

USA: Supreme Court Storm Clouds

Saturday 8 September 2012, by [Against the Current](#) (Date first published: 1 September 2012).

RIGHT-WING HOWLS OF outrage over the Supreme Court's 5-4 ruling to uphold the Patient Protection and Affordable Care Act soon faded into the general background noise. "Repeal Obamacare" is the Republican mantra for the November election, but an actual legislative reversal of ACA is highly unlikely. What's actually on the agenda — and more ominous not only for health care, but as a signal of the Supreme Court's direction on a wide range of issues — is the opportunity the Court has given states to reject the expansion of Medicaid to cover millions of the near-poor. (Milton Fisk's article in this issue of *Against the Current* explores the continuing health care reform struggle.)

If right-wingers miscalculated in assuming that the Supreme Court's majority would strike down the "individual mandate" to buy insurance, many liberals are even more deluded in thinking that Chief Justice John Roberts is moving the Court toward a more "centrist" or "moderate" stance. Quite the reverse, the Court may be poised in its next term to smash up generations of social justice and welfare provisions, beginning with the right to vote. Let's briefly explore why.

Roberts unexpectedly improvised a ruling that nullified the "individual mandate" as a regulation of interstate commerce, but turned around and upheld it as a tax (a penalty for not carrying insurance) that Congress is authorized to legislate. Many conservatives, feeling cheated of the victory they'd expected to crush president Obama's credibility, responded that Roberts had turned traitor or was losing his mind.

It would seem more likely that Roberts made a sophisticated political calculation, then worked out the legal theory to gain the desired result. Undoubtedly, the individual mandate was always the law's Achilles heel, its least popular and most dubious provision. It was made necessary — along with the massive bureaucratic complexities of the law — by the failure to create the straightforward and simple single-payer" (universal Medicare) setup that's really needed. But overturning the law would have thrown the already disastrous U.S. health care system into chaos, with unpredictable consequences.

A 5-4 Supreme Court decision to strike down or cripple the huge health reform law could also have threatened the Court's own public legitimacy — especially coming on the heels of other rightwing rulings like the infamous *Citizens United* case, which overturned a century of federal and state campaign finance laws. The stench of the Court's *Bush v. Gore* decision, which ratified the theft of the 2000 presidential election, also continues to waft through the political atmosphere.

In short, finding a way to keep the health reform law on the books was the preferable outcome for the Court's standing and for the stability of the system as a whole. Constitutional law is flexible enough to pretty much allow for whatever opinion Roberts wanted to construct. At the same time, the ruling leaves plenty of room to sabotage the reform — by states opting out of the expanded Medicaid or refusing to implement the insurance exchanges, and by Congress blocking the funds to implement it.

When the Supreme Court in the 1950s outlawed legal racial segregation in the Jim Crow South, it ordered that public schools be integrated "with all deliberate speed." That infamous phrase was a

covert poison pill enabling state governments to stall and ignore desegregation requirements for years on end, often until federal troops were sent to enforce court orders. With today's state Medicaid opt-out, the Court has overtly ruled that implementing the health reform itself is "optional." The concept that health care should be a basic human right, not a "policy" question, has essentially dropped out of sight.

Much Broader Implications

The Supreme Court's agenda and impact extend far beyond the parameters of the health care debate. First and foremost, the Court over the past thirty years has evolved into the cutting edge of the rightwing offensive. In other periods, cases like *Citizens United* wouldn't generally come to the Court, because the authority of Congress and state legislatures to regulate corporate political spending had been accepted since the forced breakup of monopolies early in the 20th century.

When such cases did come up, the Court was expected to usually rule "narrowly" — for example, to decide whether *Citizens United*'s 2008 video attacking then-candidate Hillary Clinton could be aired during the campaign season under restrictive federal laws. The Court instead took on itself the role of wiping out all restrictions on "free speech" for corporate "personhood."

The Court is also operating in a period of austerity when budget and social service cuts have been accompanied by state legislatures' mass assaults on the most basic democratic rights that were won during the past half century or more. One leading example, obviously, is the wave of voter suppression laws in more than two dozen states, which could result in stealing elections not only in 2012 but for years to come.

The racial intent of these laws is utterly clear. The Supreme Court will ultimately be asked to rule whether many of them (voter ID, proof of citizenship, restrictions on voter registration drives, etc.) are constitutional under the terms of the 1965 Voting Rights Act. The Court could decide such cases on their specific merits — or it could choose to nullify much of the Voting Rights Act itself on the grounds that it has become "outdated" or unfairly singles out southern states, or that the explicit racist intent of state laws must be "proven," or some other lying pretext that the rightwing Court majority might cook up.

