Chapter 14
Supreme Court Review of the ACA and Political Gamesmanship

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On the eve of the June 28, 2012, announcement of the Supreme Court's decision on the Affordable Care Act (ACA), official Washington DC was in a state of nervous calm. Two years, three months, and five days after the Act was signed into law, the decision that would determine the fate of key provisions intended to expand health insurance coverage to tens of millions of Americans was finally at hand. The Congress and the White House knew the decision could weaken the expansion of insurance coverage envisioned in the law and have a long-lasting effect on the public's view of healthcare reform in the USA. Healthcare industry stakeholders, their lawyers, and their consultants had been discussing for months all the possible permutations of the court's ruling in *National Federation of Independent Business v. Sebelius*.[1]

Before the oral arguments on March 26–28, 2012, a tenuous consensus had formed inside the Beltway that the Supreme Court would narrowly uphold the provisions of the law that were under review. Many constitutional lawyers, including a few conservative ones, had argued publicly that the Constitution was broad enough to sanction the insurance-related provisions that Congress wrote into the law. More confidence in a favorable court ruling prevailed with respect to a provision of the ACA that set the terms of federal support for an expansion of coverage under Medicaid.

After the oral arguments, which were widely felt by the law's supporters and critics alike to be a negative event for the ACA, those sentiments changed. As spring wore into summer, the view increasingly took hold that the Supreme Court would

[1] The National Federation of Independent Business, a lobbying group, and 26 states were the plaintiffs in the case, and Secretary of Health and Human Services Kathleen Sebelius, as the holder of the cabinet post whose responsibilities lay at the heart of the new law, was the nominal defendant.

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strike down the ACA provisions under legal challenge or perhaps even strike down the entire law. The court's decision revolved around four constitutional issues. The most important issue concerned the ACA's individual mandate, with a financial penalty for individuals who failed to buy health insurance. This penalty would be regulated and assessed by the Internal Revenue Service like a tax, but it was not referred to as a tax in the text of law. The key question at hand was whether the mandate exceeded Congress's authority, under the Constitution's Commerce Clause, "To regulate Commerce … among the several States," and its authority, under the Necessary and Proper Clause, "To make all laws which shall be necessary and proper for carrying into Execution the … Powers vested … in the Government of the United States."

If Congress had written the individual penalty as a tax, the law clearly would have fallen under its taxing powers, and this aspect of *National Federation of Independent Business v. Sebelius* would never have made its way through the lower court system to the Supreme Court. But because of President Obama's promise of no new taxes on the middle class during the 2008 presidential campaign, the Democratic-controlled Senate attached a "penalty" to the mandate rather than a "tax."

In addition, the 26 state attorneys general who filed briefs against the ACA did so on the grounds that the terms of the ACA provision to expand health insurance coverage under Medicaid was impermissibly coercive. States that chose not to accept the expansion faced a total loss of federal Medicaid funds at the discretion of the Secretary of Health and Human Services. Prior to oral arguments, most constitutional lawyers did not anticipate that this challenge would get very far, as the Supreme Court had long recognized Congress's authority to determine how federal funds were to be distributed to states.

The attorneys general used very powerful and colorful language in petitioning the Supreme Court to rule against the terms of the Medicaid expansion. One claim was that the possible loss of all Medicaid funds made the federal government like "a pickpocket who takes a wallet and gives the true owner the 'option' of agreeing to certain conditions to get it back or having it given to a stranger."

The two other issues the Supreme Court considered—the application of the legal doctrine known as severability and the relevance of the Anti-Injunction Act—had appeared to be less murky before the oral arguments.

The doctrine of severability would only come into play if the court struck down the individual mandate that was part of the fulcrum of the ACA reforms of the health insurance market. In that eventuality the question would be whether the individual mandate could be severed from the rest of the law. If severability were upheld, all the other provisions of the ACA would be allowed to stand even if the mandate were struck down.

If the Supreme Court ruled that the mandate penalty was effectively a tax, then the Anti-Injunction Act might come into play. This law states that no appeal can be made against a tax until it is actually collected. The Supreme Court thus had the option of decreeing that the mandate penalty was a tax and telling the opponents of the individual mandate to bring suit again in 2015, when the tax would first be levied.

