times what Australia spends and more than ten times what is spent in Germany.[9]

As medical costs continue to increase, there has been an interest among some Americans for government funded health care. The first comprehensive response came from the State of Massachusetts, which enacted a mandatory health insurance plan for residents.[10] Under the Massachusetts plan, sometimes derisively known as 'Romneycare' after Governor Mitt Romney (2003-2007) who signed the plan into law, all residents of Massachusetts must have private health insurance or, in the alternative, pay a tax to the State to help cover health costs for the uninsured. As to persons who cannot afford minimal health cover, the State provides the funding. The result has been that 98% of Massachusetts residents appear to have been protected by a health care plan.[11] While significantly more comprehensive, the controversial individual mandate to purchase health insurance in the Federal ACA is very similar to the mandate contained in the Massachusetts legislation.

Under the ACA individual mandate, individuals under 65 years of age must purchase private health insurance unless they cannot afford it.[12] If they cannot afford health insurance, they will be covered by a greatly expanded Medicaid program which will be 90% federally funded.[13] If individuals can afford health insurance and choose not to purchase it, they will pay a penalty on their income taxes.[14] Under the expanded Medicaid program, the States are compelled to participate or risk losing all Medicaid reimbursements – including reimbursements for persons traditionally covered under

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4 Ibid.
5 Ibid.
6 Ibid 2609.
7 Ibid 2610.
8 Research America, *2010 US Investment in Health Research* <www.researchamerica.org/uploads/healthdollar10pdf> at 25 Sep 2012.
9 Research Australia, *Trends in Health and Medical Research Funding* (April 2009) <http://researchaustralia.org/publications/trends-statistics.html> at 25 Sep 2012.
10 *Massachusetts Health Care Insurance Reform Law*, Massachusetts General Laws, Chapter 111M, section 2 (West 2011).
11 Jerry Geisel, 'Massachusetts' Insured Rate Hits 98.1%: Analysis', *Business Insurance*, 14 December 2010 http://www.businessinsurance.com/article/20101214/BENEFIT> at 1 Sep 2102.
12 26 USC 5000A.
13 42 USC 1396c, d.
14 26 USC 5000A(b)(1).

Medicaid such as children.[15] In response, a number of States challenged the constitutionality of the ACA.[16]

The constitutional challenges focused on the scope of federal rights of regulation. Like Australia, the Federal Government of the US is one of enumerated powers – Congress may only legislate as authorised in Article 1 of the Constitution. As stated by the Chief Justice:

> If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.[17]

The specific issues regarding the constitutionality of the ACA involved the fundamental question of whether the legislation was encompassed by the Article 1 powers of Congress. Specifically, the two major questions for resolution were: (1) Does the Federal Government have the power to impose a penalty on citizens who refuse to purchase health insurance? (2) Does the Federal Government have the right to withhold all Medicaid reimbursements from States that do not participate in the expanded Medicaid program? The ultimate answer of the Supreme Court in this decision was 'yes' to question one and 'no' to question two.

The current Supreme Court is divided roughly between justices who are commonly perceived as conservative or liberal, with Justice Anthony Kennedy floating between the two wings depending on the issue. The conservative Justices include Chief Justice Roberts and Associate Justices Scalia, Thomas and Alito, while the liberal wing counts Associate Justices Ginsburg, Breyer, Sotomayor and Kagan. However, in this decision, Justice Kennedy was firmly aligned with the conservative wing and it was the Chief Justice who crafted the 5-4 majority.

The linchpin of the ACA was the *individual mandate* – the portion of the law that imposed a financial penalty on Americans who failed to purchase health insurance even though they could afford the cover. Without the financial penalty, healthy individuals could decline to purchase insurance until such time as they became ill because the ACA also guaranteed insurance for those with pre-existing ailments. The underlying concept was that through the financial penalty, Americans who refused to buy private health cover would still be compelled to help share the cost of health insurance.[18] This penalty is referred to as the 'shared responsibility payment' in the legislation.[19] The mandate was also the most controversial part of the ACA. It drew a great deal of attention in the early campaigns of presidential aspirants in the 2012 election, with the President supporting the legislation and the Republican opponents generally lambasting it. Even the ultimate Republican nominee, Governor Romney, who had enthusiastically supported the 2006 program in Massachusetts, attempted to distinguish the Massachusetts individual mandate from the ACA.[20] From a

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15 42 USC 1396c.

16 For example, twenty-five States joined in the Florida litigation. See *Florida v United States HHS*, 648 F 3d 1235 (11th Cir 2011).

17 *National Federation v Sebelius*, 132 S Ct 2566, 2577 (2012).

