

Opinionator

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'Embarrass the Future'?

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Nothing in the Supreme Court arguments in the health care case last week, or in the subsequent commentary, has changed [my opinion](#) that this is an easy case. It's the court that made it look hard.

I don't mean the torrent of wisecracks at the government lawyers' expense from Justice Antonin Scalia, who despite his clownish behavior in channeling the Tea Party from the bench is surely smart enough to know the [difference between broccoli and health care](#). Rather, I mean the tough but fair questions from the members of the court who actually seemed to be wrestling with the issues: Justices Anthony M. Kennedy and Samuel A. Alito Jr. and Chief Justice John G. Roberts Jr. The Affordable Care Act will be upheld if at least one of these justices is satisfied that the briefs, the arguments, and his own judicial perspective provide sufficient answers to the questions.

By the end of the arguments, Chief Justice Roberts and, to a lesser extent, Justice Kennedy were heading in that direction, it seemed to me. While they might have initially seen the government's defense of the law as a slippery slope, leading from hospital emergency rooms to the vegetable bin, they appeared increasingly concerned by the implications of the plaintiffs' arguments as well. They seemed particularly alarmed by the categorical position put forward by Michael A. Carvin, the lawyer representing the small-business plaintiffs, who argued that a victory for the government would mean that Congress could "regulate every human activity from cradle to grave."

The chief justice's responses to Mr. Carvin included such rejoinders as "I don't think that's fair" and "I don't think you're addressing their main point, which is that they are not creating commerce in health care. It's already there." Justice Kennedy, suggesting that "most questions in life are matters of degree" — as opposed to the plaintiffs' all-or-nothing position — seemed to endorse the government's argument that the market for health care has unique features that separate it from the various hypotheticals and analogies buzzing around the courtroom.

I'll get back to health care. But first I want to consider the court's remarkable performance this week in the case on whether the Constitution bars strip searches of newly arrested people in the absence of any reason to suspect that they are concealing dangerous items or contraband. By a vote of 5 to 4, with an [opinion by Justice Kennedy](#), the court answered no. Clear enough.

But beyond that headline take-away, there is more to this decision, *Florence v. Board of Chosen Freeholders*. I don't know what the back story is, but I've parsed enough Supreme Court opinions over the years to know that there is one. What the external evidence suggests is an internal struggle. Argued back in October, the *Florence* case was the oldest argued case on the court's docket by the time the

decision came down on Monday. (By way of contrast, 5 of the 11 cases argued in January have already been decided, some of them weeks ago.) Surely something was going on during these last six months.

Justice Kennedy's opinion proceeded in five parts. Parts 1 and 2 recited the facts and precedents that the majority deemed relevant. Part 3 contained the analysis, and Part 5 stated the conclusion. What's intriguing is Part 4. This section offered an important qualification to the holding. There may be exceptions to the rule, Justice Kennedy said. Keeping a detainee out of the general prison population "may diminish the need to conduct some aspects of the searches at issue." Searches that involve touching – as those at issue in the case did not – may raise "legitimate concerns." There was no need to get more specific, Justice Kennedy said, because "these issues are not implicated on the facts of this case."

His opinion was joined in full, including Part 4, by Chief Justice Roberts and Justices Scalia and Alito. Both the chief justice and Justice Alito wrote concurring opinions to "emphasize the limits of today's holding," as Justice Alito put it. "It is important for me that the court does not foreclose the possibility of an exception to the rule it announces," Chief Justice Roberts wrote. Clearly, these two justices were troubled by the implications of the decision, and wanted its limits to be understood.

Among this edgy majority, one voice was missing: that of Justice Clarence Thomas. "Justice Thomas joins all but Part IV of this opinion," a footnote on the first page informs us. But Justice Thomas couldn't be bothered to explain himself, at least not in public. Presumably he shared his thoughts at some point with his colleagues. We're left to infer that what he wanted was a bright-line rule that would admit no exceptions, no circumstance under which a strip search might be so uncalled-for as to violate the Fourth Amendment's prohibition of unreasonable searches.

