



07.09.12

THE SUPREME COURT'S LANDMARK DECISION ON THE AFFORDABLE CARE ACT, HEALTHCARE REFORM'S ULTIMATE FATE REMAINS UNCERTAIN

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President Obama signed the Patient Protection and Affordable Care Act (ACA) into law in March 2010, and lawsuits immediately followed. In March of this year, in consolidated cases *National Federation of Independent Business v. Sebelius*, the Supreme Court heard arguments on the constitutionality of four aspects of the ACA: whether Congress has the power to enact the individual purchase mandate, whether the Medicaid expansion amounts to unconstitutional federal government coercion of states, severability of the individual mandate from other portions of the ACA, and whether the Anti-Injunction Act bars consideration of the individual mandate's constitutionality prior to the penalties taking effect in 2015.

The Court has now ruled on all the issues in a 5-4 decision written by Chief Justice Roberts, upholding the law in its entirety with the sole exception that Congress may not revoke existing state Medicaid funding to penalize states that decline to participate in the Medicaid expansion under the



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ACA.¹ The Supreme Court held that the Anti-Injunction Act does not bar consideration of the individual purchase mandate. We explain and analyze the remainder of the issues here, focusing on the mandate and Medicaid expansion, while also explaining the fundamental shifts in constitutional interpretations that may affect public health, safety and environmental protection in the future.²

THE INDIVIDUAL MANDATE

The Taxing Power

The Court's decision surprised many commentators because Chief Justice Roberts joined with more liberal Justices Breyer, Ginsburg, Kagan and Sotomayor to find the individual mandate constitutional pursuant to Congress' power to tax. Most commentators had predicted that the constitutionality of the mandate would rise or fall on the determination of whether Congress had exceeded its powers under the Commerce Clause. And in fact, Chief Justice Roberts agreed with dissenting Justices Scalia, Kennedy, Alito and Thomas that in enacting the mandate Congress had exceeded its power to regulate interstate commerce (see federalism discussion below).

Chief Justice Roberts, however, differed with the dissenters in that he was willing to view the mandate as a tax, constitutional under Congress's broad taxing powers, rather than as a penalty. Article I, §8 of the Constitution grants Congress broad power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." The taxing power provides an independent source of federal legislative authority. Congress may regulate through the tax system for purposes that may not be authorized under its other enumerated powers.

Even though the ACA explicitly called the levy a "penalty," the Chief Justice preferred a functional approach, not a label. Explaining that the Court is obligated to adopt a reasonable interpretation of a statute in order to preserve its constitutionality, Roberts wrote:

Our precedent demonstrates that Congress had the power to impose the exaction in §5000A [the mandate] under the taxing power, and that §5000A need not be read to do more than impose a tax. That is sufficient to sustain it.³

The Court, moreover, found that the tax is not so punitive as to exceed Congress's power, as the

¹ See Lawrence O. Gostin, The Supreme Court's Historic Ruling on the Affordable Care Act: Economic Sustainability and Universal Coverage, JAMA, On Line First, July 6, 2012, available at <http://jama.jamanetwork.com/article.aspx?articleid=1213772>. The full Supreme Court opinion can be found at www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf.

² For a review of American federalism and constitutional powers in relation to public health, see Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* (University of California Press, 2nd ed. 2008).

³ *Nat'l Federation of Indep. Bus. v. Sebelius*, 567 U.S. ___ (2012) (Slip opinion, Roberts, C.J. at 39).



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tax is smaller – in some instances significantly so – than the cost of insurance for those subject to it, and by statute the tax can never exceed the cost of insurance. The Court concluded that the tax is structured such that individuals have a choice in fact, rather than just in theory, whether to purchase insurance or remain uninsured and pay the resulting tax.

The Court's decision to uphold the mandate under the taxing power reinforces the principle that taxation can be a powerful tool for public health regulation. While affording Congress the financial resources to provide for the common defense and welfare, it also enables Congress to regulate risk behavior and influence health-promoting activities. Tobacco taxes, for example, are not simply levied to raise revenue, but also to disincentivize smoking, particularly among young people.

The Commerce Power: A Conservative Project in American Federalism

Beyond its historical significance for health care reform, the Supreme Court's ruling fuels a conservative project on American federalism – limiting Congress's power to protect the public's welfare, while retaining state authority. The Constitution grants the federal government limited or "enumerated" powers, while the 10th Amendment reaffirms that "powers not delegated to the United States ... are reserved to the States ... or to the people."