18 *National Federation v Sebelius*, 132 S Ct 2566, 2585 (2012).

19 26 USC 5000A(b)(1).

20 While the success or failure of this political 'two-step' is a matter for American voters, the controversy concerning the individual mandate is without question.

constitutional standpoint, the issue was clear: does the Constitution authorise the Federal Government to penalise citizens for refusing to purchase private health insurance? Would such a holding open the door to Congress legislating on almost anything and thereby eviscerating the doctrine of enumerated powers?

In defence of the ACA, the Federal Government relied on three constitutional grants of power:
The Commerce Clause[21]
The Necessary and Proper Clause[22]
The Taxation Power [23]

The primary argument relied on by the Government and the issue which occupied the bulk of the opinions of the Court was the Commerce Clause issue.[24] The Commerce Clause authorises Congress to 'regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.'[25] The Commerce Clause has been routinely utilised by the Supreme Court since the mid-20th century to validate the ever-expanding role of the Federal Government.[26] Indeed, in her dissent, Justice Ginsburg cited Commerce Clause cases for the proposition that, even if an activity is purely local and does not involve commerce, it is subject to Federal legislation if in the aggregate the activity exerts a substantial effect on interstate commerce.[27]

In the 1960s, the Commerce Clause provided the constitutional engine to permit some of the major civil rights legislation to pass muster. Writing for the majority, Chief Justice Roberts warned that expansion of the Commerce Clause power to authorise the individual mandate would justify a 'mandatory purchase to solve almost any problem.'[28] However, in support of Commerce Clause authority for the ACA, Justice Ginsburg wrote in dissent that '[s]ince 1937, our precedent has recognized Congress' large authority to set the Nation's course in the economic and social welfare realm.'[29] In response to the proponents of Commerce Clause arguments, Justice Scalia expressed his fear that, if the commerce power was found to empower the ACA, the result would be that the Commerce Clause would 'make mere breathing in and out the basis for federal prescription and ... extend federal power to virtually all human activity.'[30] Apart from the breathing hyperbole, the Ginsburg group (Sotomayor, Breyer and Kagan JJ) probably would agree that the Commerce Clause power in 21st Century is exceedingly broad and ís dependent upon practical considerations, including actual experience.'[31]However, neither the Ginsburg nor Scalia arguments

21 US Constitution, Article 1, Section 8, clause 3.
22 Article 1, Section 8, clause 18.
23 Article 1, Section 8, clause 1.
24 The opinions were authored by Chief Justice Roberts and Justices Ginsburg, Scalia and Thomas. All of them devoted the greatest attention to the Commerce Clause issue.
25 Article 1, Section 8, clause 3.
26 One of the seminal decisions cited by the Court was *Wickard v Filburn*, 317 US 111, 63 S Ct 82, 87 L Ed 122 (1942) in which the Court upheld the Commerce Clause as permitting the Federal Government to regulate the amount of wheat grown by farmers for their personal use on the grounds that, in the aggregate, the wheat used by farming households would have an impact on the national wheat market.
27 *National Federation v Sebelius*, 132 S Ct 2566, 2616 (2012).
28 Ibid 2588.
29 Ibid 2609.
30 Ibid 2643.
31 Ibid 2616.

could muster more than four votes. The deciding voice was that of the Chief Justice who, writing for the majority, said that the Commerce Clause regulates economic activity rather than economic inactivity. In the case of the ACA, the penalty was to be imposed on individuals who choose not to purchase health insurance which, to the Chief Justice, amounted to inactivity:

> The individual mandate, however, 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.[32]

The Chief Justice further stated:

> The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions [purchase healthcare]. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.[33]

Joined by Justices Scalia, Kennedy, Thomas and Alito, the Chief Justice refused to extend the commerce power to the ACA. The significance of this restraint on Commerce Clause power should not be under-estimated and it is not at all surprising that this holding elicited such an impassioned response from the dissenters.[34] The majority has imposed an outer boundary on the commerce power – a boundary that may have more implications than the validity of the ACA. Future Presidents and Congresses will need to be considerably more scrupulous about extending federal regulatory control based on the commerce power than their predecessors, who may have simply assumed that if an activity touches interstate commerce, Commerce Clause power will exist.