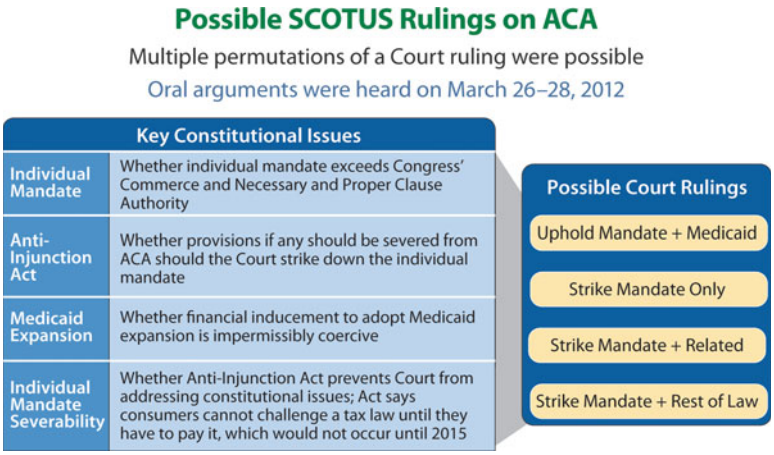

Fig. 14.1 Possible projected outcomes of SCOTUS rulings vary from upholding/striking key provisions of the law to upholding/striking the entire law. Source: based on analysis from the Marwood Group Advisory, LLC, 2012

There were many conceivable permutations to the court's ruling on these four questions. However, policymakers and healthcare stakeholders were most Focused on four scenarios (Fig. 14.1).

Of these four scenarios, one was that the Supreme Court would uphold the entire law, including the mandate and Medicaid expansion. A second possibility was that the court would strike down the mandate only. A third possibility was that the court would strike down the mandate plus certain related health insurance reform provisions, such as guaranteed issue (a prohibition on denying people coverage on the basis of preexisting conditions) and community rating (a prohibition on imposing differential rates based on individual health status). A fourth possibility was that the court would strike down the mandate and the rest of the law.

In addition to a palpable sentiment in Washington, DC, there was a thriving speculative market in these four possibilities, a market of money as well as ideas. Investment bank analysts, whose business includes trying to predict the future of both individual companies and the financial markets as a whole, assigned shifting probabilities to the four outcomes through the spring of 2012 (Fig. 14.2).

Before the oral arguments, investment analysts prognosticated a 60 % probability that the entire ACA would be upheld. They thought that the probability of the court's striking the mandate or the mandate plus related provisions was about 30 %. That amounted to a 2-1 bet that the mandate at the heart of the ACA was going to be upheld. The investment analysts assigned quite a low probability—only 5 % in each instance—to either the whole law or the terms of the Medicaid expansion being overturned.

After the oral arguments, the investment analysts, views changed, although they didn't do a complete turnaround. Once the tapes and transcripts of the oral arguments and, even more significant, the justices' questions became available, the

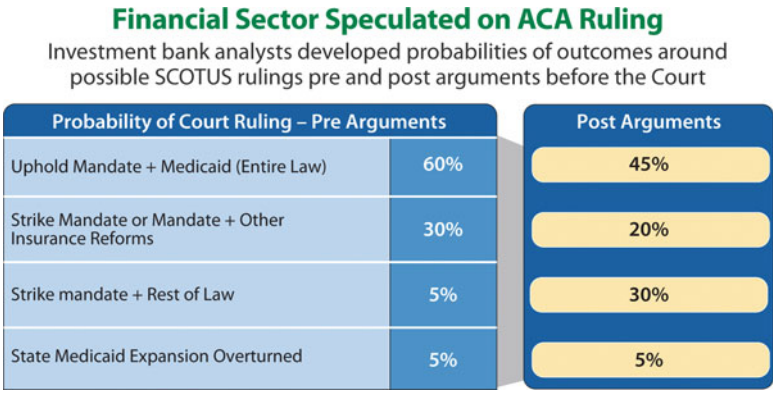

Fig. 14.2 Confidence in upholding the law decreased after legal arguments were presented to SCOTUS. Source: based on analysis from the Marwood Group Advisory, LLC, 2012

analysts still rated the upholding of the entire law, including the mandate and Medicaid expansion, as the likeliest outcome. But they only assigned upholding the law a 45 % chance of occurring, rather than 60 %.

