Assessing the Health Care Decision

>>> *Ilya Somin , MA, JD*

NFIB v. Sebelius was one of the most important federalism rulings in modern history. The Supreme Court upheld the Affordable Care Act's individual health insurance mandate, but invalidated that law's provision forcing states to greatly expand their Medicaid programs or lose all federal Medicaid funds. Five justices rightly rejected the federal government's arguments that the mandate was authorized by the Commerce and Necessary and Proper Clauses of the Constitution. But Chief Justice Roberts erred in upholding the mandate as a tax authorized by the Tax Clause. The Court's decision has several important implications for the future.

This year's Supreme Court decision ruling on the constitutionality of the Affordable Care Act was the most important federalism case in decades. An unprecedented total of 28 state governments and numerous different private groups, including the National Federation of Independent Business,[1] had filed lawsuits challenging the constitutionality of Act.

When one of the cases reached the Supreme Court in NFIB v. Sebelius,[2] a narrow 5-4 majority upheld the constitutionality of the Affordable Care Act's individual health insurance mandate, which requires most Americans to purchase government-approved health insurance by 2014 or pay a fine. Chief Justice John Roberts' decisive swing vote opinion concluded that the mandate was permissible under Congress' power to impose taxes, even though it was not authorized by Congress' power to regulate interstate commerce or by the Necessary and Proper Clause. A surprising 7-2 majority invalidated a key provision of the ACA that would deprive states of all federal Medicaid funds unless they greatly expanded their Medicaid programs to encompass all citizens with incomes up to 138% of the poverty line.

Chief Justice Roberts was right to reject the federal government's claims that the mandate was authorized by the Commerce Clause and Necessary and Proper Clause, but wrong to save the mandate by concluding that it is a tax. The Supreme Court majority was also right to partially invalidate the ACA's Medicaid expansion. Both parts of the Supreme Court's decision have potentially important implications for the future.

NFIB was the latest iteration of a longstanding struggle over constitutional limits on the scope of federal power. Beginning in the early 1990s,[3] the conservative majority on the Supreme Court began to enforce structural limits on congressional authority for the first time since the 1930s. Conservative and libertarians scholars and jurists have argued that the courts should confine Congress to the powers granted in Article I of the Constitution. By contrast, the liberal justices on the Court and most liberal commentators outside it, have consistently opposed judicial enforcement of structural limits on congressional power. In their view, Congress has essentially unlimited authority to regulate any behavior that, taken in the aggregate, substantially affects the national economy. In the modern world, that includes virtually any significant human decision.

This clash of constitutional visions accounts for the deep division over the health care cases on the Supreme Court and elsewhere. For those who believe that Congress has nearly unconstrained authority to regulate anything that affects the economy, the individual mandate is an easy case. By contrast, defenders of judicial enforcement of limits on federal power emphasized the reality that such limits would be effectively gutted if the Court had accepted the federal government's position.[4]

I. The Commerce and Necessary and Proper Clauses.

Throughout the litigation over the mandate, the federal government relied primarily on the argument that the law was authorized by Congress' power under the Commerce Clause, which gives it the authority to regulate "Commerce among… the several States." Based on the text of the Constitution, a regulation authorized by the Clause must meet two requirements: it has to regulate commerce, and that commerce must be interstate. The individual mandate failed both tests. Not having health insurance is not commerce and also is not an interstate activity.

Since the 1930s, the Supreme Court has greatly expanded the reach of the Clause, giving Congress the power to regulate any "economic activity."[5] Ye even the broadest of these cases were still consistent with the common-sense notion that "the power to regulate commerce presupposes the existence of commercial activity to be regulated."[6] The mandate "does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce."[7] If Congress can "regulate individuals precisely because they are doing nothing,"[8] it could impose virtually any mandate of any kind. It could force people to purchase broccoli, cars, or any other product.

Roberts also has a compelling answer to the oft-heard argument that the mandate was justified by precedents such as Wickard v. Filburn,[9] which ruled that the Commerce Clause allows Congress to restrict the amount of wheat a farmer can grow, even if the wheat was never intended to be sold: "The farmer in Wickard was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce."[10] By contrast, "[t]he Government's theory here would effectively override that limitation, by establishing that individuals may be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have them do."[11]

The Chief Justice rejected the federal government's many arguments to the effect that the insurance mandate is constitutional because health insurance is a special case.[12] The most common "health care is special" argument was that health insurance is a unique market because everyone uses health care at some point in their lives, a theory emphasized by numerous defenders of the mandate, including the four liberal justices who supported the Commerce Clause rationale in the Supreme Court.[13] Yet this contention relies on shifting the focus from health insurance (the product people are actually forced to buy) to health care, on the ground that the former is just one way to obtain the latter. Pretty much any product government might force you to buy is part of some larger market that is difficult to avoid.