The Government's second argument for upholding the individual mandate was predicated on the Necessary and Proper Clause, which authorises Congress to 'make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers.'[35] The Chief Justice observed that the Necessary and Proper Clause only authorises legislation that furthers the aims of one of the enumerated powers and does not license any substantive power beyond those specifically enumerated in the Constitution.[36] Having rejected the Commerce Clause substantive power, the Chief Justice rather summarily dismissed the Necessary and Proper Clause argument on the grounds that, even if the individual mandate was necessary to the effectiveness of the ACA, such an expansion of federal power was 'not a "proper" means for making those reforms effective.'[37] He was joined in this position by Justices Kennedy, Scalia, Thomas and Alito.[38] Dissent was provided by Justice Ginsburg, who was joined by

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32 Ibid 2587.

33 Ibid 2591. For this reason, the Massachusetts legislation did not present constitutional questions.

34 Ibid. Within the restrained language of Supreme Court Justices, Justice Ginsberg's reference to the Chief Justice's interpretation of the Commerce Clause as 'newly minted', 'novel' and warranting 'disapprobation' amounts to rather strong language.

35 Article I, Section 8, clause 18. The Necessary and Proper Clause is analogous to Section 51(xxxix) of the *Commonwealth of Australia Constitution Act.*

36 *National Federation v Sebelius,* 132 S Ct 2566, 2591.

37 Ibid 2592.

38 Ibid 2646-2647.

Justices Breyer, Sotomayor and Kagan.[39] At this point, the ACA appeared doomed. However, one Government argument was still standing – the power to tax.

Under Article I, Section 8, clause 1 of the Constitution, as amended, Congress has the power to 'lay and collect Taxes.' However, the ACA was not written in terms of a tax but in terms of a penalty that must be paid if health insurance is not purchased. As its fall-back argument, the Government asserted that, just because the assessment for not purchasing insurance was termed a penalty, this did not mean that it does not constitute a lawful tax. The Chief Justice was receptive to this argument. He noted that the penalty was paid and assessed by the income tax authority – the Internal Revenue Service (IRS) – and that the amount of penalty was determined by income level:

> Under the mandate, if an individual does not maintain health insurance, the only consequence is that he must make an additional payment to the IRS when he pays his taxes ... That, according to the Government means the mandate can be regarded as establishing a condition – not owning health insurance – that triggers a tax – the required payment to the IRS. Under that theory, the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the government taxes, like buying gasoline or earning income. And if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress's constitutional power to tax.[40]

The Chief Justice stated that taxation was frequently used to promote socially desirable activity such as the deduction allowed for interest paid on home mortgages and professional education.[41] Viewed through the taxation lens, the so-called penalty is but an item of tax that does not have to be paid if the taxpayer engages in a certain activity, namely, purchase of health insurance. The Chief Justice concluded that the individual mandate was a constitutionally lawful tax:

> The ACA's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness,[42]

Chief Justice Roberts was reluctantly joined by Justices Ginsburg, Breyer, Kagan and Sotomayor to craft a five vote majority upholding the individual mandate.[43] The liberal justices were less than happy because they felt that the individual mandate was authorised by the Commerce Clause power and not just the taxation power. This is significant because under the Commerce Clause, the Federal Government is accorded broad regulatory rights whereas under the taxation clause, the Government is more or less limited to simply imposing monetary taxes. Justice Ginsburg's unhappiness was clearly stated in her observation that the Chief Justice's interpretation of the Commerce Clause 'makes scant sense and is stunningly retrogressive.'[44] The Chief Justice even acknowledged that the taxation authority conferred a significantly narrower constitutional authority than would be found under the Commerce Clause:

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39 Ibid 2609, 2626-2627.
40 Ibid 2593-2594.
41 Ibid 2599.
42 Ibid 2600.
43 Ibid 2609.
44 Íbid 2609.

> Once we recognise that Congress may regulate a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear. Congress may simply command individuals to do as it directs ... By contrast, Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. If a tax is properly paid, the Government has no power to compel or punish individuals subject to it.[45]

While the liberal Justices were not satisfied with the Chief Justice's argument, they could take comfort in the upholding of the individual mandate's constitutionality. Not so for Justices Scalia, Kennedy, Thomas and Alito. In a lengthy opinion, Justice Scalia was very strident in his opposition to the constitutionality of the mandate. With respect to the taxation power argument, he focused on the point that the legislation speaks in terms of a 'penalty' and not a tax:

> Our cases establish a clear line between a tax and a penalty: '[A] tax is an enforced contribution to provide for the support of government; a penalty…is an exaction imposed by statute as punishment for an unlawful act.'... We have never held that any exaction imposed for violation of the law is an exercise of Congress's taxing power – even when the statute calls it a tax, much less when (as here) the statute repeatedly calls it a penalty. When an act adopts the criteria of wrongdoing and then imposes a monetary penalty as the 'principal consequence on those who transgress its standard, it creates a regulatory penalty, not a tax.[46]

