COLUMNISTAS

# SUPREME COMPROMISE

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VEA AQUÍ EL HISTORIAL DE *TOCQUEVILLE* EN LETRAS INTERNACIONALES

In a 5-4 decision that will make history, the Roberts court upheld Obama's signature legislation on health care last week. Contrary to expectations, it was not Justice Anthony Kennedy's "swing" vote that determined the majority but Chief Justice John Roberts himself, who, for the first time in his tenure, joined the liberal wing in upholding the constitutionality of the Patient's Affordable Health Care Act, derisively called "Obamacare" by its opponents. This decision, which will most likely bolster Mr. Obama's re-election chances, was preceded by another victory for the president last week when the Court in a 5-3 vote, struck down all but one of the anti-immigration Arizona bill SB 1070 provisions. The latter ruling dovetailed nicely with Obama's executive order two days earlier to stop deportation of children of illegal immigrants brought to the United States before age 16, and to offer them a path to legal status.

The eagerly anticipated ruling astounded conservatives and liberals alike. The same Roberts court had issued the 2010 *Citizens United* decision, which opened the floodgates for unlimited money to finance electoral campaigns and was much vilified by the populace, as well as the 2008 decision that struck down a Washington DC ban on hand guns. Both were major decisions made along ideological lines, which had led to accusations of crude partisan activism by the supreme tribunal. The new ruling is being interpreted as a compromise by a chief justice concerned with preserving the balance of the formal institutions of democratic governance at a time of deep divisions and extra-constitutional conflict in the polity itself. If this was his intention, then it would be in line with the Founders' concerns about the danger of political parties: a society deeply divided along partisan lines is anathema to law and public order, and consequently a threat to the Republic. Could Justice Roberts (who is only in his early 50s) be thinking about his legacy? Or was this a candid interpretation of the statute by a brilliant constitutional scholar? It was in these terms that the media framed the decision as the pundits set out looking for "clues".

The Affordable Care Act is a complex piece of legislation and the ruling was bound to be anything but straightforward. The majority decision is so convoluted that there was some confusion in the first few minutes after it was announced. CNN news led with the banner "Individual Mandate found unconstitutional" and had to correct itself a few minutes later with "Health Care Law Upheld" 5-4. This can be explained by the way the decision was written, which is being touted as a brilliant stroke by Roberts. Reluctant to be seen as injecting himself in presidential politics four months before a presidential election, and conscious of Congress prerogatives as the branch of government directly elected by the people, he upheld a politically controversial law while at the same time creating some legal precedents that will in fact pose more limits to the legislative powers of Congress in the long-term.

In that sense, many analysts are referring to it as both a political victory for Obama (he got his signature legislation passed, which will give him a general aura of success and thus energize the base) and also a constitutional victory for the Conservatives because it put serious constraints on the Commerce Clause interpretation. Because the so-called

Commerce Clause of the Constitution allows Congress to regulate inter-state commerce, its broad interpretation by Chief Justice John Marshall in 1924 has been the single greatest source of expansion of Congressional authority. Roberts wrote that the Commerce Clause does not apply in this case because Congress cannot regulate "inactivity" (not buying health insurance). In this part of the ruling he was joined by the**Conservative** judges and the vote was 5-4.

In a legal contortion that will be examined by constitutional scholars for decades to come, Roberts then pivoted and with the assent of **Liberal** wing (5-4), ruled that Congress does havethe power to fine individuals who do not buy insurance coverage under a its taxing authority. Failure to buy health insurance will result in a punitive measure which can be construed as a tax to influence behavior, just like taxes on cigarettes or alcohol. And since the exaction is modest, individuals still can exercise their freedom, not buy health insurance and pay the penalty instead. This exercise in semantics was viciously attacked by the dissenting judges (Scalia, Thomas, Alito and Kennedy) who wrote that the Chief Justice's logic "was not to interpret the statute but to re-write it". In fact, Roberts' reasoning hinges on his belief that in his capacity, he should find a "saving construction" to uphold laws passed by Congress, whose mandate is validated by regular elections.

Though the Constitution gives Congress broad taxing powers, when the bill was being discussed, President Obama, aware of the spleen the word elicits in some constituencies, repeatedly refused to call the penalty a tax, insisting that it was a "shared responsibility", not a tax. This cautious choice of words will give further ammunition to his contender Mitt Romney, who is running on a platform of fewer and lower taxes and who, immediately after the ruling, promised once again to repeal the law "on his first day in office". Ironically, Governor Romney's own legislation for the state of Massachusetts in 2006 was the model for "Obamacare": it was built around the individual mandate and the principle of personal responsibility, which was "essential to bring down the costs of health care" (his own words). It was indeed a Republican idea that came out of the Heritage Foundation think tank and had the full support of the private sector (insurance companies, hospitals and pharmaceutical industry). It was only in 2006, when the idea migrated to the Left, that its constitutionality became suspect. But in the present national environment, politics trumps policy.

Since 1942, the Commerce Clause has been used as the constitutional basis for modern government to regulate economic activity (much of which did not cross state lines). The health industry is one of the largest economic activities and it does clearly spill over state lines. Does the decision constitute a new jurisprudence restricting those legislative powers that made the New Deal possible? Or is this a narrow ruling that applies only to a *sui generis*, very specific activity and there probably won't be other issues that require a federal mandate as a solution? Is the individual mandate simply a "free-loader fee" and not an expansion of federal power? History will tell. For the time being, there is a sense that the institutional order prevailed over political divisions and the Founders' Republic is thus safe.

However, in their "nullification by any means" strategy, Republicans are now pivoting to another major finding by the Court, in this instance on the expansion of Medicaid (public health care for the indigent that states administer with federal grants), which will now include those receiving an income of up to 133% above the poverty line. While the expansion itself was found constitutional (and it is wholly funded by federal money for the first three years of implementation), the federal government's coercive power to withdraw present funds from states that do not accept it was struck down by a 7-2 vote. This has opened a new political front for Republicans. In their determination to make it impossible for Democrats to govern, they have turned to state governors for help: at least seven Republican governors have already claimed they will not accept federal funding to expand Medicaid. This provides enough fodder for their immediate political interests: to portray the President as a big spender who has no interest in reducing the deficit. Their political calculation is based on the fact that the lower income groups that will receive or not those benefits are *not t*heir voters. In a tight race, this could be a winning strategy.