The legal implications of the Supreme Court ruling on the Obama health care law

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In its decision upholding the Obama health care plan, the Supreme Court last month demonstrated that there is no significant constituency in the American ruling class committed to the framework of federal reforms, regulations and social programs enacted in the last century.

Legal arguments advanced in the decision place a giant question mark over the reforms of the 20th century. They herald the return of previously overruled legal doctrines that predominated in the first three decades of that century, during which the Supreme Court routinely attacked and struck down social legislation.

The June 28 ruling ranks with *Bush v. Gore* (shutting down vote-counting to steal the 2000 election) and *Citizens United* (permitting unlimited corporate campaign donations) in allowing naked political considerations to determine the outcome, with the legal arguments concocted to justify the predetermined conclusion.

Certain conflicts within the American bourgeoisie have surfaced in the litigation over the Patient Protection and Affordable Care Act (PPACA), Obama's flagship health care "reform" legislation.

On the one hand, a majority faction supports the PPACA, which shifts health care costs from businesses and the government onto the working class by forcing individual workers to buy their own insurance from private companies (the so-called "individual mandate"). Big business, the health care industry, and especially the insurance companies expect to rake in billions in profits as a result of the law. On the other hand, a substantial section of the American bourgeoisie opposes the PPACA in part because it is in principle opposed to any piece of legislation that even presents itself as a social reform.

The June 28 decision was a slick compromise between these two factions. To protect business interests and profits, the PPACA was upheld as constitutional. But the court upheld it in such a way as to expose virtually all prior social reform legislation to attack.

It now appears likely that right-wing Chief Justice John Roberts, whose opinion controls a key portion of the decision, switched sides during the deliberations. An article published by CBS News cited unnamed inside sources—perhaps including one or more of the justices—who indicated that in early deliberations Roberts had initially sided with Clarence Thomas, Antonin Scalia, Samuel Alito and the ostensible "swing justice" Anthony Kennedy to strike down the PPACA's individual mandate, but that one month before the decision was due he switched sides.

The unsigned and highly unusual dissent by Scalia, Thomas, Alito and Kennedy deliberately ignored the text of the decision of the chief justice, and in a bizarre break with tradition, did not even join the chief justice's decision where there was agreement. Inside sources quoted in the media suggest that the split between Roberts and the rest of the right-wing bloc was extremely bitter.

The central legal issue in the case, *National Federation of Independent Business v. Sebelius*, was whether the individual mandate—the linchpin provision of the PPACA requiring every adult to purchase insurance or pay a penalty—was constitutional, i.e., was a valid exercise of the power of Congress under the Constitution.

The Supreme Court, as a result of Roberts' key vote, held that the PPACA was not valid under Congress' power to regulate interstate commerce, but was valid as a tax.

Article I, Section 8, Clause 3 of the US Constitution (the "Commerce Clause"), drafted in the aftermath of the American Revolution in 1787, provides that Congress has the power to "regulate Commerce...among the several States..."

During the last century, this clause served as the basis for gradually expanding federal command and regulation of industry. The breakthrough came during the late 1930s and early 1940s, when the Supreme Court, after a long period of blocking social reform legislation, upheld key New Deal regulations as valid under the Commerce Clause.

In a landmark ruling in a case called *Wickard v. Filburn* (1942), memorized by every student of US constitutional law, the Supreme Court held that New Deal regulations designed to stabilize wheat prices applied even to wheat grown by a subsistence farmer for his own consumption, on the grounds that any production of wheat anywhere might affect interstate commerce and so fell within the regulatory powers of Congress under the Commerce Clause.

After *Wickard*, it was understood that the federal power to regulate interstate commerce was for all practical purposes

boundless. The Commerce Clause ultimately served as the basis for much of the framework of social reform legislation erected in the 20th century. It constituted the justification for much of the New Deal, regulations on the stock market, regulations on corporations, environmental regulations, wage and hour laws, child labor laws, some civil rights laws, workplace safety laws and other worker protections, antidiscrimination statutes and all consumer protections.