Although four Justices were agreeable to joining the Chief Justice in finding that the mandate was constitutional under the Taxation Power, this did not resolve the validity of the individual mandate because of special legislation relating to judicial challenges to tax laws. The Federal *Anti-Injunction Act* prohibits any lawsuit to restrain the assessment or collection of any tax.[47] Under this statute, the litigation challenging the ACA would not confer jurisdiction on the courts. Rather, the tax for not purchasing mandated health cover would first need to be paid and then followed by a suit for refund. Perhaps Chief Justice Roberts resolved the conundrum by concluding that a tax, as defined by the Constitution under Article 1, is not always a tax but sometimes constitutes a penalty under legislation. That is, the tax paid by those not having health cover is a tax for constitutional purposes but a penalty for purposes of the *Anti-Injunction Ac*t. He explained that whether the payment was constitutionally lawful as a tax does not depend on labels imposed by Congress but on judicial interpretation of the Constitution and the legislation. But whether the *Anti-Injunction Act* applied was to be determined by reference to how the legislation in question had been labelled by Congress:

> It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress's choice of label on that question. That choice does not, however, control whether an exaction is within Congress's constitutional power to tax.[48]

Without much ado and perhaps biding their peace, Justices Ginsburg, Breyer, Sotomayor and Kagan joined the Chief Justice.[49] And, to make this the only unanimous point in the entire decision, Justices Scalia, Kennedy, Thomas and Alito

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45 Ibid 2600.
46 Ibid 2651-2652.
47 28 USC 7421(a).
48 *National Federation v Sebelius*, 132 S Ct 2566, 2594.
49 Ibid 2609.

also agreed that the Anti-Injunction Act did not apply – the conservative wing thus holding on the ground that the penalty was in any event a penalty and not a tax.[50]

The ACA also provided for substantially broadening the range of persons covered by the existing Medicaid program. The remaining constitutional issue concerned whether this program, known as Medicaid Expansion, was a lawful exercise of Federal power under the Spending Clause of the Constitution.[51] Medicaid has always been a voluntary program, with Congress providing part-funding to States that want to provide Medicaid. All fifty States participate in the program and Medicaid works to provide healthcare for children and families, but not unattached adults, through a combination of State and Federal funding. Under the ACA, the scope of Medicaid under Medicaid Expansion is to expand dramatically and provide benefits for virtually all citizens who are not required to purchase health insurance and who are not covered by Medicare.[52] Under the ACA, the Federal Government will initially provide 100% of the funding for Medicaid Expansion with the contribution dropping back to 90% over a period of a few years.[53] Similarly, if a State declines to participate in Medicaid Expansion, the Federal Government will have the right to not only withhold payments for Medicaid Expansion but also to withhold all Medicaid reimbursements.[54]

For the ACA to provide something close to universal healthcare, it is essential that persons not required by the individual mandate to purchase private health cover be provided with some other form of health care. While seniors are covered by existing Medicare, low income individuals, especially adults, are not always covered by existing Medicaid. Medicaid expansion is designed to provide health benefits to the many millions who cannot afford health insurance and do not have any benefits under the existing Medicaid programs.[55] The current Medicaid program, even with Federal reimbursements, is one of the most expensive programs offered by the States – amounting to over 20% of the average State's total budget.[56] However, Federal funding reimburses 50-83% of those costs and is thereby a major component of the State expenditure.[57] The threat of losing federal funding is obviously a matter of substantial concern to the States. Medicaid Expansion is projected to add $100 billion annually to existing Medicaid expenses.[58]

The Spending Clause of the Constitution has been interpreted to allow Congress to provide funds to the States and to condition the grant upon usage of the funds in ways that Congress could not otherwise compel.[59] In other words, while there may not be an enumerated power authorising Congress to compel States to do certain things, it is permissible for Congress to offer funding to States on the condition that the funds are used for certain purposes.[60] In this way, Congress may influence State policies and

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50 Ibid 2656.

51 The Spending Clause authorizes Congress to pay the Debts and provide for the …general welfare of the United States: Article 1, Section 8, clause 1.

52 *National Federation v Sebelius*, 132 S Ct 2566, 2601.