Supplying the crucial fifth vote, the Chief Justice joined the Court's conservative wing, finding that the Commerce Clause did not empower Congress to compel individuals to buy insurance. Justice Roberts thus endorsed the activity/inactivity distinction that has permeated the health care debate, stating

The individual mandate, however, 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. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority.⁴

Thus, Roberts concluded that the well-known "if the government could make you buy health insurance it could make you buy broccoli" argument held weight, though in the opinion he used a generic vegetable analogy, arguing that under the government's theory of Congress' Commerce Clause authority, the government could "address the diet problem by ordering everyone to buy vegetables."⁵

This analogy is deeply flawed and not merely because of the extreme unlikelihood that Congress would ever pass such a law. When well-off individuals refuse to buy insurance, they

⁴ *Id.* at 20.

⁵ *Id.* at 23.



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raise the costs for everyone, requiring society to subsidize their care when they become injured or ill. The better analogy is to car insurance: imagine if drivers could buy insurance once they crashed and in a ditch, and at the same affordable cost.

The act/omission distinction is equally flawed. The mandate doesn't force individuals to enter the stream of commerce. Rather, it regulates the manner and timing of commerce because one day everyone will require medical care, and someone must pay. Individuals, therefore, are doing something affirmative, which is to shift the cost of their care to physicians, hospitals, insurers, and ultimately to society itself. Each year, "free riders" cost the health system more than \$60 billion in uncompensated care.

Thus, for only the third time since the administration of Franklin D. Roosevelt the Court found that Congress lacks the commerce power. In *Lopez*, the Court held that Congress exceeded its commerce authority by making gun possession within a school zone a federal offense. Concluding that possessing a gun within a school zone did not "substantially affect" interstate commerce, the Court declared the statute unconstitutional.⁶ In *Morrison*, the Court struck down the private civil remedy in the Violence Against Women Act.⁷

Notably, both *Lopez* and *Morrison* entailed purely local, non-economic subjects. In *National Federation of Independent Business*, however, health care represents 17% of the gross national product, with activities (e.g., medical records, pharmaceuticals, and insurance claims) crisscrossing the nation and the world. Comprehensive health insurance legislation is a paradigm for the regulation of interstate commerce.

Even so, the Court devoted the entire first part of its decision to a civics lesson showing how limiting federal power safeguards personal freedom. In doing so, the Court never mentioned the "greater" freedom afforded by humane care and treatment in the event of illness or injury. Whether *National Federation of Independent Business* portends a future whereby the Court aggressively limits federal public health regulation is unknowable. (The commerce finding is not binding because the Court upheld the ACA on other grounds). Yet, the case may one day be used to build a conservative project in American federalism distinctly unfriendly to health and safety regulation.

The ACA's Economic Viability

Regardless of the logic under which it decided the case, the practical importance of the Court's upholding the ACA, and particularly the mandate, cannot be overstated. Indeed, the Court acknowledged the integral nature of the mandate to the ACA in its decision, noting

By requiring that individuals purchase health insurance, the mandate prevents cost-

⁶ *U.S. v. Lopez*, 514 U.S. 549 (1995).

⁷ *U.S. v. Morrison*, 529 U.S. 598 (2000).



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shifting by those who would otherwise go without it. In addition, the mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses. This allows insurers to subsidize the costs of covering the unhealthy individuals the reforms require them to accept.⁸

As health economists have long argued, the mandate is part of a “three-legged stool” along with the popular provisions of “guaranteed-issue” (requiring insurers to offer coverage to all applicants) and “community-rating” (prohibiting insurers from charging differential premiums based on health status). Without the mandate, the Court aptly observed that individuals would have a strong economic incentive to forego coverage with the knowledge that they could always obtain it at a later date.

In point of fact, even under the mandate/tax, individuals have always been and will continue to be permitted to be uninsured under the ACA if they so desire – but if they do choose to forego insurance they will be taxed as a consequence. The very nature of the tax – specifically, that it is small relative both to income and the cost of insurance premiums – makes its effectiveness debatable. And, because Congress sharply limited the power of the IRS to collect the tax, prohibiting normal enforcement mechanisms such as liens and criminal prosecutions, healthy individuals will have a further incentive to pay the tax rather than purchase insurance.

A Republican President, moreover, could potentially exercise his executive authority to make IRS collection of the tax a very low priority, similar to President Obama's recent directive to the Justice Department to exercise leniency in enforcing immigration laws against young undocumented immigrants (so-called “dreamers”).

