THE SCOTUS HEALTHCARE DECISION COMETH

[UPDATE:Okay, from the SCOTUSBlog "The entire ACA is upheld, with exception that federal government's power to terminate states' Medicaid funds is narrowly read." Key language from the decision on the mandate:

> The money quote from the section on the mandate: Our precedent demonstrates that Congress had the power to impose the exaction in Section 5000A under the taxing power, and that Section 5000A need not be read to do more than impose a tax. This is sufficient to sustain it.

And, boy howdy, was I wrong. I steadfastly maintained that CJ Roberts would never be the swing vote on a 5-4 majority, but would only join a liberal majority on the heels of Tony Kennedy. WRONG! The mandate survives solely as a result of Roberts and without Kennedy. Wow.

Final update thought. While I think the mandate should have been constructed as a tax, it clearly was not in the bill passed. You want to talk about "legislating from the bench"? Well hard to see how this is not a remarkable example of just that. I am sure all the plebes will hypocritically cheer that, and fail to note what is going on. Also, if the thing is a "tax" how

is it not precluded as unripe under the AIJA? don't have a fine enough reading of the opinion – read no reading yet – to discern that apparent inconsistency.

As to the Medicaid portion, here is the key opinion language on that:

> Nothing in our opinion precludes Congress from offering funds under the ACA to expand the availability of health care, and requiring that states accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.

Oh well, people on the left have been crying for this crappy law, now you got it. Enjoy. I will link the actual opinion as soon as it is available.

And here is THE FULL OPINION]

Well, the long awaited moment is here: Decision Day On The ACA. If you want to follow the live roll out of the Supreme Courts decisions, here is a link to the incredibly good SCOTUSBlog live coverage. Coverage starts at 9 am EST and the actual Court proceedings starting at 10 am EST.

This post will serve two functions. The first is to lay just a very brief marker, for better or worse (undoubtedly the latter I am afraid), going into decision day, hour and moment, and a ready location to post the decision of the court and link the actual opinions. The minute they are known and links available, they will be put here in an update at the top of the post. That way you can start the discussion ahead of the decisions, lay a record of your predictions ahead of time AND have a place to immediately discuss the rulings as they come in and immediately afterward.

Many friends and other pundits involved in the

healthcare SCOTUS discussion have been working for weeks on alternative drafts of posts and articles to cover every contingency so they can immediately hit the net with their takes. That is great, and some of them will be a service. But I have just been too busy lately to expend that kind of energy on something so canned. Sorry about that. So my actual analysis and thoughts will mostly have to come later, but they will be on the merits, such as they may be, when the actual decisions are in. Also, I will be in comments and on Twitter (under "bmaz" of course).

Okay, with the logistics out of the way, I have just a few comments to lodge on the front end of this gig. First off, the ACA/PPA started off as truly about health *insurance*, not about health *care* from the start, and that is, still, never more true than today. Marcy laid out why this is, and why a LOT of people may get, or be forced into, purchasing health insurance, but there is a real question as to whether they will be able to afford to actually use what they will be commanded to buy. See here, here and here as a primer. Those points are pretty much as valid today as they were back when she wrote them.

Secondly, I have no real actual idea how the ruling will come down as to the merits. But, just for sport and grins, I guess I should take a stab at what I think after all the briefing and oral arguments, so here goes. The Anti-Injunction Act argument that the issue is a tax matter and therefore cannot be ripe for consideration until implemented and applied, will be rejected. The individual mandate is struck by a very narrow majority in a very carefully worded opinion written by John Roberts. The remainder of the ACA is deemed severable and is left to stand, and the Medicaid provisions are left intact, again by a narrow majority. Here is the thing, I would not bet one red cent of my *own* money on the foregoing; but if I could play with *your* money, I guess that is how I would roll. Maybe. Note that, before oral argument, my prediction was that the mandate

would be upheld; I may regret not sticking with that call.

The real $64,000 question is the mandate, and that could just as easily be upheld, in which case it will likely be by a 6-3 margin (I still think Roberts writes the opinion, and if that is to uphold that means it will be 6-3). Here is what I will unequivocally say: however this goes down as to the mandate, it is a very legitimate issue; the arguments by the challengers, led by Randy Barnett, are now, and always were, far more cognizant than most everyone on the left believed or let on. I said that before oral argument, I said that after oral arguments and I say that now. Irrespective of what the actual decision turns out to be. Oh, and I always thought the hook liberals desperately cling to, *Wickard v. Filburn*, was a lousy decision to start with.

I have been literally stunned by the ridiculous hyperbole that has been blithely bandied about on the left on the ACA cases and potential striking of the mandate. Kevin Drum says it would be "ridiculous", James Fallows says it would be a "coup!", Liz Wydra says the entire legitimacy of SCOTUS is at issue, So do the Jonathans, Chait and Cohn. A normally very sane and brilliant guy, Professor David Dow, went off the deep end and says the justices should be impeached if they invalidate the mandate. The Huffington Post, and their supposed healthcare expert, Jeffrey Young, ran this insanely idiotic and insulting graphic. It is all some of the most stupefyingly hyperbolic and apoplectic rubbish I have ever seen in my life.

Curiously, the ones who are screaming about, and decrying,"politicization of the Court", my colleagues on the left, are the ones who are actually doing it with these antics. Just stop. Please. The mandate, and really much of the ACA was ill conceived and crafted from the get go. Even if the mandate is struck, the rest of the law can live on quite nicely. Whatever the decision of the court, it will be a legitimate

decision on an extremely important and very novel extension of Commerce Clause power that had never been encountered before.

One last prediction: Irrespective of the outcome today, the hyperbole will continue. So, there is the warm up. Let's Get Ready To Rumble!

REQUIEM FOR ACA AT SCOTUS & LEGITIMACY OF COURT AND CASE

The Patient Protection and Affordable Care Act (ACA), otherwise popularly known as "Obamacare" had a bit of a rough go of it this week at the Supreme Court. Jeff Toobin called it a train wreck (later upgraded to plane wreck). Kevin Drum termed it a "debacle" and Adam Serwer a "Disaster".

