1-12-2012

Amicus Brief, Dep't of Health & Human Servs. v. Florida

Wilson Huhn
University of Akron School of Law, whuhn@uakron.edu

No. 11-398

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF CONSTITUTIONAL LAW AND ECONOMICS PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS (MINIMUM COVERAGE PROVISION)

WILSON R. HUHN
Counsel of Record
29475 BRYCE ROAD
PEPPER PIKE, OH 44124
(216) 789-0507
whuhn@uakron.edu

Counsel for Amici Curiae

January 12, 2012

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF AMICI CURIAE[1]

Each of the *amici curiae* is a professor of economics who has specialized in the area of health care or a professor of law who has studied, taught, published, or practiced in the area of Constitutional Law.

Amici submit this brief to articulate and support a set of principles at the intersection of constitutional law and economics: namely, that the Constitution does not embody a particular economic theory; that economic legislation enjoys a strong presumption of constitutionality; and that in this particular case the complex economic judgments underlying the Patient Protection and Affordable Care Act are committed to the legislative branch and are beyond the constitutional authority of the judicial branch.

Amici are:

Prof. Richard L. Aynes, University of Akron School of Law; Assoc. Prof. David S. Cohen, Earle Mack School of Law at Drexel University; Assoc. Prof. Cindy Galway Buys, Southern Illinois University School of Law; Prof. Wilson R. Huhn, University of Akron School of Law; Prof. Richard Saphire, University of Dayton School of Law; Prof. Robert H. Smith, Suffolk

---

[1] Counsel for all parties received notice of *amici*'s intent to file this brief at least ten days prior to the due date; all parties have consented to this filing. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

University Law School; Prof. Emeritus Lloyd B. Snyder, Cleveland-Marshall College of Law; Prof. Katherine Swartz, Harvard University; Prof. Rebecca Zietlow, University of Toledo College of Law.

SUMMARY OF ARGUMENT

During the 19th century and the beginning of the 20th century the Supreme Court took the position that the Constitution embodied the economic theory of *laissez faire* and it struck down state and federal legislation that was inconsistent with that theory. After 1937 the Supreme Court rejected that notion and instead embraced the healthy principle that the Constitution does not embody any particular economic theory. This change was appropriate because the changing and competing models and theories that are used to explain and predict human economic behavior are suited to legislative decision-making but have no place in the judicial responsibility to interpret the meaning of the Constitution. The principle of separation of powers requires the courts to defer to Congress on questions of economic policy. As a consequence, the Court should uphold the constitutionality of the individual mandate of the PPACA.

ARGUMENT

I. THE CONSTITUTION DOES NOT EMBODY ANY PARTICULAR ECONOMIC THEORY

It has been suggested that the individual mandate contained in the Patient Protection and Affordable Care Act (PPACA), Pub. L. 111-148, 124 Stat. 119 (2010), is unconstitutional because Congress lacks the

power to force people to purchase a product that they do not wish to purchase; that this constitutes an unconstitutional interference with the operation of the free market. See, *e.g.*, *Virginia v. Sebelius*, 728 F.Supp.2d 768 (E.D. Va. 2010), *rev'd for lack of jurisdiction* 656 F.3d 252 (4th Cir. 2011). In striking down the individual mandate the District Court stated: "At its core, this dispute is not simply about regulating the business of insurance – or crafting a scheme of universal health insurance coverage – it's about an individual's right to choose not to participate." *Id.* at 788.

In 1905 in the case of *Lochner v. New York*, 198 U.S. 45 (1905) Justice Oliver Wendell Holmes declared that "a Constitution is not intended to embody a particular economic theory." *Id.* at 75. Holmes was writing in dissent, because at that time the Supreme Court had most definitely interpreted the Constitution to incorporate one particular school of economics. Holmes wrote:

> [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. 198 U.S., at 75 (Holmes, J. dissenting).

Consistent with Holmes' dissent, the Constitution itself does not mandate or even mention any particular economic theory. Despite the silence of the Constitution on this point, the Supreme Court of that era embraced the notion that there is a constitutional right to be free of government regulation in the use of one's property. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857) (striking down law that prohibited slavery in the northern territories of the United States upon the ground that this constituted a violation of slaveholders' constitutional right to property); *Lochner*, (striking down maximum hour legislation); *Adair v. United States*, 208 U.S. 161 (1908) (striking down a statute protecting the right to belong to a union); *Coppage v. Kansas*, 236 U.S. 1 (1915) (same); and *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (striking down a minimum wage law for women and children as violation of Due Process rights of employers). In all of these cases the Court ruled that the rights of property were entitled to broad constitutional protection from interference by legislatures. While it is certainly true that the Constitution prohibits legislatures from depriving persons of certain vested rights, taking private property for public use without just compensation, interfering with the obligation of contracts, or depriving people of property without due process of law, the Supreme Court of that era also extended constitutional protection to the economic advantage that the ownership of property confers upon its owner in the marketplace. The Court explained its rationale for this theory in *Coppage*, where it stated that inequalities of bargaining power are inherent in the right of property and that legislatures are therefore constitutionally powerless to redress inequalities arising from the ownership of property:

> No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. … And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. 236 U.S., at 17.