Some have characterized the Court's decision as re-framing the mandate such that Americans now have an “invitation” to purchase insurance with the only a relatively small tax for failure to accept. Perhaps this is a more palatable view of the mandate for those relatively few individuals who wish to remain uninsured even when insurance is affordable. Regardless, until the mandate becomes operational in 2014, there will continue to be considerable debate about its effectiveness at encouraging people to buy insurance.

This uncertainty around the mandate's effectiveness raises two questions. First, will large numbers of healthy people opt out of insurance? This adverse selection would cause premiums to rise faster than projected due to the progressively less healthy status of the risk pool. Second, might public support for the Emergency Medical Treatment And Labor Act (EMTALA), the federal law requiring that hospitals provide emergency care to the insured and uninsured alike, wane now that virtually everyone will have access to relatively affordable insurance? The public's appetite for paying for expensive emergency care for the uninsured may well decrease if people are perceived to be shirking their responsibility to purchase health insurance.

⁸ *Nat'l Federation of Indep. Bus. v. Sebelius*, 567 U.S. ____ (2012) (Slip opinion, Roberts, C.J. at 17).



Building an Even Better ACA: The Imperative of Covering Undocumented Immigrants

Even if both adverse selection and decreased public support for EMTALA were to occur, the U.S. is unquestionably better situated to fix a system under which all persons are guaranteed the ability to access affordable health care rather than having to generate the political will to establish such a system in the first place. That threshold has been crossed with the ACA, and the Court's imprimatur should help ensure that all future debate will center on how to preserve and improve on the universal access framework the ACA created. Of particular importance for building on the ACA is the imperative of expanding coverage to include the approximately 20 million individuals who will remain uninsured even under the ACA. Many of those who will remain uninsured are undocumented immigrants who, in an act of discrimination both unnecessary and harmful to the public's health, have been barred from purchasing even unsubsidized insurance through the exchanges.

THE MEDICAID EXPANSION

The Court's ruling on the Medicaid expansion is equally, if not more, consequential than the mandate because it goes to the heart of health care reform – achieving near universal coverage. Under the ACA, states are required to expand their Medicaid eligibility rules to cover all people with income less than 133% of the federal poverty level. If they decline to do so, the ACA allows the Secretary of Health & Human Services to revoke not only the money for the Medicaid expansion, but also the federal funding for existing state Medicaid programs – a power that in any event the Obama Administration was very unlikely to exercise. In a narrow decision, the Court upheld the Medicaid expansion, but found that the federal government cannot withdraw existing Medicaid funds for failure to comply with the Medicaid expansion.

In essence, the Court considered the existing Medicaid program as distinct from the Medicaid expansion under the ACA. In his opinion, Chief Justice Roberts distinguished the existing Medicaid program from the Medicaid expansion, observing that the “original program was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children,” whereas the ACA transforms Medicaid “into a program to meet the needs of the entire nonelderly population with income below 133 percent of the poverty level.”⁹

Justice Roberts considered that the expansion transforms Medicaid such that it “is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.”¹⁰ Though Justice Roberts may be correct that the Medicaid expansion is part of the ACA's plan to provide universal access to health insurance, Justice Ginsburg rebutted Justice Roberts' conclusion that the ACA transforms Medicaid from being a program to care for the neediest among us, aptly observing that “[s]ingle adults earning no more than \$14,586 per year – 133% of the current federal poverty level – surely rank among the Nation's poor.”¹¹ Indeed, the Medicaid expansion is the sole mechanism

⁹ *Id.* at 53.

¹⁰ *Id.* at 53-54.

¹¹ *Id.* (Slip opinion, Ginsburg, J. at 50).



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by which the very poor are to be covered under the ACA.

Notwithstanding the critical importance of the Medicaid expansion to the ACA, under the Court's ruling states are now essentially free to decline to participate in the Medicaid expansion with no penalty other than forfeiting federal funds that would apply to the expansion. Moreover, it is unclear under the Court's ruling exactly what measures Congress could take to encourage states to participate in the expansion, short of increasing federal funding above the already generous levels, 100% from 2014 to 2016, decreasing to 90% after 2019.

Although the threat of withdrawal of Medicaid funding was always illusory – no administration would seriously consider cutting off a state's Medicaid funding and imperiling the millions who depend on it – the Court's decision may create political space for states to opt out of the expansion. Each state's decision whether to do so could be enormously consequential, as the Medicaid expansion is projected to account for fully half of the increased coverage under the ACA – 16 million of the 32 million people who will be covered. Although persons with income between 100%-133% of the federal poverty level would be eligible for subsidies to enable them to purchase insurance via the exchanges, the poorest – those with income below 100% of the poverty level – would not receive subsidies, with the almost certain result that those persons would remain uninsured. The injustice of the very poor being denied Medicaid coverage and being ineligible for federal subsidies cries out for reform.