Was it really that bad? Considering how supremely confident, bordering on arrogant, the Obama Administration, and many of the ACA's plethora of healthcare "specialists", had been going into this week's arguments, yes, it really was that bad. Monday's argument on the applicability of the tax Anti-Injunction Act (AIJA) went smoothly, and as expected, with the justices appearing to scorn the argument and exhibit a preference to decide the main part of the case on the merits. But then came Tuesday and Wednesday.

Does that mean the ACA is sunk? Not necessarily; Dahlia Lithwick at Slate and Adam Bonin at Daily Kos sifted through the debris and found at least a couple of nuggets to latch onto for hope. But, I will be honest, after reading transcripts and listening to most all of the audio, there is no question but that the individual mandate, and quite possible the entire law, is in a seriously precarious lurch.

Unlike most of my colleagues, I am not particularly surprised. Indeed, in my argument preview piece, I tried to convey how the challenger's arguments were far more cognizable than they were being given credit for. The simple fact is the Commerce Clause power claimed by Congress in enacting the individual mandate truly is immense in scope, – every man, woman and child in the United States – and nature – compelled purchase of a product from private corporate interests. Despite all the clucking and tut tutting, there really never has been anything like it before. The Supreme Court Justices thought so too.

I have no idea what kind of blindered hubris led those on the left to believe the Roberts Court was going to be so welcoming to their arguments, and to be as dismissive of the challengers' arguments, as was the case. Yes, cases such as *Raich* and *Wickard* established Congress could regulate interstate commerce and *Morrison* and *Lopez* established there were limits to said power. But, no, none of them directly, much less conclusively, established this kind of breathtaking power grant as kosher against every individual in the country.

Despite the grumbling of so many commentators that the law was clear cut, and definitively established in favor of the mandate, it wasn't, and isn't. And I was not the only one on the left who found the challenging arguments serious, Professor Jonathan Turley did as well (see here and here).

There is no particular need to rehash *all* the different arguments, and iterations of them by

the scores of commentators (not to mention the participants in the case, of course), that has already been done elsewhere, actually everywhere, ad nauseum. There is one area I do want to touch on, at least briefly, though. Limitations of power. This is an important concept in Commerce Clause law, which is why I tried to focus on it in the argument preview article.

Simply put, the the question is, if the federal government can, via the Article I Congressional authority, stretch the reach of the Commerce Clause to every individual in the US, willing or not, as they did in the "ACA Individual Mandate" is there any power over the individual and/or the states, that is still out of bounds? Are there any limitations left on the ability of the federal to consume individual determination? What the Supreme Court looks for in such an inquiry are "limiting principles" that could constrain the power in the future. Another term of art used in the law is, is there any way to "cabin", i.e. constrain, the power?

In addition to the preview post, I also asked colleagues on Twitter (here and here) to describe proper concepts that would accomplish the goal. For over a day, until the reality that – gasp – this was also the concern of the justices, there was literally no discernible response. Once that reality, forced by the Court, set in however, attempts came fast and furious. Nearly all were rationalizations for why the ACA/mandate was necessary and/or desirable, but were not actual limiting principles.

It was a bit of a trick question, because the best lawyers in the government and amici did not do so hot in that regard either. Out of all I have seen, the one that struck me as fairly easily the best was propounded by Professor Jack Balkin:

> The Moral Hazard/Adverse Selection Principle
> Congress can regulate activities that

> substantially affect commerce. Under the necesary and proper clause, Congress can require people to engage in commerce when necessary to prevent problems of moral hazard or adverse selection created by its regulation of commerce. But if there is no problem of moral hazard or adverse selection, Congress cannot compel commerce. Courts can choose different standards of review to decide how much they want to defer to Congress's conclusion.

Nice, tight and definable. Not bad. Still leaves a lot of ground – likely far too much – open to suit the apparent Supreme Court majority forming. So, when you read, here or otherwise, discussion about "limiting principles" or "cabining", this is what is being contemplated.

As usual, Justice Anthony Kennedy is the critical swing. And Kennedy's general understanding (and consideration here) of liberty is instructive. The following lays it out quite well, using both quotes from last Tuesday's oral argument and background, and comes via Adam Liptak at the New York Times:

> Paul D. Clement, representing 26 states challenging the law, had a comeback. "I would respectfully suggest," he said, "that it's a very funny conception of liberty that forces somebody to purchase an insurance policy whether they want it or not."
> …..
> Justices tend to ask more questions of the lawyers whose positions they oppose, and Justice Kennedy posed six questions to Mr. Verrilli and just three to the two lawyers challenging the law.
>
> The questions to Mr. Verrilli were, moreover, mostly easy to read. They were crisp expressions of discomfort with the administration's arguments.

> “Can you create commerce in order to regulate it?” Justice Kennedy asked.
>
> “This is a step beyond what our cases have allowed, the affirmative duty to act to go into commerce” he said. “If that is so, do you not have a heavy burden of justification?”
>
> “Can you identify for us some limits on the commerce clause?” he asked.
>
> Those questions fit neatly within one strain of Justice Kennedy’s understanding of liberty, one he discussed at length last year in an opinion for a unanimous court.
>
> Limiting federal power, he wrote, “protects the liberty of all persons within a state by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.”

There is a Constitutional desire, and instruction to, colloquially, have limitation on federal power and to reserve rights to states and liberties to individuals. The Supreme Court, and Justice Kennedy (and to a lesser extent Chief Justice Roberts), in the ACA arguments was grappling with these concepts. How they find them, and decide them, will determine the outcome on the mandate.

One way or another, the case on the mandate will be decided. In the preview post before oral arguments began, I predicted either a 6-3 decision to uphold the constitutionality of the mandate or a 5-4 decision against it. The odds on the latter have soared. At this point, I would rate the odds at 50:50 either way. But,

sometime – likely near the end of June – there will be a decision and the victory dance by the winning side and caterwauling and demeaning of the "politicized Court" by the losers will commence. That pattern will play out regardless of which party wins, and which party loses.