Right-wing attacks on the Commerce Clause, which take the form of calls to "go back" to the understanding of the clause that preceded the New Deal, are essentially attacks on all federal reforms in general. Historian Jeff Shesol, recently interviewed by National Public Radio, explained: "The conservative legal establishment has been very open about its interest in undoing the New Deal at the constitutional level." He added that Roberts' decision was "the first great success of the movement."

The Supreme Court's decision on the PPACA seeks to impose limits on the understanding of the Commerce Clause that has predominated since *Wickard*. The relevant passages constitute an open invitation for legal challenges to federal reforms to be brought in the immediate future.

Justice Ruth Bader Ginsburg, in her dissenting opinion, declared that the portion of Roberts' opinion that relates to the Commerce Clause "makes scant sense and is stunningly retrogressive." Roberts' "crabbed reading of the Commerce Clause," she continued, "harks back to the era in which the Court routinely thwarted Congress' efforts to regulate the national economy in the interest of those who labor to sustain it."

Ginsburg suggested a comparison between Roberts' opinion and an infamous 1935 decision, from a period when the Supreme Court routinely struck down social legislation, overturning a compulsory retirement pension plan on the grounds that it was not a valid exercise of Congress's power to regulate interstate commerce.

In a very revealing passage in Ginsburg's opinion, she wrote that what distinguishes the Obama health care legislation from the major reforms of the last century, such as Social Security, is that in passing the Obama legislation, the government chose "to preserve a central role for private insurers and state governments." She criticized Roberts and the rest of the ultra-right justices from essentially a business standpoint, stating that their interpretation of the Commerce Clause "does not permit that preservation."

In attacking the Commerce Clause, Chief Justice Roberts formed a controlling majority with the rest of the right-wing bloc: Scalia, Thomas, Alito and Kennedy.

Article I, Section 8, Clause 1 of the Constitution provides: "The Congress shall have Power to lay and collect Taxes...and provide for the...general Welfare." This power to "tax and spend," in the 20th century, served as the basis for federal social spending programs such as Social Security and Medicare.

From a legal standpoint, characterizing the individual mandate as a tax results in an absurdity. The Anti-Injunction Act prohibits legal challenges to taxes before they are enforced, and the individual mandate provision of the PPACA has yet to go into effect. Thus, in one and the same case the Supreme Court decided that it could rule on the individual mandate because it was not a tax, and handed down a ruling saying that it was a tax.

Having upheld the individual mandate as a tax, the Court simultaneously struck down part of a provision of the PPACA expanding Medicaid on the grounds that it was "coercive" and a "gun to the head" of the states. So-called "liberal" justices Steven Breyer and Elena Kagan, an Obama appointee, joined Roberts, Kennedy and the rest of the right-wing bloc in doing so. The media has taken little note of this important feature of the decision, which undermines Medicaid and federal spending programs in general on the grounds of "states' rights." (See: "US states to opt out of Medicaid expansion of health care law".)

Thus the decision attacked the two main juridical pillars of federal reform legislation—the longstanding precedents regarding the Commerce Clause and the tax-and-spend provisions of the Constitution. This fact was not lost on the more perceptive right-wing legal commentators, who applauded the decision and Roberts' switch on the grounds that it "lost the battle to win the war."

In an article titled, "The Political Genius of John Roberts," Ezra Klein commented in the *Washington Post*: "If you read the opinions, [Roberts] sided with the conservative bloc on every major legal question before the court. He voted with the conservatives to say the Commerce Clause did not justify the individual mandate... He voted with the conservatives to limit the federal government's power to force states to carry out the planned expansion of Medicaid."

Klein quoted Justice Kennedy's former clerk Orin Kerr as saying, "He [Roberts] was on-board with the basic challenge," referring to the Commerce Clause challenge to federal reforms generally. Klein also quoted prominent right-wing law professor Randy Barnett as saying, "We won... A majority of the court endorsed our constitutional argument about the Commerce Clause..."

While the American ruling class now asserts the power to assassinate, torture, establish military commissions, imprison without trial and conduct unlimited secret surveillance, all of the social rights of the working class won through decades of struggle are being placed on the chopping block.