

HEALTH LAW, ETHICS, AND HUMAN RIGHTS

Reframing Federalism — The Affordable Care Act (and Broccoli) in the Supreme Court

Wendy K. Mariner, J.D., M.P.H., Leonard H. Glantz, J.D., and George J. Annas, J.D., M.P.H.

The U.S. Supreme Court decision to uphold most of the Affordable Care Act (ACA), including the insurance-coverage requirement, allows historic reforms in the health care system to move forward.^{1,2} Because the justices were split four to four on whether the ACA was constitutional, Chief Justice John Roberts was able to write the lead opinion that commanded five votes for whatever outcome he determined was constitutional. The chief justice's leadership in upholding almost all of the ACA was unanticipated, as was much of his legal reasoning. It was widely assumed that the interpretation of the Commerce Clause by the Court would determine whether the Constitution authorized Congress to require individuals to purchase a product from private companies, something Congress had never done before and, therefore, something the Court had never considered.^{3,4} It was not surprising that the chief justice found no Commerce Clause authority for the individual mandate. The surprise was that he saved the individual mandate by determining that it was a constitutional tax. The chief justice received support for each of these conclusions from two different four-justice groups, sometimes referred to as the liberal and conservative wings of the Court. Perhaps most unexpected, seven justices voted to limit the power of the federal government to impose conditions on federal funding allocated to the states.

DIRECT FEDERAL REGULATION UNDER THE COMMERCE CLAUSE

The chief justice began his opinion by describing our federal system, underlining that the federal government possesses only limited powers — those listed or enumerated in the Constitution. Powers not granted to the federal government in the Constitution are retained by the states. In this case, the question was whether either the federal power to regulate commerce or the power to tax authorized specific provisions of the ACA.

The Commerce Clause has historically been interpreted as granting the federal government broad power to regulate matters of interstate commerce and activities that affect such commerce.⁵ Examples include the regulation of drugs,⁶ consumer products,⁷ air and water pollution,⁸ workplace safety,⁹ and discrimination in employment.¹⁰ Nonetheless, the chief justice concluded that the Commerce Clause did not include the power to impose a mandate on individuals to buy health insurance from a private company. Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito, in a jointly written dissent, agreed with the chief justice regarding the limitations of the Commerce Clause.

In the majority view on this issue, the power of the federal government to require or regulate behavior applies only to people who are actively engaged in commerce. As the chief justice put it, “The Framers gave Congress the power to *regulate* commerce, not to *compel* it. . . .”¹¹ (italics in original). These justices accepted the argument that individuals who are not currently seeking care or under the care of physicians or other health professionals “are not currently engaged in any commercial activity involving health care.” They rejected the argument by the government that the fact that virtually everyone is or will at some point be in the health care market empowers Congress to regulate how they pay for their care. Instead, the chief justice distinguished the health insurance market from the health care market, concluding that they “involve different transactions, entered into at different times, with different providers.”¹¹ He concluded, “The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to ‘regulate Commerce.’”¹¹

The decisive issue for these five justices was their view of federalism, specifically how to dis-

tinguish federal authority to regulate commerce from the inherent authority of the state (“police power”) to directly regulate individuals, such as by requiring immunizations and school attendance. If the Commerce Clause allowed the federal government to regulate people who are not engaged in commerce, they worried, then the federal government would have the same power that states have to regulate individual behavior, because almost anything that anyone does or does not do can affect the national economy. Congress can regulate a great deal of what people do, but these five justices drew the line at inactivity, lest the Commerce Clause “give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government. . . . That is not the country the Framers of our Constitution envisioned.”¹¹ In the chief justice’s words, “Every day individuals do not do an infinite number of things. . . . Any police power to regulate individuals as such, as opposed to their activities, remains vested in the states.”¹¹

Justice Ruth Bader Ginsburg dissented from the Commerce Clause ruling. The Ginsburg opinion was joined by Justices Sonia Sotomayor, Stephen Breyer, and Elena Kagan, together comprising the remaining four justices on the Court. They accepted the argument of the government that health insurance is simply a method of paying for health care, along with self-payment (or self-insurance) and reliance on charity.¹¹ Virtually everyone in the country uses health care,¹² so they are necessarily health care consumers. More than 86% of national personal health care expenditures are paid through insurance.¹³ Thus, Justice Ginsburg concluded, the mandate regulates people who are or will inevitably be active in the health care market and Congress can regulate the terms on which they pay for their care: “Persons subject to the mandate must now pay for medical care in advance (instead of at the point of service) and through insurance (instead of out of pocket).”¹¹ The Ginsburg opinion characterized the uninsured as getting a “free ride,”¹¹ a term often used as a major justification for the individual mandate.¹⁴

Justice Ginsburg concluded that health care and its financing were unique and therefore found that Commerce Clause authority for the individual mandate would not result in an unrestrained expansion of federal power. She specif-

ically rejected the conclusion that finding the individual mandate valid under the Commerce Clause would mean that the federal government could require people to purchase healthy vegetables, including broccoli, which she characterized as “the broccoli horrible.”¹¹ She argued that broccoli purchases could be easily distinguished and that the claim that broccoli or vegetable purchases would have a substantial effect on health care costs required a “chain of inferences” that previous Commerce Clause cases had rejected.¹⁵

FEDERAL POWER TO TAX

Chief Justice Roberts saved the individual mandate by finding that the payment for noncompliance is a tax, not a penalty, that Congress has authority to impose under the Taxing Power, an enumerated power distinct from the Commerce Clause.¹⁶ With the Ginsburg opinion, the chief justice had a five-to-four majority for this conclusion.