Was this a position that Justice Thomas wanted to maintain without having to defend it in writing? Earlier in his tenure, he wasn't shy about advocating extreme positions, such as his dissenting opinion in a 1992 case, [Hudson v. McMillian](#), on whether inmates have a constitutional right not to be beaten by prison guards. The majority held that the Eighth Amendment's prohibition on cruel and unusual punishment could apply regardless of the severity of any resulting injury. Justice Thomas said the Eighth Amendment protected inmates against only "serious injury" at the hands of their jailers, not against "a use of force that causes only insignificant harm."

By refusing on Monday to sign Justice Kennedy's Part 4, Justice Thomas deprived his colleague of a majority for the full range of his opinion, and without explanation. This was a wildly uncollegial act, violating the court's norm that votes come with reasons. I suspect that the court's center of gravity in this case, if not the actual opinion assignment, seesawed during the months of consideration. Of course, I don't know whether Justice Kennedy wrote his Part 4 as the price of retaining the support of Chief Justice Roberts and Justice Alito. Might one or both have otherwise joined Justice Stephen G. Breyer's powerful dissenting opinion and thus flipped the outcome? Or did Justice Breyer start out with a majority that he then lost as Justice Kennedy offered a softer version of an initial position?

All as tantalizing as it is unknowable from the outside. The larger point – the relevance to the health care case – is that there are obviously tensions and even rifts within the Supreme Court that don't map readily

onto the one-dimensional 5-to-4 narrative. This is the challenge facing Chief Justice Roberts as he tries to lead the court to an outcome. While I expect the statute to survive, I also have two other predictions. One is that however the case comes out, the chief justice will be in the majority and will write the controlling opinion. I don't say "majority opinion" because I don't think there are five justices who will necessarily agree on a common rationale for their agreed-upon result. In addition, or as an alternative to upholding the individual mandate as an exercise of Congressional authority under the Commerce Clause, some may prefer to treat the individual mandate as a tax, squarely within Congress's taxing power. Others may invoke the "necessary and proper" clause of Article I, Section 8. Consider that a court that spent nearly six months on the strip search case has barely three months before the end of the current term to decide the future of health care.

The chief justice's concurring opinion in the strip search case, only three paragraphs long, is interesting for a reason beyond what it might suggest about intramural stress. Here is the final paragraph:

"The court makes a persuasive case for the general applicability of the rule it announces. The court is nonetheless wise to leave open the possibility of exceptions, to ensure that we not 'embarrass the future.'"

"Embarrass the future"? The quote, from a [1944 opinion by Justice Felix Frankfurter](#) in a tax case, is usually offered to mean that the court shouldn't encumber itself by declaring solutions to problems that have yet to emerge. Maybe that's all the chief justice meant. But John Roberts is both a careful prose stylist and a man acutely conscious of his and the court's place in history. There are so many other ways of expressing a minimalist impulse than this unconventional use of the word "embarrass" that I have to wonder whether he didn't have in mind the prospect of institutional embarrassment, and not only in the case at hand.

On the third and final day of the health care arguments, the justices took up the question of "severability" – what parts of the Affordable Care Act should fall or remain if the individual mandate is carved out. Under the court's precedents, this is an inquiry into Congressional intent. The question of what Congress would once have wanted or might do now turned various justices into armchair political scientists, a role to which they were no better suited than their role earlier in the week as amateur economists. The effect was somewhat surreal. Late in the argument, interrupting a lawyer's statement that "Congress would have wanted ...," Justice Kennedy asked: "The real Congress or a hypothetical Congress?"

Although the courtroom audience chuckled, I'm not sure that Justice Kennedy meant his smart question to be funny. And anyone watching or listening to the argument had to wonder: is this the real Supreme Court or a hypothetical Supreme Court? The hypothetical court is the court depicted in so many recent confirmation hearings, where the justices dispassionately go about applying the law to the facts. The real court is – well, by three months from now, we'll see.