In 1937 in the case of *Parrish v. West Coast Hotel*, 300 U.S. 379 (1937) (upholding minimum wage law), the Supreme Court overruled *Adkins* and declared that "freedom of contract" would no longer be recognized as a constitutional principle. The Court stated: "In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract." *Id.* at 391. In *Ferguson v. Skrupa*, 372 U.S. 726 (1963), the Court added: "The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases - that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely - has long since been discarded." *Id.* at 730. Instead, the Court adopted Holmes' view that the Constitution does not embody any particular economic theory:

> We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt

> adjusting. … Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas. *Id.* at 732.

In 1992, in the case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) the Supreme Court explained that the *Lochner* line of cases was overruled because the Supreme Court had erred in adopting the theory of *laissez faire* as a constitutional principle. It was an error – "a fundamentally false assumption" – for the justices to have treated their faith in "a relatively unregulated market to satisfy minimal levels of human welfare" as a fundamental principle of constitutional law. *Id.* at 861-862.

Accordingly, the Constitution is no longer considered to embody the economic theory of *laissez faire* or interpreted to protect the rights of property against government regulation. But neither has the Supreme Court chosen to incorporate redistributivist principles into the Constitution. *See Dandridge v. Williams*, 397 U.S. 471, 484 (1970) (no constitutional right to welfare); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (no constitutional right to subsidized housing); *Maher v. Roe*, 432 U.S. 464 (1977) (no constitutional right to public funding for abortion). In the area of Equal Protection, the Supreme Court has declined to treat the poor as a suspect class or wealth as a suspect classification. *See Rodriguez v. San Antonio Independent School District*, 411 U.S. 1, 29 (1973) (stating, "[T]his Court has never heretofore held that

wealth discrimination alone provides an adequate basis for invoking strict scrutiny"). Similarly, the Court has acknowledged that the Due Process Clause does not favor labor over capital. *See Lincoln Federal Labor Union No. 19129, A.F. of L. v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 537 (1949) (stating, "Just as we have held that the due process clause erects no obstacle to block legislative protection of union members, we now hold that legislative protection can be afforded non-union workers.") The Constitution does not take sides between the rich and the poor nor does it dictate economic policy.

Accordingly, the courts must accord great deference to the judgment of Congress regarding the constitutionality of economic legislation.

II. IN A BROAD RANGE OF AREAS OF CONSTITUTIONAL LAW, THE SUPREME COURT HAS RULED THAT IN REVIEWING THE VALIDITY OF ECONOMIC LEGISLATION THE COURTS MUST DEFER TO LEGISLATIVE JUDGMENT, TO THE EXTENT THAT THIS PRINCIPLE MUST BE CONSIDERED TO BE AN ASPECT OF THE SEPARATION OF POWERS.

The Supreme Court has ruled in a broad range of areas in constitutional law that economic legislation is presumed constitutional and that the courts are not to substitute their judgment on economic matters for that of the legislature. In various cases interpreting the Due Process Clauses, the Equal Protection Clause, the General Welfare Clause, the Commerce Clause, and the Necessary and Proper Clause, the Supreme Court has stated:

[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators. *United States v. Carolene Products*, 304 U.S. 144, 152 (1938) (Stone, J.) (upholding federal law against challenge under Due Process Clause).

[T]o be constitutional … It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955) (Douglas, J.) (unanimous decision) (upholding state law against challenge under Equal Protection Clause).

We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (Black, J.) (unanimous decision) (upholding state law against challenge under Due Process Clause).

[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end. *Katzenbach v. McClung*, 379 U.S. 274 303-304 (1964) (Clark,

J.) (unanimous decision with concurring opinions by Black, Douglas, and Goldberg, JJ.) (upholding federal law under Commerce Clause).

It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. *Usery v. Turner Elkhorn Mining* Co., 428 U.S. 1, 15 (1976) (Marshall, J.) (upholding federal law against challenge under Due Process Clause).

Although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, *United States v. Carolene Products Co*., 304 U.S. 144, 153-154 (1938), they cannot prevail so long as "it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable." *Id*., at 154. Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken. *Minnesota v. Clover Leaf Creamery Co*., 449 U.S. 456, 464 (1981) (Brennan, J.) (footnote omitted) (upholding state law against challenge under Equal Protection Clause).

