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Adjudicating Health Care Reform By Dissent

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The procedural infrastructure within which the nation’s judicial system operates is as important as the canons of law the Courts espouse. In many ways, the doctrine of justiciability affords the federal courts an opportunity to rule with finality in matters of the U.S. Constitution, while at the same time ensuring that an appropriate distance is maintained between the three branches of federal government. Given the numerous preconditions upon which *certiorari* is determined, rightful passage through the Supreme Court’s Corinthian columns can seem as improbable as procuring a return ticket across the river Styx.

However, those for whom *certiorari* is ultimately granted can count on a few basics from the Supreme Court, including a session each first Monday in October, quill pens on counsel tables, and the Court’s own general prohibition from issuing judicial advisory opinions. In commenting upon this most revered prohibition, Chief Justice Earl Warren noted: “When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III.”

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Some 175 years before Chief Justice Warren paid homage to this limitation, the nation’s first Chief Justice, John Jay, denied President George Washington the benefit of his sage counsel, respectfully refusing to interpret certain treaties governing the young country’s relations with Britain and France as both nations tried to draw America into the French Revolution. In responding to the President’s solicitation of advice, Chief Justice Jay, along with the other Justices of the Court, explained:

The lines of separation drawn by the Constitution between the three departments of government, there being in certain respects checks on each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to; especially as the power given by the Constitution to the President of calling on the heads of departments for opinions, seems to have been purposely as well as expressly limited to executive departments. [¶] We exceedingly regret every event that may cause embarrassment to your administration; but we derive consolation from the reflection, that your judgment will discern what is right, and that your usual prudence, decision and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States.²

Nearly 219 years later, the Supreme Court continues to honor the Jay Court and its refusal to issue advisory opinions. While it has at times allowed itself to circumvent this historical wisdom by offering a dissenting opinion, which provides an opportunity for at least one of the nine

² Letter from Justices of the Supreme Court to George Washington (Aug. 8, 1793) (reproduced in Stewart Jay, Most Humble Servants: The Advisory Role of Early Judges (1997)).
Justices to speak his or her mind irrespective of the majority ruling, throughout our nation’s history the Supreme Court has almost always directed and redirected society’s course through its majority opinion. On occasion, however, a Justice may issue a dissenting opinion that resonates long after interest in the majority opinion has waned, and in many cases a dissenting opinion has provided a foreshadowing of things to come.

3 See, e.g., Marbury v. Madison, 5 U.S. 137 (1803) (declaring unconstitutional for the first time an act of Congress); Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that “equal but separate accommodations” on railroad cards did not violate the Equal Protection Clause of the Fourteenth Amendment); Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (invalidating the ruling in Plessy by declaring unconstitutional racial segregation in schools); New York Times v. Sullivan, 376 U.S. 254 (1964) (extending the First Amendment protections to members of the press); Roe v. Wade, 410 U.S. 113 (1973) (ruling that a woman has the right to an abortion without interference from the government in the first trimester of pregnancy); Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (restricting affirmative action by eliminating the use of rigid quotas on the basis that it leads to reverse discrimination).

4 See, e.g., Plessy v. Ferguson, supra at 559 (Harlan, J., dissenting) (“But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens.”); School District of Abington Township v. Schempp, 374 U.S. 203, 309 (1963) (Stewart, J., dissenting) (“We err in the first place if we do not recognize, as a matter of history and as a matter of the imperatives of our free society, that religion and government must necessarily interact in countless ways.”); Morrison v. Olson, 487 U.S. 654, 697 (Scalia, J., dissenting) (“This is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish.”).
2012 may prove to be a case in point when the Supreme Court entertains 330 minutes of oral argument on health care reform. While the Court will have the opportunity to opine on the Constitutionality of the Affordable Care Act, it seems unlikely that any single decision will put an end to the debate over health care reform. While speculating about the direction in which the majority will rule, it thus becomes increasingly important to pay particular attention to the dissenting opinion(s), as they may prove in the long run to be akin to a modern-day oracle concerning the future of reform. Indeed, the present Court has already established a similar recent precedent.