The ACA calls the payment a “penalty” for not having health insurance, but the Court is not bound by this label. The chief justice reasoned that the penalty functions like a tax. The ACA does not prescribe any punishment for failing to have coverage. Instead, the Internal Revenue Service (IRS) collects the payment with federal income taxes. The IRS is authorized to withhold the payment from any refund due the taxpayer, but it is barred from imposing criminal prosecution or additional penalties for nonpayment. Moreover, the payment amount is a small percentage of taxable income and is capped at a relatively low-level health insurance premium.¹⁷ Thus, the failure to have coverage is not unlawful; it is simply taxable.

The joint dissent argued that the Court should take Congress at its word in calling the payment a “penalty,” asserting that upholding the mandate as a tax amounted to rewriting, rather than interpreting, the statute.¹

INDIRECT FEDERAL REGULATION THROUGH CONDITIONAL FEDERAL SPENDING

The ACA amends the Medicaid statute by adding a new category of eligible recipients: persons younger than 65 years of age with incomes below 133% of the federal poverty level (\$14,170 for an individual and \$23,050 for a family of four).¹⁸ Existing categories were narrower and more specific, such as families with children, pregnant

women, and Supplemental Security Income recipients, with varied income ceilings for different groups. The federal government will pay 100% of the cost of the newly eligible beneficiaries through 2016 and 90% after 2020, instead of the 50% to 83% that it now pays for currently eligible categories. One of the possible sanctions for a state that does not comply with the new Medicaid eligibility rules is forfeiture of federal funding for the entire Medicaid program in the state.

In the most unexpected result, seven justices concluded that the new category of eligibility for Medicaid in the ACA could not be imposed on the states as a condition of continuing to receive federal Medicaid funds for existing state Medicaid programs. The Spending Power of Congress is an important source of power in areas in which the federal government does not have direct authority.¹⁶ For example, although Congress has no constitutional authority to set a national minimum drinking age (or to require states to enact state laws), it has restricted eligibility for full federal highway funding to states that have laws that set the minimum drinking age at 21 years.¹⁹ Because states are free to accept or reject federal funds and the conditions that come with them, the Court has never found that a condition on federal funding is an impingement on state sovereignty.

The Court, nonetheless, agreed with the argument of the 26 states that challenged this provision of the ACA, that, in practice, the states have no choice but to accept the “new,” expanded eligibility category and amend state Medicaid laws accordingly. The Court reasoned that if a state refused to accept this “new” Medicaid expansion, the federal government could “penalize” the state by terminating its participation in — and all federal funding for — the “old” Medicaid program. The Court found that this “penalty” made the offer of new federal funding “coercive,” such that the federal government was “forcing” the states to accept it. In the opinion of the Court, federal coercion of states violated the core principle of federalism.

The chief justice also emphasized that the Medicaid expansion was intended to complete the construction of an overarching federal program: “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.”²¹ Medicare covers

persons 65 years of age or older, and the ACA will allow all those younger than 65 years of age to buy federally regulated health insurance through a federally regulated exchange, with federal subsidies for those with incomes between 100% and 400% of the federal poverty level. The Medicaid expansion, if adopted by all states, would bring almost everyone into a federally regulated system, something that both the chief justice and joint-dissent justices appear to consider objectionable.

FEDERALISM

The three opinions present strikingly different views of the authority of the federal government in relation to individuals and to the states. The chief justice and the joint dissent emphasized that the Constitution grants Congress only specifically enumerated powers, leaving all other sovereign powers to the states. They focused on how the Framers might have understood “commerce,” and the joint dissent quoted definitions from 18th-century dictionaries.¹ The joint dissent argued that if Congress could regulate people who do nothing other than “breathe in and out,” then it becomes, in the words of Alexander Hamilton in *The Federalist*, No. 33, “the hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor sacred nor profane.”²¹ Their language suggests alarm at the prospect of an all-powerful national government — alarm that they believe the Framers shared.

In contrast, the Ginsburg opinion viewed the federal government as one designed to craft solutions to national problems that the states cannot solve by themselves. The joint dissent disparaged this view as treating “the Constitution as though it is an enumeration of those problems that the Federal Government can address,”²¹ rather than as a document that grants the federal government only specific, enumerated powers. The Ginsburg opinion replied that their views “bear a disquieting resemblance to those long-overruled decisions” of the Court that struck down federal legislation from the early 20th century requiring minimum wages and maximum hours for employees.^{1,20} The different perspectives are reminiscent of disagreements over New Deal legislation. This seems to be why the Ginsburg opinion compared the ACA to the Social Security Act, noting that although Social Security was unprecedented when first enacted, the Court found it to be a permissible exercise

of the power of Congress to tax and spend for the general welfare.²¹ They also expressed a disagreement over the nature of health care, which Justice Ginsburg argued is unique and critical to life and which the majority of justices saw as just another market good.

