

Texas' ObamaCare Strikedown Should Stand

Publication info: Wall Street Journal , Eastern edition; New York, N.Y. [New York, N.Y.]22 Dec 2018: A.14.

[ProQuest document link](#)

FULL TEXT

As lead counsel for individual plaintiffs in the recent ObamaCare case in federal court, I disagree with your editorial criticizing Judge Reed O'Connor's decision to strike down the law ("Texas ObamaCare Blunder," Dec. 17). The editorial does not distinguish between ObamaCare's individual mandate and its "shared-responsibility payment." The mandate is the provision of the law that compels taxpayers to purchase insurance, while the shared-responsibility payment was the actual fee levied on those who did not. Separating these components is the key to seeing why ObamaCare can no longer be found to square with the Constitution.

In *NFIB v. Sebelius* in 2012, the Supreme Court ruled the individual mandate to be unconstitutional, saying Congress has no power to order Americans to buy a service. In the same stroke, however, the court declined to strike down the law as a whole, finding that the shared-responsibility payment could be construed as a tax intended to raise funds rather than a penalty for failure to buy insurance. Yet in 2017 Congress reduced the shared-responsibility payment to zero. Without the basis for the court's savings construction, the mandate is left as an unconstitutional order upon Americans to purchase a good.

The *NFIB* ruling also held that the mandate is not severable from ObamaCare. While rulings on severability do implicitly call for judicial restraint, that is not the driving factor in that doctrine. Judge O'Connor correctly looked to the most recent Supreme Court case involving severability, this year's *Murphy v. NCAA*. In that case, the court ruled an unconstitutional provision of a federal antigaming law to be unseverable, and struck down the entire law.

Under the severability doctrine, courts ask three main questions. Would severing the unconstitutional provision result in the remaining scheme being sharply different from what Congress intended? In the case of ObamaCare, the answer is yes. Is it evident that Congress would have enacted those provisions which are within its power independently of those which are not? No, it isn't. Would the law remain fully operational without the invalid provisions? No, it wouldn't. All three answers point to unseverability.

When ObamaCare was adopted in 2010, the individual mandate was the lynchpin. When the law was challenged, both the Supreme Court and the federal government granted that the mandate was essential to and inextricably intertwined with the regulatory scheme, which could not function without it. As such, in light of the standard above, Judge O'Connor was bound to follow precedent and strike down the entire law.

Robert Henneke

Texas Public Policy Foundation

Austin, Texas

DETAILS

Subject: State court decisions; Judges & magistrates

Location: Texas

People: O Connor, Reed

Company / organization: Name: National Collegiate Athletic Association--NCAA; NAICS: 813990; Name: National Federation of Independent Business; NAICS: 813910; Name: Texas Public Policy Foundation; NAICS: 813211; Name: Congress; NAICS: 921120

Publication title: Wall Street Journal, Eastern edition; New York, N.Y.

First page: A.14

Publication year: 2018

Publication date: Dec 22, 2018

Section: Letters to the Editor

Publisher: Dow Jones & Company Inc

Place of publication: New York, N.Y.

Country of publication: United States, New York, N.Y.

Publication subject: Business And Economics--Banking And Finance

ISSN: 00999660

Source type: Newspapers

Language of publication: English

Document type: News

ProQuest document ID: 2159605601

Document URL: <https://search.proquest.com/docview/2159605601?accountid=11209>

Copyright: (c) 2018 Dow Jones & Company, Inc. Reproduced with permission of copyright owner. Further reproduction or distribution is prohibited without permission.

Last updated: 2018-12-22

Database: The Wall Street Journal

LINKS

[Check for full text via WebBridge](#)

Database copyright © 2019 ProQuest LLC. All rights reserved.

[Terms and Conditions](#) [Contact ProQuest](#)