Analysts lowered their estimate of the Supreme Court's overturning the mandate or mandate plus related provisions to 20 %. But they assigned a much higher probability than before the oral arguments to the possibility that the court would strike down the mandate and the rest of the law, giving this a 30 % chance of occurring versus the earlier prediction of 5 %. Put these together and the smart money, post-oral arguments, was betting that there was about a 50 % chance of the court's overturning either the entire law, the individual mandate, or the mandate plus related provisions.

The one probability the bank analysts left unchanged was the 5 % chance they gave to the Supreme Court's striking down the terms of the Medicaid expansion. However the oral arguments on this issue were felt inside the Beltway to be a very negative event that caught the Administration and Congress off guard.

The analysts' prognostications for the ACA grew bleaker as the annual Supreme Court session neared its end in June 2012, although they never assigned more than a low probability to the court's overturning the terms of the Medicaid expansion.

A similar trend was evident on the website Intrade, where investors can buy shares in the likelihood of various events. By June 11, 2012, 71 % of Intrade investors buying ACA-related shares were betting that the law would be overturned, and conservative economist Tyler Cowen suggested that this might be because of a leak from within the Supreme Court. A week later, 78 % of Intrade investors buying ACA-related shares were betting that the law would fall.

In the midst of these gloomy predictions, perhaps everyone should have remembered the wisdom of Yogi Berra, who famously observed, "Prediction is very hard, especially about the future." Only two weeks before the Supreme Court announced its decision, Justice Ruth Bader Ginsburg dismissed speculations about the ruling

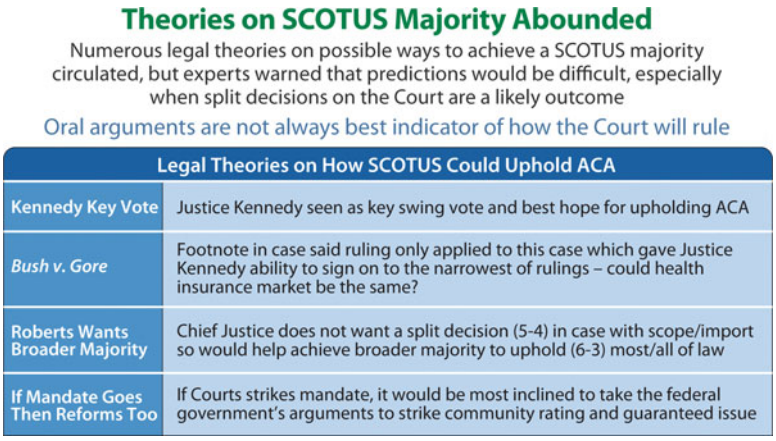

Fig. 14.3 Different legal precedents were considered as possible basis for upholding or striking the law and/or key provisions

by telling a conference of the American Constitution Society, "Those who know don't talk. And those who talk don't know." So for those who supported the ACA, there was still hope about the court's final ruling.

At the same time, legal theorists were speculating about how the Supreme Court might find a way to uphold the ACA. Most of this speculation revolved around Justice Anthony Kennedy, who has provided the swing vote on a number of close rulings since he joined the Supreme Court. There was also a speculation that the Supreme Court might leave the ACA standing because of Chief Justice John Roberts's well-known distaste for closely divided rulings on matters of broad significance (Fig. 14.3).

One theory behind the notion that Justice Kennedy might join the Supreme Court's four liberal justices in voting to uphold the ACA drew a line between his voting with the majority in *Bush v. Gore* and the application of the Commerce Clause to the individual mandate. Some theorized a footnote in the 5-4 ruling in *Bush v. Gore* emphasized that the decision only applies in that single instance and should not be taken as a precedent for any subsequent rulings on political elections. A few Supreme Court observers felt that the narrowness of the in *Bush v. Gore* ruling was a crucial factor in Justice Kennedy's voting for it.