53 Ibid.

54 Ibid 2603.

55 Ibid 2601, 2606.

56 Ibid 2604.

57 Ibid.

58 Ibid 2601.

59 Ibid.

60 Ibid 2602.

programs. But, influence is one thing and compulsion is another. Keeping in mind that the Federal Government is acting outside its enumerated powers, it can only influence or persuade States with respect to Medicaid or Medicaid Expansion. Some of the States raised the constitutional challenge that by threatening to withhold all Medicaid funding, the Federal Government was compelling the States to adopt Medicaid Expansion.[61]

Spending Clause arguments focused on a technical point – whether Medicaid Expansion was a new program or just an adjustment of an existing program. If Medicaid Expansion was viewed simply as a modification to existing Medicaid, it would likely be found to be lawful within the Spending Power. However, if taken to be something new, it could be viewed as unconstitutional pressure on the States to accept policy changes. Chief Justice Roberts wrote:

> The States contend that the expansion is in reality a new program and that Congress is forcing them to accept it by threatening the funds for the existing Medicaid program. We cannot agree that existing Medicaid and the expansion dictated by the ACA are all one program simply because Congress styled them as such.[62]

The Chief Justice concluded that Medicaid Expansion accomplished 'a shift in kind, not merely degree'[63] and that 'this statute is clearly beyond [the line between persuasion and compulsion].'[64] Consequently, the ability of the Federal Government to withhold all Medicaid funding unless a State accepts the terms of Medicaid Expansion was found to be unconstitutional. The Chief Justice was joined by Justices Scalia, Kennedy, Thomas and Alito as well as two deserters from the liberal camp (Justices Breyer and Kagan) with the result that there was a 7-2 vote for unconstitutionality, with only Justices Ginsburg and Sotomayor willing to uphold the law on the grounds that the States have no entitlement to receive funding and enjoy only the opportunity to accept funds on Congress's terms.'[65]

Having found a portion of the ACA unconstitutional, the remaining issue was whether the entire Medicaid Expansion legislation fails or whether the unconstitutional part could be severed. Again the deciding voice was that of the Chief Justice who noted that Chapter 42 of the United States Code which includes Medicaid Expansion (42 USC 1396c) also contains a severability clause (section 1303), which states that if any provision of a chapter is held to be invalid, the remainder shall remain unaffected. Again, there was a 5-4 majority, with the Chief Justice being joined by Justices Ginsburg, Breyer, Sotomayor and Kagan.

Besides requiring a scorecard to keep track of the voting on the various issues, one may inquire about the constitutional effect of this decision, both as to healthcare and future issues. From the perspective of the ACA, individuals who earn in excess of 133% of the federal poverty level will now be required to purchase private health insurance or pay additional tax.[66] As for the millions of persons below this income

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61 Ibid 2601.
62 Ibid 2605.
63 Ibid.
64 Ibid 2606.
65 Ibid 2630.
66 The poverty level set by the US Department of Health and Human Services for a family of four persons in 2012 is US$ 23,050: *Federal Register,* Vol 77, No 17, Jan 26, 2012, pp 4034-4035.

level, the future is uncertain. While they would receive health care under Medicaid Expansion, it remains to be seen whether the States will adopt Medicaid Expansion. The Governor of one large State, Texas, has already indicated that Texas will not be participating.[67] However, it is likely that with the Federal commitment of an additional $100 billion annually for Medicaid Expansion, the States will be hard pressed to refuse – and even Governor Perry of Texas may only have been posturing politically. If the States agree to Medicaid Expansion, the US will have achieved something approaching universal healthcare but, like the rest of the US healthcare delivery system, it will remain a complex mixture of State, Federal and private funding. Whether it can achieve any efficiencies in the delivery of health care remains the undecided question and it is in this respect that the limited constitutional grounds for the ACA's validity may pose serious obstacles.

A major challenge with health care in the US is the high cost associated with delivery including unregulated use of specialists, diagnostic testing and expensive technology. In Australia, most aspects of these issues are dealt with through Medicare administration and the result is an efficient, though not perfect, delivery system. Had the ACA been sustained under the Commerce Clause, the proverbial floodgates would have been opened for additional and pervasive federal regulation. For this reason, Justice Ginsburg and her allies were justifiably less than enthusiastic about the Chief Justice's reliance on the narrow grant of power under the Taxation Clause. While a majority upheld the law, it did so by the narrowest of grounds – so narrow that it will be difficult for the Federal Government to legislate much beyond the current legislation. Unless the Commerce Clause power is invoked, the US may have something less than a universal healthcare system. To this extent, the liberal wing may have won the battle, but, at least for the time being, lost or at least suffered a serious setback in the war. At the end of the day, perhaps only the Chief Justice was fully satisfied with the eight Associate Justices having to be satisfied with diverse bits and pieces of the legislation.

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67 Daniel Borunda, 'Governor Rick Perry rejects Medicaid expansion' *El Paso Times*, 10 July 2012, <http://www.elpasotimes.com/news/ci21040962/governor-ricl> at 10 Oct 2012.

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