From a social justice perspective, states declining to participate in the Medicaid expansion would be a disastrous result, leaving the poorest citizens without access to insurance. Unfortunately, this result is not inconceivable given that many states are currently cutting Medicaid funding in the face of budgetary constraints and that political resistance to the ACA remains high among conservatives. The strong political resistance is exemplified by statements in recent days by various Republican governors and legislators indicating that they plan not to participate in the Medicaid expansion.

In addition to being cruel, refusal to participate in the Medicaid expansion is also bad economic policy. Not only are the terms of the Medicaid expansion exceedingly generous to states (a far higher federal "match" in funding than for either existing Medicaid or the Children's Health Insurance Program), a 2009 report by the Council of Economic Advisors concluded that most states would actually *save* money by expanding Medicaid under the terms of the ACA, through (i) lower premiums for state employees and (ii) the sharply reduced cost of uncompensated care.

The CEA report examined sixteen representative states, concluding that each of the sixteen would see a net positive budgetary impact from participating in the Medicaid expansion, ranging from \$3 million in Arkansas to nearly \$2 billion in savings in California.¹² No state was

¹² Executive Office of the President, Council of Economic Advisers, *The Impact of Health Insurance Reform on State and Local Governments 6* (September 15, 2009), available at <http://www.whitehouse.gov/assets/documents/cea-statelocal-sept15-final.pdf>.



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projected to lose money by participating in the expansion. Thus, both basic human decency and economic concerns weigh in favor of states participating in the Medicaid expansion. One can only hope that cooler heads prevail in statehouses across the country as the political tumult of the ACA decision fades.

The Perversion of the Spending Power

From a constitutional perspective, the Court's Medicaid expansion decision was problematic, foreshadowing an activist judicial agenda. To uphold Medicaid expansion, the Court had to re-write the ACA, which granted the Secretary discretion to withdraw all Medicaid funding as a lever to ensure coverage of the poor. As Justice Kennedy warned, the Court contravened the legislative intent, leaving in place a statute that Congress never enacted.

Supreme Court precedent holds that Congress has power to withhold federal funds provided a reasonable relationship exists between the funding and the conditions – in this case Medicaid funds as a condition of revising the program's rules. Congress created Medicaid, and made clear from the onset that it can alter or amend – even abolish – the program at any time. Previously, the Court granted the federal government wide leeway in setting conditions on spending, for example, by upholding the loss of a portion of federal highway funds for failure to raise the minimum drinking age in *South Dakota v. Dole*.¹³

Conservatives have argued insistently that the spending power should be limited by the principle of “coercion” – meaning that if states truly have little choice but to comply with spending conditions, the condition would be deemed overly punitive. Although the Court has accepted the coercion principle in theory, it has never truly embraced it until now.

The Court's argument in *National Federation of Independent Business* is, essentially, that if the federal government is giving away so much money, states have no recourse but to accept it. That seems a bizarre construction of “coercion.” And in this case, the federal government could not have been more generous to the states, offering to fund the Medicaid expansion at 100%, falling eventually only to 90%.

What is most concerning is that public health, safety, and environmental programs are typically justified under the spending power, which may be in jeopardy going forward.

THE FUTURE OF AMERICAN FEDERALISM

The Court's decision upholding the constitutionality of the Affordable Care Act is one of the most momentous of our generation, for a few reasons. First, the Court has clearly signaled that there are five votes for a circumscribed view of the Commerce Clause, under which Congress must firmly establish the existence of “activity” affecting interstate commerce prior to regulating such activity. Although most constitutional law scholars strongly believed that the “activity-inactivity” distinction was entirely semantic (after all, what is failure to buy

¹³ *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (upholding the constitutionality of a federal statute conditioning states' receipt of federal funds on adoption of a minimum drinking age of 21).



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health insurance except the “active” decision to self-insure?), five of the Justices believed the distinction to be meaningful. Future Congresses must be mindful of this distinction and justify new laws accordingly.

