

## Cheating Death Through Taxes: Chief Justice Roberts and the ACA

By **Anthony R. Miles**  
*Partner*  
*Stoel Rives LLP*



On June 26, Chief Justice Roberts once again demonstrated the wisdom of the nation's founders, joining with separate groups of four Justices to fulfill Benjamin Franklin's oft-quoted aphorism: "[N]othing can be said to be certain, except death and taxes."<sup>i</sup> The Court majorities ruled that although sitting at home doing nothing may be bad for your health, it's not commerce and Congress can't regulate your inactivity.<sup>ii</sup> Congress can tax it, however; so the Patient Protection and Affordable Care Act of 2010 (the "ACA") is constitutional.<sup>iii</sup> Much has been written and said about the survival of the individual mandate,

but too little attention has been devoted to the other significant part of the decision—striking the ACA's mandatory expansion of Medicaid—and how the Court's analysis of Congress's powers to tax, spend and to regulate commerce will affect Congress's options in further reform efforts.

### Medicaid Expansion

In declining to uphold the mandatory expansion of eligibility for Medicaid, the Court articulated a limitation on Congress's ability to attach conditions to new grants that expand existing programs. More interestingly, Congress's ability to attach conditions to its provision of federal funds to states may be limited by how much the states have come to rely on those funds.<sup>iv</sup> For example, one could read the Chief Justice's opinion as imposing a limitation on losses for noncompliance with new requirements at 10% of a state's budget.<sup>v</sup> This has the paradoxical result that the more the state needs the money, the less control the federal government subsequently can exert over the state's spending policies.

The Court made clear that states must be able to decline expansion

of their programs without the threat of losing funding for their existing programs. By effectively treating the expansion as a new program, the Court's opinion will affect future reform efforts. It creates uncertainty about Congress's authority to impose new conditions on historical spending when those conditions might require the receiving state to change its policies. While some undoubtedly hope this uncertainty will move Congress to adopt a block grant approach, the ruling readily could lead to more national programs.

Many observers anticipate that all states will accept the expansion, but some governors already have expressed opposition.<sup>vi</sup> If states do opt out of Medicaid, questions of significant importance to providers may arise. For example, could a state that expands its own Medicaid program include a minimum residency requirement for eligibility to avoid having to accept increases in its rolls due to in-migration of residents from states that have declined the expansion?<sup>vii</sup>

This question is not purely academic. Without in-migration, Washington State's Medicaid expansion is expected to result in the addi-

tion of 330,000 more beneficiaries, 100,000 more inpatient bed days and increase total healthcare spending by \$840 Million.<sup>viii</sup> Although Washington State has pursued early implementation of the expansion, which is supported by both gubernatorial candidates, providers must remain vigilant about implementation for these and other reasons. For example, the state plan is scheduled to be amended in 2013 with regard to the “newly eligible group.”<sup>ix</sup>

### Implications of Congressional Powers Analysis

By authorizing Congress to tax individuals’ choice to obtain coverage, while limiting Congress’s authority to influence state policy through federal spending and to act independently to regulate behavior under the commerce clause, the decision substantially limits Congress’s options for future reform. As Justice Ginsberg’s dissent notes, the Court’s opinion may have the effect of precluding Congress from preserving a role for private payors in subsequent reform legislation enacted under the commerce clause.<sup>x</sup>

The Chief Justice’s analogy of health insurance to broccoli or cars and his statement that “regulation of the uninsured as a class is, in fact, particularly divorced from any link to existing commercial activity” ring false.<sup>xi</sup> As a society, we build healthcare infrastructure, price services and allow individuals to take all manner of risks partly on the assumptions that providers will care

for them when they get injured. All of this is activity and most of it is directly or indirectly commercial. None of this means that the Commerce Clause authorizes Congress to require individuals to purchase insurance, but a more nuanced discussion of these issues would have provided Congress with meaningful guidance in trying to preserve a role for private payers and state governments. Ironically, the limitations on Congress’s powers under the Commerce and Spending clauses from the Court’s decision combined with the broad construction of the taxing power could steer Congress toward something closer to a single-payer approach in future stages of health reform. While that result may appeal to some, there is good reason to question whether it would be good for the country.

*Tony Miles is a Partner at Stoel Rives LLP who focuses his health-care practice at the intersection of healthcare regulation and technology. He counsels providers and other health industry players in corporate matters, strategic affiliations, technology development and services transactions, and data privacy and security issues involving health information technology. Contact Tony at 206.386.7 577 or armiles@stoel.com.*

This column is not to be considered legal advice or a legal opinion on specific facts or circumstances. The contents are intended for informational purposes only. If you need legal advice or a legal opinion, please

consult with an attorney.

<sup>i</sup>In a letter to Jean-Baptiste Leroy dated November 13, 1789, following ratification of the U.S. Constitution, Franklin wrote “Our new Constitution is now established, and has an appearance that promises permanency; but in this world nothing can be said to be certain, except death and taxes.”

<sup>ii</sup>See *National Fed. of Ind. Bus. V. Sibelius*, 567 U.S. \_\_\_\_ (Opinion of Roberts, C. J.), Slip op. at 27, 44.

<sup>iii</sup>*Id.* at 39, 42 & 44.

<sup>iv</sup>*Id.* at 51.

<sup>v</sup>*Id.* at 52.

<sup>vi</sup>The governors of Florida, Iowa, Louisiana, South Carolina, Texas, and Wisconsin all have suggested that they will oppose expansion of Medicaid funding in their states. Louise Radnofsky et al., “Some States Balk at Medicaid Expansion,” *Wall Street Journal*, (July 2, 2012) available at [http://online.wsj.com/article/SB10001424052702304211804577502912265771898.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB10001424052702304211804577502912265771898.html?mod=googlenews_wsj) (last visited July 9, 2012).

<sup>vii</sup>The Court previously has held that the privileges and immunities clause of the Fourteenth Amendment includes a right to travel that prevents a state from implementing tiered benefits based on prior state of residence. See *Saenz v. Roe*, 526 U.S. 489 (1999).

<sup>viii</sup>See Matthew Buettgens et. al., Health Policy Center, The Urban Institute, *The ACA Medicaid Expansion in Washington 1*, 9 (May 2012), available at [http://www.hca.wa.gov/hcr/documents/ACA\\_Medicaid\\_Expansion\\_WA\\_State.pdf](http://www.hca.wa.gov/hcr/documents/ACA_Medicaid_Expansion_WA_State.pdf) (last visited July 8, 2012);

<sup>ix</sup>See Washington State Health Care Authority, *Affordable Care Act Medicaid Expansion 2014 Implementation Plan*, 1, 10, (June 22, 2012), available at [http://www.hca.wa.gov/me/documents/ME2014\\_Implementation\\_Plan.pdf](http://www.hca.wa.gov/me/documents/ME2014_Implementation_Plan.pdf) (last visited July 8, 2012).

<sup>x</sup>See *National Fed. of Ind. Bus.*, 567 U.S. \_\_\_\_ (Opinion of Ginsburg, J. concurring in part and dissenting in part), Slip op. at 2.

<sup>xi</sup>See *National Fed. of Ind. Bus.*, 567 U.S. \_\_\_\_ (Opinion of Roberts, C. J.), Slip op. at 25.

**Reprinted with permission from the California Healthcare News. To learn more about the California Healthcare News visit [cahcnnews.com](http://cahcnnews.com).**