In the case of Arizona's infamous SB70 law, the Court threw out provisions that clearly "infringed" on federal prerogatives (e.g. to impose penalties for hiring undocumented workers), but upheld the vilest "show me your papers" part, which authorizes police to demand that anyone who's arrested or pulled over for a driving violation prove their citizenship or immigration status.

Republican state legislatures are enacting brutal anti-abortion laws that quite clearly violate the 1973 *Roe v. Wade* decision. Will the Supreme Court take the opportunity to overturn *Roe v. Wade* as several of its members clearly intend — or will the fear of a serious public reaction, threatening the Court's own legitimacy, hold it back from that particular obscene act?

The Court will also be asked, as early as this fall, to outlaw any form of affirmative action by public universities to increase racial minority enrollment. The result — exactly as intended by opponents of affirmative action — would be to keep tens if not hundreds of thousands of African-American and Latino students out of higher education, where the reactionaries don't think they "belong."

In short, as Stanford professor Pamela S. Karlan puts it, even though the Court upheld the health reform, "the conservative majority also laid down a cache of weapons that future courts can use to attack many of the legislative achievements of the [1930s] New Deal and the [1960s] Great Society — including labor, environmental, civil rights and consumer protection laws — and to prevent new

progressive legislation. Far from being a source of jubilation, the term may come back to haunt liberals." ("No Respite for Liberals," *New York Times Week in Review*, July 1, 2012: 1)

A Broken System: Struggle Will Decide

There's a secondary factor that gives the Supreme Court enhanced power: In a political system paralyzed by a rightwing veto over legislation and divisions over social policy, the Court tends to become a legislative branch of government in its own right.

The legal arguments presented to the Court and to public opinion do matter, because they reflect a struggle of underlying philosophies. The liberal case is excellently presented by Ronald Dworkin in his analysis of the health reform decision, based on a view of "political morality" underlying the constitutional text:

"The national power to tax is not just a mechanism for financing armies and courts. It is an indispensable means of creating one nation, indivisible, with fairness for all. The Affordable Care Act's mandate is not just another example of regulation of an interstate industry like cars or steel. It does not impose a tax in the ordinary political meaning. No one thought when the act was passed that Obama had broken his promise not to raise middle-class taxes: that claim is a sudden invention of opportunistic Republicans...But the act is nevertheless best understood as in the long tradition of mandatory insurance for the sake of justice." ("A Bigger Victory Than We Knew," *The New York Review of Books*, August 16, 2012: 12)

Whether arguments based on social justice and "fairness" prevail is ultimately decided by the power of movements versus that of money and entrenched privilege. If that's true in periods of relative prosperity and political stability — as in the 1950s and early 1960s, when the Civil Rights Movement rose up to challenge segregation and racist terror — it is all the more true now in a time of austerity, anti-democratic assaults and a broken political system.

The U.S. Congress today cannot adopt a federal budget, let alone discuss a decent immigration reform. The House of Representatives passes one after another resolution-to-nowhere "repealing Obamacare." The Senate can't ratify judicial or federal agency appointments, even if they're not controversial. It won't even do away with filibuster rules that prevent it from voting on much of anything. Dealing with climate change? Don't even think about it!

Most of this dysfunction will remain regardless of whether the corporate centrist Barack Obama or the appalling vulture-capitalist Mitt Romney and ultra-reactionary Paul Ryan occupy the White House in 2013. That Supreme Court — the Roberts/Scalito/Thomas Court, of all monstrous things — holds center stage to such a great extent is a reflection of the realities of bourgeois politics and the even bigger crisis of social movements in this country.

With the Democratic Party in abject retreat on almost every question of economic and social justice since the Reagan era, the absence of militant movements has allowed the assaults of capital and the right wing to advance almost without resistance — even as the past decade demonstrated what a disaster the Wall Street agenda produced. It was the eruption of the Occupy movement in Fall 2011 that began to change the political debate and balance of forces, challenging not only the "one percent" but also the labor movement and all of us on the left.

As this issue of *Against the Current* goes to press, the Chicago Teachers Union is in the forefront of the struggle against austerity and cutbacks — taking on the destructive "education reform" agenda of Arne Duncan, Rahm Emanuel, the Obama administration, and the all-too-bipartisan profiteering charter school industry. It's a struggle that's absolutely necessary and emblematic of the period,

part of the fightback that must be carried forward on all fronts, regardless of the outcome in November — and whatever new horrors the Supreme Court may have in store.

The Editors, *Against the Current*

P.S.

* From Against the Current n° 160, September-October 2012.

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