To use a much-discussed, not everyone purchases broccoli.[14] But we all participate in the market for food.[15] The federal government and the four liberal justices also argued that the mandate is authorized by the Necessary and Proper Clause, which gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution" other powers granted to Congress under the Constitution. The Supreme Court has long defined the term "necessary" very broadly to include anything that might be "useful" or "convenient."[16] But even a "necessary" law may be unconstitutional if it is not also "proper."[17] As Roberts puts it, "[e]ven if the individual mandate is "necessary" to the Act's insurance reforms, such an expansion of federal power is not a "proper" means for making those reforms effective."[18] A "proper" regulation is one that can be justified by a logic that does not give Congress virtually unlimited power to adopt any mandate of any kind. As James Madison put it in 1791, "[w]hatever meaning this clause may have, none can be admitted that would give an unlimited discretion to Congress."[19]

Unfortunately, the logic justifying the in dividual mandate could equally easily justify a mandate requiring people to purchase virtually any other product, or engage in any other activity. If thehealth insurance mandate is permitted because it is a convenient way to regulate the market in health care, then a broccoli-purchase mandate can be defended as a tool for regulating the market in food. A mandate requiring people to exercise regularly could be justified as a convenient tool for increasing economic productivity and decreasing health care costs.

The federal government's defense of the

mandate would also make most of Congress' other enumerated powers superfluous. If the Commerce Clause and the Necessary and Proper Clause give Congress the power to adopt any regulations that might affect commerce in some significant way, then Congress' has no need for it powers to declare war, raise armies, and coin money. Declaring war, raising armies, and coining money all have major effects on commerce and could be justified as useful or convenient tools for regulating it. A regulation that relies on a rationale that would make much of the rest of the Constitution superfluous cannot possibly be "proper."[20]

Some defenders of the mandate have advanced the argument that the Constitution gives Congress the power to address "national problems," especially those that states supposedly cannot address on their own.[21] But nowhere in the Constitution is Congress given a blank check to solve any and all alleged national problems. If Congress were intended to have such a sweeping power, there would be no need for the detailed enumeration of numerous specific congressional powers in Article I. The Framers could instead have replaced the eighteen clauses of Article with a single catch-all National Problems Clause. Moreover, to the extent that this argument relies on the idea that states cannot adopt an individual mandate on their own, it runs into the reality that they are entirely capable of doing so, as Massachusetts did in 2006. If the mandate really does reduce the cost and increase the quality of health care as advertised, state governments have every incentive to adopt it.[22] Such a state would be attractive to both individuals seeking lower health care costs, and insurance companies, which welcome the opportunity to operate in a state where people are required to purchase their plans.

For these reasons, Chief Justice Roberts ruled that the mandate could not be justified by the Commerce and Necessary and Proper Clauses. In this conclusion, he was joined by a narrow 5-4 majority of the Court.[23]

II. Is the Mandate a Tax?

Despite rejecting the federal government's most important arguments for the mandate, Chief Justice Roberts still joined with the four liberal justices to uphold it as a "tax" authorized by Congress' power to establish taxes.[24] This part of the decision came as a surprise to most observers. The tax argument that had been rejected by every lower court that addressed it, including liberal judges who had upheld the mandate on other grounds. Lower courts had consistently ruled that the mandate is a penalty, not a tax.[25] Roberts admits that this not the "most natural interpretation" of the law.[26] The text of the statute refers to the fine as a "penalty," not a tax.[27] And the Supreme Court has repeatedly distinguished between taxes and penalties, defining the latter as "an exaction imposed by statute as punishment for an unlawful act" or omission.[28] The health insurance mandate fits the definition of a penalty almost perfectly: it imposes a fine as punishment for the unlawful refusal to purchase government-mandated insurance. Roberts contends that it not a real penalty because it "is not a legal command to buy insurance," but merely a requirement that violators pay a fine to the IRS.[29] The logic here is weak. Is speeding or jaywalking not really unlawful if the penalty for it is a fine?

Roberts also advances three other reasons for claiming that the mandate is a tax rather than a penalty: that the fine is collected by the Internal Revenue Service, that it is not very high relative to the cost of health insurance and therefore not "coercive," and that there is no requirement of criminal intent.[30] None of these distinctions is persuasive. Many penalties require lawbreakers to pay only a small fine, as in the case of numerous traffic tickets. A penalty does not become a tax merely because it happens to be collected by the IRS; if Congress passed a law stating that traffic tickets are to be collected by the IRS, they would not become taxes. Finally, as the dissenters point out, there are many strict-liability crimes on the books for which proof of criminal intent is unnecessary.[31]