Although eclipsed in media coverage by the pending case on health care reform, February found the Supreme Court tackling issues specific to Medicaid in *Douglas v. Independent Living Center of Southern California, Inc.*, focusing in particular as to whether Medicaid providers and beneficiaries can challenge California’s rate reductions on the basis of preemption by federal Medicaid law. The Ninth Circuit issued preliminary injunctions preventing California from

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6. The 2010 Patient Protection and Affordable Care Act, Pub. L. 111-148, as amended by the Health Care and Education Reconciliation Act, Pub. L. 111-152 (collectively the Affordable Care Act or health care reform).


making these Medicaid reductions, holding that the providers and beneficiaries had Supremacy Clause claims against the State.

Subsequent to oral argument before the Supreme Court, yet prior to the February 22, 2012, decision in the Douglas case, the Centers for Medicare & Medicaid Services (CMS) approved most of California’s proposed amendments to Medi-Cal, thereby nullifying any viable claim against California under the Supremacy Clause. Under the doctrine of justiciability, these actions by CMS, whether calculated or not, should have put an end to the Douglas case, at least to the extent of the Supreme Court’s involvement.

Such was not to be, however, and the majority remanded the Douglas case back to the Ninth Circuit so the Circuit Court could address, in part, the same Supremacy Clause issues upon which that very Circuit Court had already ruled. The Supreme Court was unmistakably clear that its order was not an opportunity for just “reargument,” but instead a total remand, “thereby permitting the parties to argue the matter before that Circuit in the first instance.” When the parties return to the Ninth Circuit, they will now be armed with unsolicited advice from the Supreme Court. Rather than refraining from a substantive ruling on the grounds of justiciability, the majority opinion in Douglas suggested that providers and beneficiaries might consider review of the decisions by California and CMS under the Administrative Procedure Act (“APA”) rather than the Supremacy Clause claim. As if that were not enough, the majority

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9 Independent Living Center of Southern California, Inc. v. Maxwell-Jolly, 572 F.3d 644 (9th Cir. 2011).
10 Douglas, supra, at 8.
12 Douglas, supra, at 6.
opinion even offered reasons why an APA claim might supplant an argument based upon the Supremacy Clause.\textsuperscript{13}

Four Justices disagreed with the majority in \textit{Douglas}, including Chief Justice Roberts. The dissenting opinion contended that the case before the Ninth Circuit referred only to the Supremacy Clause, serving as a limitation on the Supreme authority to strike down California’s modification to its Medicaid program: “The question presented in the certiorari petitions is narrow: ‘Whether Medicaid recipients and providers may maintain a cause of action under the Supremacy Clause to enforce [§30(A)] by asserting that the provisions preempt a state law reducing reimbursement rates.’\textsuperscript{14} The dissent also argued that not only was there no viable claim under the Supremacy Clause in the first instance, but more importantly, the majority took it upon itself to answer a question that had not been asked, even going so far as to \textit{vacate} the Ninth Circuit rather than simply \textit{remand}. Chief Justice Roberts asked: “I am not sure what a \textit{remand} without answering the preliminary question is meant to accomplish. The majority claims that the agency’s recent action ‘may change this [lower courts’] answer’ to the question whether the particular state rates violate §30(A). \textit{Ante}, at 6. But that fact-specific question is not the one before us; we chose not to grant certiorari on the question whether California’s rates complied with §30(A), limiting our grant to the cause of action question.”\textsuperscript{15}

\textsuperscript{13} \textit{Douglas, supra}, at 6 (majority slip opinion) (“For one thing, the APA would likely permit respondents to obtain an authoritative judicial determination of the merits of their legal claim.”).  

\textsuperscript{14} \textit{Douglas, supra}, at 6 (Roberts, J., dissenting).  

\textsuperscript{15} \textit{Id.}
The *Douglas* case highlights a critical issue at the center of the modern day health care crisis. Whether or not the Medicaid program -- established as a collaborative federal and state program to afford the poor, elderly and disabled access to medical care – will ultimately survive the effects of the Affordable Care Act is of great concern to the future of modern healthcare. And yet, equally worrisome is the Supreme Court’s insistence on solving a puzzle different from the one presented by the parties.

The national focus on health care reform will not abate when the Supreme Court finally issues its decision in June, nor will it end with the elections in November, even should they force a changing of the guard or a repeal of the Affordable Care Act. In the midst of such chaos, our only certainty rests in the knowledge that a fundamentally divided Court will continue to stand as a bellwether, with the arguments and decisions of all nine Justices pointing the direction for the evolution of our health care system, one single step at a time.