> [Referring to] the strong deference accorded legislation in the field of national economic policy…. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 476 U.S. 717, 729 (1984) (Brennan, J.) (unanimous decision upholding federal law against challenge under Due Process Clause).
>
> In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. *South Dakota v. Dole*, 483 U.S. 203 (1987) (Rehnquist, J.) (upholding federal law under General Welfare Clause).
>
> [I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power. *United States v. Comstock*, __ U.S. __, 130 S.Ct. 1949, 1956 (2010) (Breyer, J.) (upholding federal law under Necessary and Proper Clause).

The principle that the courts must defer to legislatures in the formation of economic policy infuses the Constitution. It is so pervasive that it must be considered a fundamental aspect of the doctrine of Separation of Powers.

In the landmark case of *Wickard v. Filburn*, 317 U.S. 111 (1942) (unanimous decision upholding allotment program of federal Agricultural Adjustment Act against challenge under Commerce Clause),

Justice Robert Jackson explained why the courts are disabled from second-guessing the judgment of legislatures on economic questions:

> The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. *Id.* at 129 (Jackson, J.).

The allocation of economic burdens and benefits among classes of persons necessarily involves compromise. Compromise among economic interests is appropriate in the formation of economic policy by the legislative branch, but it has no place in the interpretation of the Constitution by the judicial branch.

The following section of this brief identifies a number of economic factors that Congress had to consider in designing the PPACA.

III. ECONOMIC ANALYSIS IS SUITED TO THE LEGISLATIVE DUTY TO DEVELOP PUBLIC POLICY BUT IS NOT COMPATIBLE WITH THE JUDICIAL DUTY TO INTERPRET THE MEANING OF THE CONSTITUTION

In deciding whether to enact the individual mandate as part of the PPACA, Congress had to consider a host of interrelated factors including the following: the cost of health care in the United States; the cost of health insurance; the extent of out-of-pocket expenses for health care; the increase in the cost of

health insurance relative to increases in personal income and the cost of living; the absolute and relative cost borne by persons in different income groups; the extent and effect of cost-shifting under current law; and the number and effect of personal bankruptcies attributable to the cost of health care. Most importantly, Congress had to assess the state of the nation's health and the effect of the lack of adequate insurance upon people's health.

In deciding whether the nation's system of paying for medical care ought to be reformed, Congress also had to evaluate the cost and effectiveness of current federally funded programs, including Medicare, 42 U.S.C. § 1395, Medicaid, 42 U.S.C. § 1396, the National Health Service Corps, 42 U.S.C. § 254d, the Veterans Health Administration, 38 U.S.C. § 7401, and federally funded community health centers, 42 U.S.C. § 254b. For purposes of comparison, Congress had to familiarize itself with the details of the health care delivery systems in other countries as well as the relative cost and efficacy of those programs. Once again, a prime consideration was whether the people of other countries enjoy better health than American citizens.

Congress also had to predict the likely effect of the PPACA on all of the previously mentioned cost and health factors. Specifically, Congress sought to anticipate the likely effect of insurance reforms, including guaranteed issue regardless of health; guaranteed coverage of preexisting conditions; complete coverage for preventive care; coverage for adult children; and minimum medical loss ratios. It had to determine the level of federal subsidies to individuals and families of different income groups

that would be necessary to enable them to purchase health insurance and offset out-of-pocket expenses; the future cost of federal contributions to the states that would be necessary to pay for the expansion of Medicaid; and the extent and mix of tax increases and spending reductions that would be necessary to pay for these reforms.

In keeping with our constitutional tradition that the states have served as laboratories for experimentation in governing, Congress also examined the efficacy of health insurance reform in the various states and modeled the PPACA after the plan that was adopted in Massachusetts in 2006, Mass. St. 2006, c. 58 (An Act Providing Access to Affordable, Quality, Accountable Health Care).

In making these determinations Congress had at its disposal an array of economic studies from various sources, including the Agency for Healthcare Research and Quality,[2] the Office of the Actuary of the Centers for Medicare and Medicaid Services,[3] the

---

[2] *See*, *e.g.*, Agency for Healthcare Research and Quality, Healthcare Cost and Utilization Project, *HCUP Facts and Figures 2009*, at http://www.hcup-us.ahrq.gov/reports/factsandfigures/2009/TOC_2009.jsp (containing data relating to the cost and efficacy of hospital care in the United States).

[3] *See*, *e.g.*, Office of the Actuary, Centers for Medicare and Medicaid Services, *Estimated Effects of the "Patient Protection and Affordable Care Act" as Proposed by the Senate Majority Leader on November 18, 2009* (December 10, 2009), at http://src.senate.gov/files/OACTMemorandumonFinancialImpactofPPAA%28HR3590%29%2812-10-09%29.pdf#page=1 (estimating the effect of the proposed PPACA on health care coverage and total health expenditures).