As described in both the instant post, and the preview piece, the arguments are indeed contentious, but they are also quite real. There are fundamental differences, over fundamental interpretations of fundamental rights. And, despite the often PT Barnum like contentions of the ACA cheer squad on the left, and from the Obama Administration, the nature and reach of the mandate truly is unprecedented and never was "unquestionably constitutional" as so many claimed. The left created their own self sustaining echo chamber and convinced themselves a truly controversial mandate was self fulfilling and golden.

The arguments against the mandate by the challengers are not wrong or silly simply because made by the "other side". There IS merit to their concern, even if you ultimately believe the mandate should be upheld. Which has made it distressing, to be kind, to see the efforts of many of my colleagues on the left to demonize and degrade the questions and apparent inclination by the conservative bloc of the Roberts Court during oral arguments.

It took Jonathan Chait at New York less than a day after the fateful oral arguments to start salting the thought the court was somehow illegitimate:

> The spectacle before the Supreme Court this week is Republican justices seizing the chance to overturn the decisions of democratically-elected bodies. At times the deliberations of the Republican justices are impossible to distinguish from the deliberations of Republican senators.

Chait's fellow dedicated ACA supporter, Jonathan Cohn at The New Republic quickly weighed in with his hyperbolic joinder:

> Before this week, the well-being of tens of millions of Americans was at stake in the lawsuits challenging the Affordable Care Act.
>
> Now something else is at stake, too: The legitimacy of the Supreme Court.

Even Dahlia Lithwick and Professor Richard Hasen, both of whom I respect somewhere beyond immensely, in separate articles at Slate, joined the chorus of casting stones of Court legitimacy degradation.

Please, folks, just stop. The question on the mandate is legitimate, and the other side believes their position every bit as much as you do yours. While there is certainly case precedent in the general area, there is just as certainly none directly on point with the way the "commerce" in *this* mandate is framed and "regulated".

The Supreme Court is inherently a political body, at least in that its Justices are politically appointed. Presidential candidates of both stripes campaign on the type of Justices they would appoint if given the opportunity. Further, the Supreme Court is the final arbiter of the most controversial questions, that habitually involve mixed issues of politics and law, and has been ever since *Marbury v. Madison*.

Charges against the legitimacy of the Supremes have also been extant since the time of *Marbury v. Madison*, and continue into the modern set of decades with cries by the right against the Warren Court, to the bookend cries by the left against the Burger and Rehnquist Courts. The Supreme Court survived all those, and is still ticking after *Bush v. Gore* and *Citizen's United.* It will survive this too.

And, as David Bernstein pointed out, why in the

world would the left undermine the Court's legitimacy when it is one Presidential appointment away from taking over the ideological majority? No kidding. I respectfully urge my colleagues on the left to step back, take a breath of air, and rethink the idea of degrading the Court over this case.

Those, however, are not the only reasons Democrats and the left should take a step back and rethink how they are reacting to the SCOTUS consideration of the ACA mandate. I pointed out in the ACA/SCOTUS preview post that progressives and conservatives were both, strangely, arguing contrary to type and ideology on the mandate. In a really bright piece of counterintuitive and intelligent thought, Jon Walker points out just how true that was:

> If Conservatives get their way and the Supreme Court strikes down the individual mandate to buy health insurance, it would be a real victory for them; but in the end, the last laugh may be with actual progressives. While in this case an individual mandate was used to expand health coverage, similar individual mandates are the cornerstone for corporatist plans to unravel the public social insurance systems created by the New Deal/Great Society.
>
> The basic subsidies, exchanges and individual mandate design that defines the ACA are at the heart of many corporatists' attempts to destroy/privatizes the programs progressives support the most.
>
> There are are two main ways for the government to provide universal public goods. The first and normally best way is to have the government raise money through taxes and then use that money to directly provide the service to everyone. The other option is to create an individual mandate forcing everyone to buy the service from private

> corporations while having the government subsidize some of the cost. These needless middlemen mostly just increases costs for regular people and the government. This is why corporations love this setup and push hard for it.
> ….
> If the Supreme Court rules against this individual mandate in a way that basically makes it legally impossible to replace most of our current public insurance systems with mandated private systems, that should be seen as a big silver lining for progressives.

Go read the entire piece by Jon Walker, as it contains specific instances and discussions that are important.

In closing, I would just like to say it is NOT the case that the conservatives are definitely right in their challenge to the individual mandate in Obamacare, but it is a lot closer case than liberals make out, and liberals are being blind to the potential downside of it being upheld. All of these factors make the situation different than has been relentlessly painted; there are legitimate arguments on both sides and the Supreme Court will make a tough decision. Whatever it is, that will be their decision. It was a flawed law when it got to the Supremes, and they will still maintain legitimacy and respect when it leaves, regardless of how they sort the hash they were served.

[Article updated to reflect author Jon Walker for the last link, not David Dayen]

ACA AT SCOTUS: SOME

THOUGHTS ON THE MANDATE

As you likely know by now, we stand on the cusp of historic oral arguments this week in the Supreme Court on the Patient Protection and Affordable Care Act (ACA), otherwise popularly known as “Obamacare”. The arguments will occur over three days, for a total of six hours, Monday through Wednesday. Yes, they really are that historic, as Lyle Denniston explains in SCOTUSBlog. The schedule is as follows: Monday: 90 minutes on whether the Anti Injunction Act (AIJA) prevents consideration of a challenge to the individual mandate until it takes effect in 2014; Tuesday: Two hours on the Constitutionality of the individual mandate; and Wednesday: 90 minutes on severability of the main law from the mandate and 60 minutes on state sovereignty concerns of Medicaid reform.

There are two areas of particular interest for me and which really are the meat on the bone of the overall consideration. The first is Monday’s technical argument on the AIJA, which I actually think may be much more in play than most commentators believe, because the Supremes may want to punt the politically sticky part of the case down the road until after the 2012 elections, and the AIJA argument is a ready made vehicle to do just that. Judge Brett Kavanaugh’s dissent in *Seven Sky v. Holder* explains how that would go should the Supreme beings decide to punt. This is by no means likely, but do not be shocked if it occurs; can kicking down the road is certainly not unknown at SCOTUS on politically sensitive cases.