III. The Medicaid Decision.

The most surprising aspect of the Supreme Court's decision in NFIB was that seven justices voted to partially strike down the provision of the ACA requiring states to expand their Medicaid programs to cover all residents with incomes up to 133 percent of the poverty line, or risk losing all federal Medicaid subsidies. The Court ruled that this provision was unconstitutionally "coercive," acting as a "gun to the head" of the states, which stood to lose federal Medicaid subsidies equal to as much as 10 to 16 percent or more of their total budgets unless they accepted the expansion.[32] Congress could still offer states new funds in exchange for expanding Medicaid eligibility, but not take away all their existing Medicaid funding if they refuse the offer.[33]While previous decisions had noted that "coercive" grants were unconstitutional,[34] this was the first use of Congress' power to spend money that the Supreme Court had invalidated as unconstitutional since the 1930s.

In retrospect, this decision should not have surprised as much as it did. If any conditional grant can be invalidated as "coer cive," it would have to be this one. Virtually all state governments are heavily dependent on federal Medicaid subsidies, and would risk bankruptcy without them. The Court likely struck down this part of the law because the justices believed that the entire coercion framework for assessing federal grants to state governments would be gutted if they upheld it. This may help explain why two liberal justices were willing to join with the five conservatives on this issue, despite their opposition to judicial enforcement of structural limits on federal power in most other contexts.

The coercion doctrine applied in NFIB is far from ideal. It is difficult to tell when the terms of a federal offer of conditional grants are so onerous as to be "coercive."[35] But giving Congress completely unconstrained authority to use conditional grants to influence state policy is also highly problematic, since it would severely undermine states' ability to pursue any policies at odds with those preferred by national political majorities. Had the Supreme Court upheld the Medicaid expansion, a similar "gun to the head" could be used to force states to give up almost any policy that a Congressional majority disapproves of.[36]

III. Implications.

Assuming it is followed by lower courts,[33] Chief Justice Roberts' Commerce Clause and Necessary and Proper reasoning might put some meaningful constraints on Congress' power to impose other mandates, particularly those that are imposed on people simply because "they are doing nothing."[37] The threat of such mandates is far from purely theoretical. Many industries could potentially lobby for laws requiring people to purchase their products, and Congress has a long history of enacting special interest legislation.[38] The political process cannot be relied on to consistently prevent the

enactment of future mandates that benefit narrow interest groups at the expense of the general public.

The potential beneficial effects of Roberts' reasoning are partially undercut by the reality almost any purchase mandate could potentially be restructured to fit his definition of a tax. To qualify, the mandate would have to be enforced only by a monetary fine that is collected by the IRS, is not too high, and levied without regard to criminal intent. At the very least, however, such future mandates could not be enforced by threats of imprisonment or by extremely high monetary penalties.

The Court's invalidation of the Medicaid condition makes it possible that many states will refuse to expand Medicaid coverage, as some have already decided to.[39] What is not clear is whether any other federal conditional grant programs may be invalidated as coercive. NFIB is extremely imprecise as to where the boundary between an incentive and a "gun to the head" actually lies.

Ultimately, the extremely polarized decision over the ACA proves that there is no consensus on the constitutional limits of federal power, either within the Court or outside it. The only safe prediction is that the political and legal struggle over federalism will continue.