Congressional Budget office,[4] the Joint Commission on Taxation,[5] the Commonwealth Fund,[6] the Organisation for Economic and Cooperative Development,[7] the World Health Organization of the United Nations,[8] the

---

[4] *See*, *e.g.*, Congressional Budget Office, Letter to Nancy Pelosi, Speaker, U.S. House of Representatives, *Preliminary Estimate of the Effects of the Insurance Coverage Provisions of the Reconciliation Legislation Combined with H.R. 3590 as Passed by the Senate* (March 18, 2010), at http://www.cbo.gov/ftpdocs/113xx/doc11355/hr4872.pdf (estimating the effect of the proposed PPACA on health care coverage and the federal budget).

[5] *See*, *e.g.*, Joint Commission on Taxation, *JCT report on House Reconciliation Bill H.R. 4872* (Report JCX-16-10), (March 18, 2010), accessible at http://www.jct.gov/publications.html?func=startdown&id=3671. (estimating the effect of the proposed PPACA on the federal budget).

[6] *See*, *e.g.*, Davis, Karen, et al., *Mirror, Mirror on the Wall: An International Update on the Comparative Performance of American Health Care* (May 15, 2007), Commonwealth Fund, at http://www.commonwealthfund.org/Publications/Fund-Reports/2007/May/Mirror--Mirror-on-the-Wall--An-International-Update-on-the-Comparative-Performance-of-American-Healt.aspx (comparing the United States to other industrialized countries on a number of measures regarding performance of the health care system).

[7] *See*, *e.g.*, Organisation for Economic and Cooperative Development, OECD.StatExtracts, at http://stats.oecd.org/index.aspx?DataSetCode=HEALTH_STAT (setting forth data regarding health and health care within a number of industrialized countries).

[8] *See*, *e.g.*, World Health Organization, *World Health Report 2000*, at http://www.who.int/whr/2000/en/ (measuring and comparing the health of the population of different countries).

Kaiser Family Foundation,[9] and Families USA.[10] Congress also was free to consider the voluminous literature published by health care economists[11] as well as their testimony before Congress.[12]

All of the foregoing economic factors had to be considered in designing this complex, comprehensive scheme of legislation. In the words of the District Court below, the various elements of the PPACA are a "finely crafted watch," containing "approximately 450 separate pieces," many if not most of which are interrelated and interdependent. *Florida v. U.S. Dept. of Health and Human Services*, 780 F.Supp.2d 1256, 1304 (N.D. Fla. 2010). Congress had to choose not only

---

[9] *See*, *e.g.*, Kaiser Family Foundation, *Employer Health Benefits Annual Survey*, available from Kaiser Family Foundation, at http://ehbs.kff.org/ (tracking increases in the cost of health insurance, average income, and the cost of living since 1999).

[10] *See*, *e.g.*, Families USA, *Costly Coverage: Premiums Outpace Paychecks* (August 2009), at http://www.familiesusa.org/resources/publications/reports/costly-coverage.html (comparing increases in cost of health insurance to increases in income and inflation).

[11] *See*, *e.g.*, Brief Amici Curiae of Economic Scholars in Support of Defendants-Appellees, Liberty University, Inc., v. Geithner, __ F.3d __ (4th Cir. 2011) (citing numerous studies by economic scholars relating to the necessity of the individual mandate).

[12] *See*, *e.g.*, Rowland, Diane, Testimony Before the U.S. Senate Committee on Finance, *Medicaid and Health Reform*, Kaiser Family Foundation at http://www.kff.org/healthreform/upload/050509RowlandTestimony.pdf/; Pearson, Mark, *Written Statement to Special Senate Commission on Aging: Disparities in health expenditure across OECD countries: Why does the United States spend so much more than other countries?*, OECD (September 30, 2009), at http://www.oecd.org/dataoecd/5/34/43800977.pdf.

from a competing set of economic models and theories but also had to decide how to combine the hundreds of moving parts of this Act into a comprehensive and unified scheme of economic regulation. This was a matter of legislative prerogative and is beyond judicial competency.

In the exercise of its lawmaking function, Congress is not only permitted but expected to take economic data and expert economic opinion into account in determining whether to enact a system of universal health care coverage and in deciding what form that system should take. While judges as individuals are as capable as legislators at understanding and acting upon this information, it is incompatible with their judicial role to bring these considerations to the interpretation of the Constitution. The role of the courts is limited to determining whether Congress had a rational basis for enacting a particular plan of economic legislation.

CONCLUSION

The United States Constitution does not grant the courts any role in the development of economic policy. This power is instead conferred upon Congress. Accordingly, the individual mandate contained in the Patient Protection and Affordable Care should be upheld.

January 12, 2012

Respectfully submitted,

WILSON R. HUHN
Counsel of Record
29475 Bryce Road
Pepper Pike, OH 44124
(216) 789-0507
whuhn@uakron.edu