By far, however, the biggest, and most contentious, kahuna of the healthcare debate is the individual mandate, and that is where I want to focus. The two sides, pro (predominantly liberal left) and con (predominantly conservative right), have been selling their respective wares since before the law was passed and signed by the President. As we truly head into the arguments, however, the pro left have crystallized around a matched pair of articles by Dahlia Lithwick and Linda Greenhouse, and the con right around response pieces by James Taranto and Ed Whelan.

Now this hardly seems like a fair fight, as Taranto has no degree, nor legal training, whatsoever; that said he and Whelan actually lay out the contra to Dahlia and Linda pretty well. Each side effectively accuses the other of being vapid and hollow in argument construct. I will leave aside any vapidity discussion because I think both sides genuinely believe in their positions; as to the hollowness, though, I think both sides are pretty much guilty. Which is understandable, there is simply not a lot of law directly on point with such a sweeping political question as presented by the mandate. "Unprecedented" may be overused in this discussion, but it is not necessarily wrong (no, sorry, *Raich v. Gonzales* is not that close; it just isn't).

In short, I think both sides are guilty of puffery as to the quality of *legal* support for their respective arguments, and I believe both are guilty of trying to pass off effective political posturing as solid legal argument. Certainty is just not there for either side. This is a real controversy, and the Supreme Court has proved it by allotting the, well, almost "unprecedented" amount of time it has to oral argument.

All of the above said, I join my friend Dahlia (and, more nebulously, Linda) in predicting the mandate will be considered (i.e. the AIJA argument discarded) on its merits, and the

mandate will survive by either a solid 6-3 or 7-2 vote. There is one caveat to that, however. I have long maintained John Roberts will never be the fifth, and swing, vote to uphold the mandate/Obamacare by a narrow split of 5-4. If it comes down to that, Tony Kennedy would have had to have thrown in with the conservatives, and Roberts will never be the swing, nor would Alito or Scalia. But, if Kennedy goes with the liberal bloc, so that 5-4 is already there, Roberts will sign on to make it 6-3 and there might even be one more that signs up to make it 7-2. So, Obamacare either wins by 6-3 or 7-2, or loses by 5-4, and I think the former. You heard it here.

Now, I want to explain why, at least in my eyes, the mandate is no slam dunk and why I think even my friends on the liberal side are perhaps a little rah rahed and puffered on how awesomely clear cut the mandate is. In that regard, a couple of examples of just how important the mandate consideration is, because of how largely writ it can be extrapolated out, should be considered.

The first analogy comes courtesy of David Bernstein at Volokh:

> But let's say the Federal government decided to pass legislation, modeled on longstanding state laws, requiring all residents of the United States to attend school until age 18 or face [some penalty—a fine, or being drafted into "national service" or whatever]. A resident of a state where schooling is only mandatory until age 16 sues, claiming that this is beyond Congress's enumerated powers.
>
> The government claims that it has the authority under its Commerce power to require school attendance. After all, not only is education is a huge percentage of the American economy, the federal government already regulates the education market to a substantial degree

> and spends tens of billions of dollars annually for education, money that will to some extent be wasted if children don't continue their education at least through high school. Thus, it's both necessary and proper that the government impose an education mandate to ensure that it's education policies will be successful.
>
> To the argument that a sixteen year old dropout isn't engaged in economic activity, the government argues that staying out of school is itself an economic activity, because, among other things, it reduces the amount of federal and state aid to one's school, makes one less marketable in the employment market, reallocates resources that would otherwise be spend on the dropout's education, and makes it more likely that one will need to spend money on education in the future. Moreover, no one is really "out" of the education market, because everyone is learning things all the time, whether from t.v., one's friends, Facebook, or formal schooling. Finally, by dropping out of school, a sixteen year old is raising the expected costs to the government and society of future crime, welfare payments, and the like.
>
> Anyone think the government should win?

Actually David, yeah I wouldn't have a real problem with that. As a sage friend related to me this morning, there is a direct correlation between a nation's ability to compete in a world market and the level of education provided to it's citizens. Citizens with less, or poorer, education harm the entire nation – it's welfare, it's defense, its very liberties and it's ability to defend itself against threats and enemies, foreign and domestic. I think that is exactly right; if you accept the individual mandate is constitutionally agreeable, it would

be hard to see how you could disagree with an "education mandate".

I would hazard a guess, contrary to David Bernstein's point, most liberals, and maybe even many from the right, might have no problem with mandatory education as a corollary act to the healthcare mandate under the Commerce/Necessary & Proper Clauses (though they may, of course, want vouchers and church school subsidization).

Problem is, the analogies can get harder. Much harder. Let's try this one of my own construct:

> Guns and armament are necessary for the national defense, as is a strong and robust domestic weapons industry. It is important to not only encourage adequate arming of the citizenry for protection from terrorists and foreign agents, but to also encourage the manufacturing capability here in the homeland.
>
> Ergo, every citizen, regardless of their age, shall from here forward be mandated to buy a gun (parents will be in charge of, and responsible for, the guns on behalf of the minors until they reach the age of majority). You will, of course, be able to opt out and pay a $750.00 per person, per year, tax penalty for not complying with the mandatory gun purchase and ownership.

You okay with this one too? If so, is there any mandatory purchase legislation you would not be okay with? What would be the threshold discrimination for a compelled commerce purchase law that would *not* be appropriate to you be then?

The question of whether one believes there is any limit whatsoever on the commerce power of Congress, and whether that is a good or bad thing, exists irrespective of SCOTUS, at least until they rule on this ACA extravaganza. This stuff matters. A lot. I personally find the analogies extremely useful to explore just how

committed people are to the political blarney that has been casually cast about as legal argument on this issue – by both sides.

Are the liberal proponents of the mandate, who bellow "it is absurd to even question the issue, obviously the mandate is within the Commerce power!" really willing to follow the import and implication of their arguments out to their conclusion?