References

1. This was the first time that an absolute majority of the states have ever challenged the constitutionality of a federal law in court.
2. 132 S.Ct. 2566 (2012).
3. United States v. Lopez, 549 U.S. 514 (1995) , the first case to limit Congress' authority under the Commerce Clause in almost sixty years, was a key milestone in the Supreme Court's 1990s "federalism revival."
4. Two prominent conservative lower court justices – Jeffrey Sutton and Laurence Silberman did vote to uphold the mandate despite this issue. See Ilya Somin, "A Mandate for Mandates: Is the Individual Health Insurance Case a Slippery Slope?" Law and Contemporary Problems 75 (2012). 75, 81-82. But their opinions relied on reasoning that would have given the Supreme Court unlimited authority to impose virtually any mandate of any kind. Silberman even explicitly recognized this in his opinion upholding the mandate. See Seven-Sky v. Holder, 661 F.3d 1, 18 (D.C. Cir. 2011). This approach was unlikely to find support among Supreme Court justices and others committed to enforcing meaningful limits on federal power.
5. See, e.g., Gonzales v. Raich, 545 U.S. 1 (2005).
6. NFIB, 132 S.Ct. at 2586 (Roberts, C.J.).
7. Id. at 2587.
8. Id.
9. 317 U.S. 111 (1942). Wickard was heavily relied on by defenders of the individual mandate, including the four liberal justices on the Supreme Court. See NFIB, 132 S.Ct. at 2616-17, 2619-21. (Ginsburg, J., concurring in part and dissenting in part).
10. NFIB, 132 S.Ct. at 2588 (Roberts, C.J.).
11. Ibid.
12. For a much more comprehensive critique of the various "health care is special" arguments advanced during the course of the litigation, see Somin, "A Mandate for Mandates, 84-93.
13. See NFIB, 132 S.Ct. at 2619-20 (Ginsburg, J., concurring in part and dissenting in part); For citations to lower court cases making the same argument, see ibid., 84 n.39.
14. The broccoli example was first raised by Judge Roger Vinson, who struck down the individual mandate at the trial court level, and quickly became famous. See Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1289 (N.D. Fla. 2011), aff'd in part, rev'd in part Florida ex rel. Atty. Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011), rev'd NFIB v. Sebelius, 132 S.Ct. 2566 (2012).
15. As Roberts puts it "[e]veryone will likely participate in the markets for food, clothing, transportation, shelter, or energy.." NFIB, 132 S.Ct. at 2590-91 (Roberts, C.J.).
16. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413-15 (1819).
17. For a more extensive explanation of the reasons why the mandate is not "proper," see Ilya Somin, "The Individual Mandate and the Proper Meaning of 'Proper'," in Gillian Metzger, Trevor Morrison, and Nathaniel Persily, eds., The Health Care Case: The Supreme Court's Decision and its Implications, (New York: Oxford University Press, forthcoming).
18. NFIB, 132 S.Ct. at 2592 (Roberts, C.J.).
19. James Madison, Speech on the Bank Bill, House of Representatives, Feb. 2, 1791, in James Madison, Writings 480, 484, Jack N. Rakove, ed. (New York: Vintage, 1999).
20. For an extensive discussion of the relationship between redundancy and propriety, see Somin," The Individual Mandate and the Proper Meaning of 'Proper.'"
21. See, e.g., NFIB, 132 S.Ct. at 2612-13, 2616 (Ginsburg, J., concurring in part and dissenting in part).
22. I discuss this issue in detail in Somin, "Mandate for Mandates," 90-94, which also rebuts claims that states cannot adopt an individual mandate on their own due to supposed collective action problems.
23. The four conservative dissenters agreed with him on these points. Ibid. 2644-50 (joint dissent).
24. Ibid. 2593-2600 (Roberts, C.J.).
25. For a list of these decisions, see Somin, "Mandate for Mandates," 87 n.53.
26. NFIB v. Sebelius, 132 S.Ct. at 2594.
27. 26 U.S.C. § 5000A(b).
28. United States v. Reorganized CF&I Fabricators of Utah, 518 U.S. 213, 225 (1996).
29. NFIB v. Sebelius, 132 S.Ct. at 2594.
30. Ibid., 2594-97.
31. Ibid. 2654-55 (joint dissent).
32. Ibid. 2601-2607.
33. Ibid.
34. See South Dakota v. Dole, 483 U.S. 203, 211 (1987).
35. Elsewhere, I have argued that the Court should use a different approach to enforcing limits on the Spending Power. See Somin, "Closing the Pandora's Box of Federal: The Case for Judicial Restriction of Federal Subsidies to State Governments," Georgetown Law Journal 90 (2002): 461.
36. Under current precedent, conditions attached to federal grants need only have a very minimal connection to the policy area addressed by the grant. See, e..g, Sabri v. United States, 541 U.S. 600 (2004). So Congress could potentially use the threat of withholding Medicaid grants to leverage policy changes on issues that are only faintly related to health care.
37. Some have argued that Chief Justice Roberts' Commerce Clause and Necessary and Proper is not binding on lower courts because it was not necessary to the outcome in this case. So far, most lower courts have rejected this view. See ,e.g., United States v. Elk Shoulder, 696 F.3d 922, 930-31 (9th Cir. 2012).
38. NFIB, 132 S.Ct. at 2587 (Roberts, C.J.).
39. For a fuller discussion of this danger, see Somin, Mandate for Mandates, 93-96.
40. Eight states have already announced that they are rejecting the expansion, and others are considering doing so. See CNN, "Medicaid: States Turning Down Free Money, Group Says," CNN.com, Nov. 26, 2012, available at http://thechart.blogs.cnn.com/2012/11/26/medicaid-states-turning-down-free-money-group-says/?hpt=he_c2Elise Viebeck, "Fifteen Governors Reject or Leaning Against Expanded Medicaid Program," The Hill, July 3, 2012, available at http://thehill.com/blogs/healthwatch/health-reform-implementation/236033-fifteen-governors-reject-or-leaning-against-expanded-medicaid-program

Ilya Somin is Professor of Law at George Mason University at George Mason University School of Law. He has written extensively on constitutional limits on federal power. He was the author of an amicus brief in NFIB v. Sebelius on behalf of the Washington Legal Foundation and a group of constitutional law scholars.