Similarly, the same theory went, the Supreme Court might delineate a very narrow basis for upholding the individual mandate in the ACA. Aside from whether the mandate penalty was or was not a tax, the justices had to decide whether Congress had power under the Commerce Clause to assess a penalty for not purchasing health insurance. If Congress can act to compel people to enter into commerce, what is the limiting principle? If you can tell people to buy insurance and penalize them if they don't, can you likewise tell people to buy broccoli and penalize them if they don't?

The narrow-ruling theory went that the market for health insurance is quite different from the market for broccoli. Even a large number of individuals who don't

buy broccoli will not have much of an impact on the market for broccoli. However, when large numbers of individuals sit on the sidelines and don't buy health insurance, they do have an impact on the market for health insurance. When large numbers of people don't buy health insurance, they often wait to purchase insurance when they are greasily ill, which increases health insurance premiums and healthcare costs for everybody.

Thus, a *Bush v. Gore*-like footnote might apply to the ruling on the ACA, to the effect that the mandate to engage in commerce by buying health insurance did not apply to any other sort of commerce. On that basis, the proponents of the narrow-ruling theory argued, Justice Kennedy might be persuaded to vote to uphold the ACA.

With regard to Chief Justice John Roberts, the theory was that he would strive to avoid a close decision against a case as significant for the country as *National Federation of Independent Business v. Sebelius*. Constitutional scholars have noted that Chief Justice Roberts has often spoken and written about the desirability of broad majorities in Supreme Court decisions. So it was thought that if Justice Kennedy voted to uphold the ACA on narrow grounds, Chief Justice Roberts might join with him and the four liberal justices to create a 6-3 decision in favor of the law.

Another fairly popular theory for how the Supreme Court could decide on the case held that if the court struck down the individual mandate, a majority of justices might well accept the federal government's severability argument that only the mandate-related provisions for guaranteed issue and community rating should be struck down with it. This would leave in place the rest of the law, including the Medicaid expansion and numerous provisions for healthcare delivery sustain reform.

As it happened, the public prognosticators and theorists were nearly all wrong. In the 5-4 ruling on June 28, 2012, that upheld the ACA, it was Chief Justice John Roberts, not Justice Anthony Kennedy, who provided the swing vote on the grounds that the mandate penalty was constitutional because it was indeed a tax and thus permissible as part of the government's taxing power. Other justices upheld the constitutionality of the mandate on the grounds that the Commerce Clause permitted Congress to enact it. Thus, the court provided a narrow ruling in support of the mandate only because the justices held different views of what constitutional authority Congress held to enact it.

The conservative wing of the court outvoted the four liberal justices by decreeing that the individual mandate was not permissible under the Commerce Clause. But if Chief Justice Roberts had not broken with the conservative wing and also decided that the mandate penalty was a tax, the ACA would not have survived its review by the Supreme Court.

In what some consider the most surprising turn of events, Chief Justice Roberts also joined with Justice Kennedy and the three other conservative justices on the court to overturn the provision that would have allowed the federal government to withhold all federal Medicaid funding to states that did not accept the law's Medicaid coverage expansion. Although the tenor of the oral arguments presaged the Medicaid ruling, the decision was nonetheless stunning because Congress had in the past attached requirements for states or terms for the receipt of federal funds.

The court's Medicaid ruling meant states have the option of turning down the Medicaid coverage expansion in the ACA without fear of losing funding for their pre-ACA program. Some advocates and healthcare stakeholders have feared the ruling would mean many states will choose not to expand coverage, a result that would severely undercut the coverage goal of the ACA. (About half of the ACA coverage expansion was expected to come within Medicaid, according to Congressional Budget Office estimates.) But the court's Medicaid ruling was narrow: it maintained all the other Medicaid provisions of the ACA that held that states would receive federal matching funds for expanded coverage only if they met the terms of the ACA. Thus, states that did not choose to expand would maintain current funding but also reject significant additional federal spending, as much as $930 billion during the next decade, to insure Americans whose income is up to 133 % of the official federal poverty level.