Are the conservative opponents of the mandate, who screech "this is unprecedented, and of course Article III courts have the innate power and authority to ban a facially valid law of Congress under the Commerce/Necessary and Proper Clauses!" really willing to accept that authority, control and micromanagement of Article I Congressional will by the Article III courts? Because that is not exactly what they normally say.

There is actually a bit of a paradox in both side's positions vis a vis their normal views; liberals usually accept more control and regulation by courts on Congressional action as a check and balance, conservatives usually vehemently argue courts have no such proper role.

This is about far more than Obama's questionably cobbled together ACA law; the law is inane in how it soaks Americans to benefit craven insurance companies. Either way, sooner or later, healthcare as constructed and/or mandated by the ACA will die a painful death, but will continue to decimate American families for years, irrespective of the ruling by the Supreme Court on its nominal constitutionality. At some point, single payer, such as "Medicare For All" is inevitable.

However, the pervasive effects of the Commerce/Necessary & Proper Clause determination on the individual mandate, caused by the nightmarishly cobbled together Obamacare, will shape the direction of the Supreme Court in relation to commerce, business interests and,

indeed, potentially American life across the board, for decades, if not lifetimes, to come.

That is what is at stake this week. Yes, it is *that* big. No, it is not *that* easy or clear cut. I do not know how it all sorts out for sure, but I do I do think, unlike the vast majority of the political commentators opining in the ether, the Supreme Court understands the consequences for the long run and the gravity of what they are considering. That said, it is still a very political decision for the Supreme beings, and how they calculate that, vis a vis history, is anybody's guess.

One thing IS certain, when the dust has settled, one side will say the Supremes are beautiful minds, and the other will say they are craven activist tyrants. That is life in the modern Article III existence. Game on!

NY TIMES ADMITS GRUBER PROBLEM, FAILS TO MENTION KRUGMAN PROBLEM

In a full throated *mea culpa* by the New York Times Public Editor, Clark Hoyt, appearing in the Sunday edition, the Times officially describes the critical and material implications that arise when readers are misled by undisclosed interests of sources and authors in their paper of record.

> These examples have resulted in five embarrassing editors' notes in the last two months — two of them last week — each of them saying readers should have been informed of the undisclosed interest. And on Thursday, the standards editor sent Times journalists a memo

> urging them to be “constantly alert” to the outside interests of expert sources. The cases raised timeless issues for journalists and sources about what readers have a right to know and whose responsibility it is to find it out or disclose it.

That is exactly right. One of the prime examples the Times’ Public Editor bases his proper conclusion on is that of Jonathan Gruber:

> Jonathan Gruber, a prominent M.I.T. health economist, wrote an Op-Ed column and was quoted frequently in other Times columns, news articles and blogs on health care reform before it came to light that he had a contract worth nearly $400,000 to analyze health proposals for the Obama administration.
>
> ….
>
> Gruber, the health care economist, wrote an Op-Ed column in July supporting an excise tax on so-called Cadillac health plans. Not long before, he had signed a contract with the Department of Health and Human Services to analyze the economic impact of various health care proposals in Congress. He did not tell Op-Ed editors, nor was the contract mentioned on at least 12 other occasions when he was quoted in The Times after he was consulting for the administration. After a blogger reported on Gruber’s government contract on the Daily Kos Web site, Gruber did volunteer it to Steven Greenhouse, a Times reporter interviewing him for an article on the excise tax. Greenhouse said he included the fact in a draft but struck it because the article was too long. Greenhouse said that Gruber’s views on the tax were so well-known that he did not think they would be influenced by a consulting contract. But had he realized

> how large the contract was, Greenhouse said, “I would have stood up and paid lots more attention.”

While it is nice the Times has admitted its problem with Gruber, and his wantonly serial failure to disclose material facts and appearances of conflict, it is extremely curious and convenient they dodge the most recent, and in many regards most glaring, example of their damage from Gruber’s omissions. Namely, the scurrilous attack on Marcy Wheeler by New York Times columnist Paul Krugman, where he petulantly defended his friend and colleague Gruber by tarring Marcy and the entire Firedoglake blog with the statements:

> This has led some people, mainly Marcy Wheeler at Firedoglake, to question Gruber’s objectivity. ….. What the folks at Firedoglake should ask themselves is this: do you really want to become just like the right-wingers with their endless supply of fake scandals?

This was an unjustified and unconscionable slash by Mr. Krugman. Both Mr. Krugman and the Times were fully apprised of the complete absence of factual basis for Krugman’s remark; I know, because I wrote a blog post to that effect and personally sent it to Krugman and the Times. I will not reprint the contents of my email forwarding the same to Krugman and the Times, as I indicated in it I would not make it public. Suffice it to say I suggested Mr. Krugman owed Marcy Wheeler a retraction and/or apology. He still does.

But there has been no response from the esteemed Mr. Krugman, and the Times’ Public Editor Hoyt decided to completely, and conveniently, ignore the matter by declining to discuss it. Instead, Mr. Hoyt chose to disingenuously refer as follows:

> After a blogger reported on Gruber’s

> government contract on the Daily Kos Web site….

Actually, there are several terms beyond disingenuous to describe this contemptuous soft sell; but I will leave it there. First off, Mr. Hoyt does not have the decency or professionalism to even name the Daily Kos author he is referring to. Her name is Mcjoan Mr. Hoyt, and she is very good. Secondly, Hoyt willfully refuses to address the individual blogger, Marcy Wheeler, who was responsible (see: here, here, here, here, here, here and here) for fleshing out, over several days, the full extent of Gruber's disclosure failings and laying the evidentiary foundation for the same. Lastly, of course, Hoyt fails to address the baseless attack his paper, via Paul Krugman, wrongfully made on Marcy Wheeler and Firedoglake.

What Hoyt does make crystal clear though, and provides robust documentation of, is that Jonathan Gruber's disclosure failings were no "fake scandal", nor were they in any way analogous to the spurious antics of "right wingers" as Paul Krugman callously alleged. After all, it is right there in the "paper of record".