Second, for the first time since the iteration of the coercion doctrine in the 1930s, the Court found a federal condition on funding unduly coercive and in violation of Congress' broad spending power. The Court took special note both of the large portions of state budgets that are allocated to Medicaid and of the possibility that *all* existing Medicaid funding could be withheld. From that standpoint, the facts may be relatively unique in that Medicaid is overwhelmingly the largest federal funding allocation to states. However, as with the Commerce Clause, future Congresses must be cognizant of this Court's willingness to closely examine funding restrictions and perhaps even to strike them down.

THE FUTURE OF NATIONAL HEALTH CARE REFORM

As for the ACA, even though the Court has affirmed its constitutionality the Act's ultimate fate remains uncertain. Near term practical challenges include the tight deadlines states must meet to have the insurance exchanges operational by 2014. While much of this time pressure is self-inflicted (many states delayed implementation in the hope that the Court would strike down the ACA), states are now faced with the considerable task of establishing exchanges and many are ill-prepared. Some are continuing to resist creating exchanges in the hope that a new Congress (and a President Romney) will repeal the law after the 2012 elections.

Fortunately, the ACA provides the federal government the authority to step in and establish federally-run exchanges in states that fail to meet deadlines, ensuring that all Americans will have access to affordable insurance via the exchanges as scheduled. Still, federal operation of exchanges will likely inflame conservative opposition even more than state exchanges themselves.

Even if the exchanges are smoothly implemented, there remains uncertainty about the practical effectiveness of the mandate in ensuring that individuals actually purchase insurance. The penalties are quite low in 2014, rising only gradually in subsequent years and capped at a relatively modest amount compared with the cost of insurance premiums. Whether individuals actually purchase insurance may ultimately depend on their current reasons for failure to do so – while many conservatives argue that people should be “free” to be uninsured, there is no evidence that most uninsured would remain so if subsidized affordable insurance were readily available (and legally required). CBO projections of the dramatic increase in insured persons under the ACA reflect this truth – most people who fail to buy insurance do so because they feel they cannot afford it, not because they are exercising a “right to be uninsured.”

Additional uncertainty surrounds state participation in the Medicaid expansion. Whether ideology trumps economics and basic social justice remains to be seen, but initial signs are not encouraging.

In addition, given the mandate's unpopularity and political resistance to the ACA in general,



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there will certainly be conservative-led efforts to slow and perhaps even undermine the full implementation of the law. The Republican-led House has already scheduled another vote to repeal the ACA, and presumptive Republican presidential nominee Mitt Romney is using the Court's decision as a rallying point for supporters.

Commentators are busy offering novel ways in which Congress, state governments, and a Republican administration could forestall the implementation of the ACA. While it is unlikely that the ACA could be repealed without strong Republican majorities in both houses of Congress and a Republican president, some proposals are troubling. For example, some have advocated that a President Romney could effectively nullify the mandate by directing the IRS not to enforce it, as mentioned above.¹⁴ The constitutionality of such an order may be subject to question but the practical impact of the order would be extremely disruptive in the short term. Similarly, Governor Romney has firmly stated his opposition to the law and his intent to exercise the full range of executive discretion, including the administrative rulemaking process, to delay and/or prevent full implementation of the law.

For advocates of universal health care, the Court's decision is an enormous vindication of their efforts, but there remain formidable challenges to achieving and expanding upon the promise of the ACA. These challenges will become even more apparent if health care spending continues to rise at its currently unsustainable rate – the United States cannot remain economically competitive in a global environment by continuing to spend considerably more than other developed countries on health care while achieving worse health outcomes.

Nonetheless, future discussions will likely center around ways to contain costs while maintaining, or expanding, access, not whether to give people access to coverage in the first place. Most notably, the ACA leaves out an important segment of the American population – undocumented residents. This omission is not just inhumane but contrary to the public's health. (Think about treatment for tuberculosis or other infectious diseases). Finally, and too often forgotten in the debate, is that the lives of our fellow citizens – and indeed, fellow human beings – can depend on access to health insurance, with researchers estimating in excess of 45,000 deaths per year due to lack of health insurance. It is truly a national shame that America has allowed itself to remain the only developed nation that fails to guarantee access to adequate health care for its population.

The ACA has achieved a remarkable paradigm shift. The months and years ahead will tell the law's full fate, but for now, the Court's decision allows the country to continue on its chosen path toward ensuring access to affordable health care for all Americans.

Additional briefings from the O'Neill Institute on the ACA can be found at <http://www.law.georgetown.edu/oneillinstitute/resources/briefings.html>.

¹⁴ Randy Barnett, We lost on health care. But the Constitution won. *Washington Post*, June 29, 2012.