The financial incentives for states to expand medicaid are significant. (The federal government will pay for 100 % of the cost of expansion for three years and phase down its matching rate to states to 90 % over time, compared to a matching rate of 57 % on average for the pre-ACA portion of Medicaid.) In addition, the ACA provides no alternative mechanism for Americans with income at or below federal poverty to obtain federal funds for health coverage other than through Medicaid. Federal subsidies to purchase private health insurance plans from the soon-to-be-created health insurance "exchanges" are less generous than Medicaid and only available to Americans with incomes between 100 % and 400 % of federal poverty. Thus, it is widely expected that over time most states will expand Medicaid per the ACA, despite the court ruling. States that do not take up the ACA Medicaid expansion will leave a significant portion of their uninsured population without coverage, all while their residents' federal tax dollars will be used to fund other states' Medicaid expansions.

Thus the narrow basis for upholding the ACA's individual mandate was that the mandate penalty is a tax by another name. And the outcome that was least expected, the overturning of the terms of the Medicaid expansion, was the one that came to be.

With dust just settling on the Supreme Court's decision, prognosticators immediately turned their eyes to the November 2012 elections. There were still strong forces opposed to the ACA, and if they triumphed in November, they would be in a position to undo the law via legislative repeal or executive action (Fig. 14.4).

In short, the Supreme Court decision was not the only defining moment for the ACA. Rather it was the first act of a two-act play, in which the November elections represented the true dramatic climax. As November approached, there was agreement on all sides that if the Republicans swept the elections, winning the White House and both houses of Congress, repeal of the ACA was virtually guaranteed.

The only elements of the ACA that it was thought the Republicans might preserve were the Medicare cost reductions, or "pay-fors" in Washington speak. Healthcare providers, such as hospitals and physicians, feared this as the worst of all possible worlds, with money being pulled out of the existing system and no expansion of funding through an expansion of coverage.

November 2012 Elections Tested Fate of ACA After SCOTUS Ruling

Presidential Election Outcome	Congressional Election Outcome	Possible SCOTUS Decision			Possible Impact on ACA
		Eliminate Entire Law	Eliminate Individual Mandate	Uphold Law	
Romney	Republicans Take Senate and House	✔			Focus turns to deficit & Republican healthcare priorities, i.e., health savings accounts, high risk pools, malpractice
			✔		Repeal coverage expansion, Medicare pay-fors remain
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Romney	Democrats Retain Senate	✔			Focus turns to deficit, including Medicare & Medicaid reform
			✔		Possible gridlock, i.e., negotiation on alternatives to mandate do not result in other fixes to ACA
				✔	ACA likely maintained in large form
Obama	Republicans Take Senate and House	✔			Focus turns to deficit reduction, including Medicare & Medicaid reform; marginal insurance market reforms reinstated
			✔		Negotiations on alternatives to mandate result in fixes to ACA
				✔	ACA maintained with possibility for some fixes to be negotiated
Obama	Democrats Retain Senate	✔			Replacement of insurance market reforms, including exchanges
			✔		Replace individual mandate with alternative
				✔	ACA maintained

Fig. 14.4 The ACA was again publicly debated during the 2012 election campaign. The law was in danger of repeal should the Republicans win the Presidency and/or majority seats in the US Senate and US House of Representatives. (Source: based on analysis from the Marwood Group Advisory, LLC, 2012)

If the Democrats swept the election, maintaining control of the Senate and giving President Obama a second term, then obviously the law would remain intact and its implementation would proceed.

With divided government (where Republicans and Democrats split control of the legislative and executive branches), the ACA would also likely remain in place. Divided government of any kind would almost certainly keep the Republicans from repealing the law, although it might result in modifications of greater or lesser importance if a Republican was elected to the White House.

The perceived closeness of the approaching elections gave impetus to the same intensity of speculation about the ACA's ultimate fate as there was on the eve of the Supreme Court decision. Many factors seemed to point to divided government as the most likely scenario after November 2012. On the one hand, President Obama retained an edge over Mitt Romney in polling through the summer, On the other hand, the Democrats faced difficulties in maintaining their slim majority in the Senate, owing to the fact that they had many more seats up in 2012 than the Republicans (Fig. 14.5). The Democrats had 21 Senate seats in play, 23 counting the two seats of the Independent senators who caucused with them, whereas the Republicans had only 10 Senate seats in play and fewer seats to defend. With numbers like these, control of the Senate seemed destined to change hands in 2012.