I guess avoidance means never having to say you are sorry; but it is a pretty unsavory tact for the New York Times, paper of record and home of "all the news fit to print". All the news maybe, but certainly not all the truth, honesty and chivalry.

UPDATE: To clarify, and properly so as Marcy points out in a comment, the original reporting of Jonathan Gruber's contract giving rise to the issue of disclosure came from a blogger by the name of Mote Dai in a comment to Mcjoan's Daily Kos post on the excise tax Paul Krugman linked to in his article.

I would also like to agree with the sentiment expressed by Professor Foland in his comment:

> Krugman has earned the presumption from us that he's acting in good faith and happens to disagree; and we should honestly try to understand where he's coming from otherwise we'll never convince him.

I think that is a more than fair point as to Mr. Krugman's position on Jonathan Gruber; it is Krugman's lashing out at Marcy Wheeler, and Firedoglake as an entity, I take issue with. It is in this regard Mr. Krugman painted with an excessively broad, harsh and false brush.

MARCY WHEELER TEEVEE – JONATHAN GRUBER AND THE CADILLAC PLAN

There has been a fair amount of misinformation and disinformation about what has been said by Marcy Wheeler on this blog about Jonathan Gruber, his modeling work on healthcare and relationship with the Obama Administration. One instance in this regard, quite unfortunately, was notably made by Paul Krugman. Mr. Krugman, who is a solid liberal voice and worthy of respect, nevertheless very unfairly tarred Marcy with complaints he had, or perceived, with others and he owes better.

First off, I would like to point out the matter of Gruber started primarily about the duty and obligation of disclosure, and there *was*, unequivocally, a failure in full disclosure by both Mr. Gruber and the White House, both relying on his work (inferring that it was independent), and simultaneously funding it, whether directly or indirectly. For Mr. Krugman

to extrapolate that out to being “just like the right-wingers with their endless supply of fake scandals” was startling and beyond the pale. There was also no foundation for it from Marcy’s words and statements on this blog.

The foregoing is something that I, bmaz, felt compelled to say; if you disagree, then your beef is with me, not Marcy, not Firedoglake, nor anybody else. Now, with that said, I wish to present Marcy Wheeler and let her speak for herself about exactly what the Gruber matter is about, and what it means. The attached video clip is from a MSNBC interview of Marcy conducted by David Shuster Tuesday morning.

It should be noted that Marcy was covering the North American International Auto show in Detroit when MSNBC interviewed her, as David Shuster notes. What David didn’t catch was that, the whole time he was discussing the infamous “Cadillac tax” Mr. Gruber’s work is central to, Marcy was standing in front of the Cadillac display. Now *that* is product placement!

Interestingly enough, in discussing the Cadillac tax, Paul Krugman has flat out admitted the claims of insurance premium reductions leading to wage increases are “exaggerated” and that “Cadillac plans aren’t really luxurious – they reflect genuinely high costs.” Mr. Krugman might want to take a look at the most recent work by Larry Mishel, an economist Mr. Krugman has cited before; in fact the exact economist Paul cited as support for the fact that the wage growth claims were “exaggerated”. Mr. Mishel’s new article seems to undercut the entire Cadillac tax thesis as to wage movement.

UPDATE: Economist Larry Mishel, who was linked to in the main post and referred to with seeming approval by Paul Krugman as well (link to that also in main post) put the following in a comment to his FDL Seminal Post yesterday:

> I do think Gruber’s claim about the wage impact of lower health care inflation in the 1990s (and the reverse trends in the

> 200s) was wrong: The simple tale seemed to support his policy desire to curtail health care costs via the excise tax but digging into the details shows that health care costs have not driven wage trends. This does not mean that lower health care costs might not lead to better wages, just that the scale of the impact won't move wages appreciably.
>
> I may differ with many of you on the site though in that I don't impugn Gruber's motives. I don't think there's much of a scandal regarding his contract with HHS. I think his error in the case I'm criticizing is that he's a health care economist and doesn't know the details about wage trends. I, on the other hand, have been studying wages for thirty years or more. Gruber clearly over-reached with the argument about health care driving wage trends and has acknowledged that to me privately (yesterday).
>
> So, I think he's wrong on this issue and I also disagree with him on the overall merits of the health excise tax. But I think he's a pretty smart, reasonable and straightforward economist. I've had to debate some pretty scummy economists and he's not one of them. (emphasis added)

I agree with Mr. Mishel about the absence of malice by Mr. Gruber. But malice was never ascribed by Marcy Wheeler, she merely pointed out that there was a simple failure to fully disclose potential conflict information, that others had an interest in knowing, and that the assumptions Mr. Gruber's model was based on may not be correct. These points have been borne out by others, indeed effectively by Paul Krugman himself and other experts he relies on. The tarring that occurred from Paul should be retracted.

LATE NIGHT: MAX TAX BAUCCHANAL GRABS THE DENTAL FLOSS

There seems to be no end to the duplicitous clean livers that are hiding cirrhotic private lives and peccadillos. Now, if you ask me, no one should be all that shocked Tiger Woods prowls like a big cat. He has been known to feel a kinship and run with Michael Jordan and Charles Barkley pretty much since he left Stanford for the bright lights and big city attractions of the PGA traveling circus. Tiger didn't want to be like Mike, he *already was* like Mike. The "right stuff" that makes the greatest athletes stand out above the mere all stars and all pros generally comes with a healthy quotient of carnivore like killer instinct and desire.

But the discovery that a holier than thou condescending family values prairie dweeb like Max Baucus (R-Dentalflossville) is footing the shack up of his latest shag, well that is a whole nuther thing. Who knew Max chased the skirts and dental floss just like those hedonists in California? And considering the Max Tax concubine was, at least for a while, one of his staffers, there is of course some relief it was not an intern. So he has got that going for him I guess.

Before the moment that is the Passion Of Max fleets from memory though, let the proletariat he arrogantly betrays daily in his day job as an elected representative of the people, nation and the collective interest not be lost as to the real upshot. But lost it will be if left up to the puerile panty sniffers in the main stream political media. For instance those deer hunting manly men over at Politico have two stories on their front page (here and here) on the Max Tax plan to boost his squeeze with an elite

appointment to a coveted US Attorney position and, yet, not one mention of the hypocrisy exhibited by the revelation as framed against the Baucus constant braying for fiscal responsibility and reticence to provide a health care bill covering women equally and fairly. Go figure.

As an extra Late Night bonus, check out this story of the evil terrorist Christmas elf:

> A man dressed as an elf is jailed after police in Georgia say he told a mall Santa that he was carrying dynamite.
>
> Police say Southlake Mall in suburban Atlanta was evacuated but no explosives were found.
>
> …
>
> Police say Caldwell got in line Wednesday evening to have his picture taken with Santa Claus.
>
> Police say when Caldwell reached the front of the line, he told Santa he had dynamite in his bag. Santa called mall security and Caldwell was arrested.
>
> Caldwell faces several charges, including having hoax devices and making terrorist threats.

Awesome.

PAY2PLAY CECI: “THE MOST INFLUENTIAL PLAYERS” LOVE MAXTAX

Pay2Play Ceci Connolly has an article out summing up the reaction she’s seeing to Max Baucus’ health care plan:

> As they scoured the 223-page document, many of the most influential players found elements to dislike, but not necessarily reasons to kill the effort. Most enticing was the prospect of 30 million new customers.

In order of appearance, here are the people she cites in her article (I've bolded the ones she has actual quotes from):

- Max Baucus
- Obama
- Liberal Democrats and allies, particularly labor unions
- Republicans
- Major industry leaders and interest groups
- White House strategists
- Obama
- John D. Rockefeller
- Lawmakers and lobbyists
- Ron Wyden
- Neil Trautwein, a vice president of the National Retail Federation
- Leaders of the Business Roundtable and the National Federation of Independent Business
- Drugmakers and hospitals
- Kenneth E. Thorpe, an Emory University professor and Clinton administration official (noting that health care providers stand to make more than they'll lose)
- Max Baucus

- Several trade associations
- The medical device industry (dsecribed "recruiting" four senators to roll back fees on its industry)
- One White House aide

In all, Ceci presents a landscape in which the most important players—aside from two Senators who have been slighted in the process thus far—are trade industry groups. And the most important issue for them is the profit they stand to make off of taxing America's middle class to make them wealthier.

Now, to be fair to Pay2Play Ceci, that's unashamedly the point of her article—that while the bill has pissed off Democrats and Republicans, it has thus far lulled the industry with dreams of forthcoming riches.

> But behind the rhetorical fireworks was a sense that the fragile coalition of major industry leaders and interest groups central to refashioning the nation's $2.5 trillion health-care system remains intact.

And also to be fair to Pay2Play Ceci, it's clear that these players were the prime movers behind this bill. The story is absolutely accurate—though that doesn't mean it has any business being told.

Nothing demonstrates the degree to which actual politicians—much less their constituents—have become mere bystanders as the health care industry crafts up a plan to get 30 million new captive customers.

One more point on this (so I can count this as my daily thrashing of the WaPo). An article like this is the natural outcome of the WaPo's attempt to be a broker of the key players (not surprisingly, the same industry hacks highlighted here) in the health care debate.

From the time Katharine Weymouth first recruited Pay2Play Ceci to invite her ~~clients~~ sources to the Pay2Play salons, it pretty much guaranteed that Pay2Play Ceci would come in at precisely this moment and present the industry's judgment—that they'd be perfectly happy getting 30 million new customers with almost no payback—as "news."

CBO ON CO-OPS

Ezra has posted the CBO's initial estimates on the costs of MaxTax—some of the assumptions for which seem to pretend that insurance companies will not react in any way to the new rules imposed by MaxTax.

But before I get into what CBO's assumptions, here's what CBO thinks of Baucus' crappy co-op option.

> (The proposed co-ops had very little effect on the estimates of total enrollment in the exchanges or federal costs because, as they are described in the specifications, they seem unlikely to establish a significant market presence in many areas of the country or to noticeably affect federal subsidy payments.)

That is, as designed, the co-ops would not be more attractive than the private insurance options, nor would they bring down subsidies (which means they wouldn't bring down costs to us, either).

As designed, the co-ops are totally worthless.

THE REAL WORST POLICY IN THE BILL

Ezra continues to claim that the worst employer incentive in MaxTax is the way it fines employers for not covering employees.

> Max Baucus's bill retains the noxious "free rider" provision on employers. Rather than a simple employer mandate that forces every employer over a certain size to provide health-care insurance or pay a small fee, the free rider approach penalizes employers $400 for hiring *low-income workers who are eligible for subsidies*.
>
> [snip]
>
> This isn't just the worst policy in the bill. It's one of the worst policy ideas I've ever seen. It creates a huge incentive to build a workforce that entirely excludes low-income workers.

Now before we get into whether this really is the worst incentive or not, let me correct something Ezra said. He said:

> The employer doesn't just pay $400 per low-income employee. He pays "$400 multiplied by the total number of employees at the firm (regardless of how many are receiving the state exchange credit)." The bill actually gives an example of how this works: Employer A has 100 employees and does not offer health-care coverage. Thirty of the employees receive subsidies on the exchange. Employer A doesn't pay $400 x 30 employees, but $400 x *100 employees*, for a total of $40,000.

But that's not what the MaxTax does or says. Here's what MaxTax says [update: Ezra has now amended his post to reflect this difference.]

> The employer would pay the lesser of the flat dollar amount multiplied by the number of employees receiving a tax credit or a fee of $400 per employee paid on its total number of employees.
>
> For example, Employer A, who does not offer health coverage, has 100 employees, 30 of whom receive a tax credit for enrolling in a state exchange offered plan. If the flat dollar amount set by the Secretary of HHS for that year is $3,000, Employer A should owe $90,000. Since the maximum amount an employer must pay per year is limited to $400 multiplied by the total number of employees (for Employer A, 100), however, Employer A must pay only $40,000 (the lesser of the $40,000 maximum and the $90,000 calculated fee). [my emphasis]

So Ezra's (and Baucus') hypothetical employer would pay just $40,000. But say Employer B had just 5 employees who were subsidized, out of the same 100 employee firm. Employer B would pay $15,000, which brings it closer to the costs an employer might incur trying to preferentially hire an employee who might already have health care.