The results of the November elections maintained divided government at the federal level, even though the results favored Democrats overall (Democrats had a net *gain* of two seats in the Senate and 13 seats in the House). The reasons for these

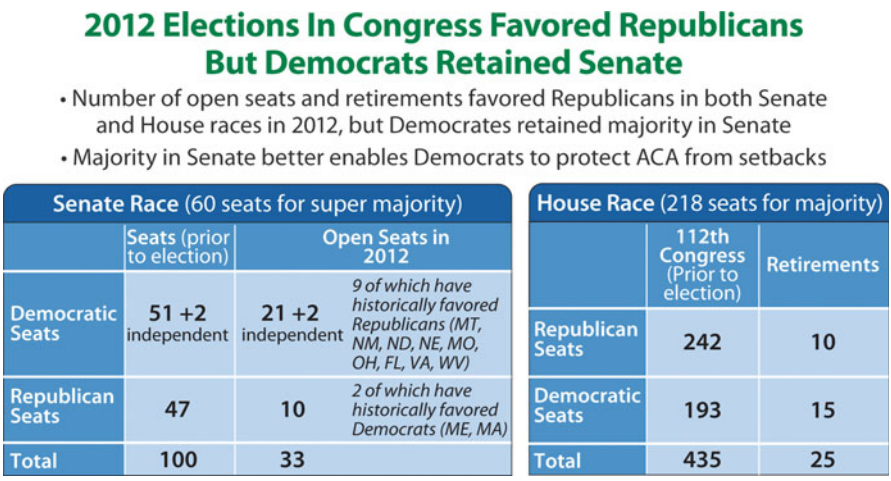

Fig. 14.5 The outcome of 2012 election would determine major fiscal and healthcare policies. (Source: based on analysis from the Marwood Group Advisory, LLC, 2012)

results are numerous and have been the subject of much reflection within both political parties. Suffice it to say they reflect the net effect of both the successes earned by winning candidates and the missteps made by losing candidates. Moreover, the election results sealed the Supreme Court's ruling over the ACA as the law of the land and set back its critics for at least two years and possibly four. President Obama will have a window of time to in which he can implement the ACA and make it part of the fabric of America's healthcare system before another round of political gamesmanship is at hand in 2014 and 2016.

When Congress undertakes major policy innovation, the fate of a law remains uncertain as in the case of the ACA. Major laws can be challenged in court. Even when a court decision is handed down, it could have uncertain outcomes as was the case with the Supreme Court's decision on the ACA Medicaid expansion. Major laws can be viewed as unwelcome by the public and repealed, as was the case with the Medicare Catastrophic Coverage Act of 1988. Although not every year, Congress proceeds in passing major policy innovations despite these types of uncertainties because its members learn quickly that there is no perfect law. Legislation is almost always imperfect—especially major policy innovations—and modified at a minimum to fix drafting errors and address issues that were not foreseen. Thus, Congress does not usually intend new policy innovations to be static. The challenge with a controversial law such as the ACA is that continued opposition will hamper Congress' ability to aptly fine-tune the law through future legislation. Thus, the next phase of modifications to the ACA experiment will come through the regulatory process, except in rare cases where Congress and the President will be able to agree to make changes.

Arguably, the polarized political dynamics surrounding passage of the ACA sowed the seeds of opposition that led to the Supreme Court challenges and numerous calls for repeal from Republican candidates during the November elections. Could Democrats and Republicans have come to agreement on a less controversial version of the law? Many have asserted that the 111th Congress could have passed a bipartisan bill that would have avoided substantial judicial and political challenge. However, history tells otherwise. Landmark pieces of healthcare legislation, such as the law creating Medicare and Medicaid, were similarly polarized before, during, and after passage.

In the case of the ACA, the Chairman of the Senate Finance Committee, Senator Max Baucus (D-MT), tried valiantly to negotiate a bipartisan compromise on the ACA, but to no avail. The Senate version of the ACA passed the chamber on December 24, 2009, with a strict party-line vote. Congress had been deeply divided over expanding health insurance coverage not just during passage of ACA but for over 100 years leading up to it. Attempts to pass universal health reform failed acrimoniously several times during the twentieth century. Hence, the polarization surrounding the ACA is part of the long history of debate over establishing universal access to health insurance coverage in the US.