Ezra's point still holds—to a degree. Both employers have an incentive to avoid hiring low income workers for whom they might be fined.

But that last bit is key: not every low income worker will get an employer fined. In fact, as I've pointed out, MaxTax actually includes an even bigger incentive for employers to hire very low income workers—and make sure they remain very low income. That's because MaxTax does not penalize employers whose employees opt out of their health care by enrolling in Medicaid instead. With the Medicaid eligibility raised to 133% of poverty, it would be a very easy thing for a company like Wal-Mart to ensure its employees remain eligible for Medicaid. And,

unlike a few of the scenarios that Ezra describes (such as preferring undocumented workers who can't be enrolled in the exchange), this one is completely legal. So with the Medicaid provisions, the biggest incentive is for an employer to employ as many employees as possible who qualify for Medicaid, because it's the one way for a large employer to get the federal government to pay for the employer's health care for free.

Mind you, the employer would have to offer some kind of insurance to get this big bonus. But given the captive terms which MaxTax puts employees in, any employer who puts their mind to it can offer an insurance option not only priced precisely to ensure that no employee can opt-out for subsidized exchange coverage (thereby completely eliminating the risk Ezra points to), but priced in such a way as to make Medicaid a far more attractive option.

And this scenario is not far-fetched. It is, in fact, what Wal-Mart already does in states where Medicaid laws permit. This would just institutionalize it on the national level and make it easier for Wal-Mart to manage staffing in such a way as to ensure its employees remain eligible for Medicaid. And given that ensuring low wages is much easier to do on a large scale than trying to game which relatively low wage worker (teenagers and spouses) might already have healthcare, forcing employees onto Medicaid is probably by far the cheapest way for employers to avoid any significant costs to comply with MaxTax.

The reason I say this is a worse policy than the one Ezra points to is that it is much easier to pull off while staying within the law and its got a bigger upside for employers. More importantly, it means the one employer action for which MaxTax provides the biggest incentive is to create huge numbers of jobs guaranteed to keep those working in them in poverty.

The Wal-Mart bonus included in MaxTax would likely set off a race to the bottom among

employers—to shift as much of its work force as possible into Medicaid-eligible shit jobs. MaxTax is a Democratic bill rewarding employers for keeping its employees in poverty, and it would accelerate the impoverishment of America's workers.

Now, ultimately, MaxTax's entire treatment of workers creates several different incentives, all of them perverse. Employers can minimize costs under MaxTax by:

- Ensuring entry-level workers never make more than 133% of the poverty level (my concern—one large employers are likely to choose)
- Avoiding hiring the workers most likely to qualify for subsidies (Ezra's concern—something more manageable for smaller sized employers)
- Using employees—who under MaxTax terms will be auto-enrolled in employer programs with limited options to get out—as profit centers for horrible health care that nevertheless meets MaxTax's crappy requirement levels for healthcare (also a choice for larger employers)

Employers may well employ a mix of these strategies so as to fulfill the requirements of MaxTax with the fewest costs. And, I suspect Ezra would agree, the entire employer requirement would need to be totally reworked to be even minimally acceptable.

But as bad as the MaxTax disincentives to hire some kinds of low wage workers are, the incentives are actually much bigger to hire very low wage workers—but to ensure they remain poor. And both are recipes for disaster for American workers.

AFFORDABLE FOR INDIVIDUALS VERSUS AFFORDABLE FOR WAL-MART EMPLOYEES

Here's a scary part of MaxTax, if I understand it correctly. MaxTax still screws employees but rewards Wal-Mart as I've laid out in this post and this post. Here's the language in question:

> As a general matter, if an employee is offered employer-provided health insurance coverage, the individual would be ineligible for a low income premium tax credit for health insurance purchased through a state exchange. An employee who is offered coverage that does not have an actuarial value of at least 65 percent or who is offered unaffordable coverage by their employer, however, can be eligible for the tax credit. Unaffordable is defined as 13 percent of the employee's income. For purposes of determining if coverage is unaffordable, salary reduction contributions would be treated as payments by the employer. The employee would seek an affordability waiver from the state exchange and would have to demonstrate family income and the premium of the lowest cost employer option offered to them. Employees would then present the waiver to the employer.

> The employer assessment would apply for any employee(s) receiving an affordability waiver. Within five years of implementation, the Secretary must conduct a study to determine if the definition of affordable could be lowered without significantly increasing costs or decreasing employer coverage.
>
> A Medicaid-eligible individual can always choose to leave the employer's coverage and enroll in Medicaid. In this circumstance, the employer is not required to pay a fee.

But note how affordability is defined: 13% of "income."

Now look at how MaxTax defines "affordable" for individuals having to buy insurance via an exchange.

> Exemptions from the excise tax will be made for individuals where the full premium of the lowest cost option available to them (net of subsidies and employer contribution, if any) exceeds ten percent of their AGI.

The individual definition of affordable uses 10% of Adjusted Gross Income. Whereas the employer's definition of affordable uses 13% of (apparently) total income.

Now, it's a good thing (sort of) that the affordability rate for individuals is 10% of AGI. That means a family would be able to opt out if there were no health care available at even a lower rate than I thought (for example, it might mean a middle class family could opt out if health insurance cost them $6,000 a year, as opposed to $8,000 a year). It's a bad thing, though, because it means MaxTax would be far from universal—a lot of middle class families will pretty much have to opt out because they can't afford coverage.

But if your employer offers health care—even if it covers just 65% of costs—then you can't opt-out unless you're paying out of pocket 13% of your total income!! Oh, and to opt-out you have to go to your manager and tell him or her that you're opting out, which means the employer will be fined; how many people do you think will be fired rather than opt-out?

I hope I'm wrong about this. But if I'm understanding this correctly, it reinforces my impression that MaxTax is an invitation to allow employers to turn their employees into captive profit centers.