QUESTIONS THE COURT DID NOT ANSWER

By limiting the power of Congress to directly regulate individuals under the Commerce Clause, while allowing Congress to indirectly regulate individuals by taxation, the Court permits the federal government to influence individuals by taxing them for not having health insurance. This is now a constitutional way to regulate people who are doing nothing. It is also precisely the type of expansion of federal power that the chief justice said would redefine the relationship of the federal government to individuals. Yet nothing in the opinions appears to limit the use of this power. Given the number of things that “people do not do,” the taxing power is now remarkably broad. The chief justice even suggested that a \$50 tax on homeowners without energy-efficient windows would be a permissible tax.¹ He did not address whether a \$15,000 tax on the uninsured would be permissible or would be an unjustified penalty. Future questions may include whether a federal tax on failing to use public transportation or failing to maintain a normal body-mass index would be constitutional. As for the “broccoli horrible” hypothetical, this opinion arguably supports congressional power to tax people for not buying broccoli.

The most unsettling aspect of the Court decision is the novel limit on the authority of the federal government to impose conditions on how its money is used. The Court had never before found a federal spending program to be coercive, and most scholars believed coercion to be an illusory standard that the Court would not apply. It is remarkable that the Court could conclude that states have no choice but to accept the new Medicaid conditions with their Medicaid funding. Although federal funding provides an incentive for states to participate in a federal program, it is hardly a “gun to the head,” as the chief justice called it.¹ The ACA made the new Medicaid funding generous in order to entice the states to participate, and Congress expected all states to do so. However, that expectation was based on the fact that the offer was so generous

that no rational decision maker would refuse it, not because it was coercive.

Because the coercion rationale seems so weak, it is perhaps not surprising that the opinions fail to explain what counts as coercion. The leading case on the Spending Power, *South Dakota v. Dole*, held that it was not coercive for the federal government to withhold 5% of federal highway funds from states that failed to enact a state law raising the minimum age for drinking alcohol to 21 years.¹⁹ In the ACA case, the Court found that it was coercive to withhold 100% of federal Medicaid funds. However, the Court did not attempt to draw any principled line between coercive and noncoercive payments, so it is unclear whether withholding anything between 5% and 100% of funding could qualify as unconstitutionally forcing states to accept a federal program.

Moreover, although the Court found that it is coercive to make the funding of an old program conditional on the adoption of a new program, it did not provide a meaningful standard for determining when a statutory amendment might be considered a “new” federal funding program, rather than an “amendment” of a previous program. The chief justice said that “a shift in kind, not merely degree” creates a new program.¹ The expansion of Medicaid in the ACA altered both the categories of individuals and the income level that qualified for eligibility. Is a change in both required to constitute a new program, or does only one suffice? Federal programs, including Medicaid, are often altered as experience suggests needed improvements.²² At this point, no one can confidently predict how to distinguish a new program from an amendment. Because so many federally funded health, education, and housing programs depend on the use of the conditional spending power, this ruling may encourage opponents of these programs to challenge new conditions in court.

IMPLICATIONS

Remarkably, given all the commentary about the importance of this case to the future authority of the federal government, none of the opinions made any attempt to limit the currently broad power to regulate interstate commerce that the federal government currently possesses. Rather, the Court seems to have expanded federal power to tax people for “doing nothing,” the primary fear that brought this case to court. It is hard to

believe that this power is as expansive as the chief justice suggested, but his opinion did not discuss limitations. The current taxing power certainly would permit an increased income or payroll tax to expand Medicare or create a new federal substitute for Medicaid. However, the limits of the taxing power probably will not be tested soon. It is the power that Congress is least likely to exercise in an era of widespread antipathy to tax increases.

The lack of health care for the poor is a national problem that the federal government was trying to fix and one that only the federal government can fix. States cannot solve national problems. With health insurance exchanges open to all legal residents and Medicare providing coverage for elderly adults, the addition of all low-income, nonelderly adults to Medicaid by the ACA would give virtually the entire population access to affordable health insurance. The decision of the Court to allow the states to reject the Medicaid expansion, however, creates a substantial gap in the comprehensive-coverage design of the ACA. States such as Florida and Texas, whose governors have already pledged to reject the Medicaid expansion, have large uninsured populations.²³ Such states may leave their uninsured populations doubly burdened. They will deny impoverished citizens the coverage that the federal government was willing to finance and also leave many (who are above the tax-filing threshold) subject to the new tax on the uninsured. The ACA does not provide tax subsidies to those below 100% of the poverty level, because they were expected to be covered by Medicaid. Their impoverished legal residents must continue to rely on the charity of safety-net providers, which is the very problem that the ACA was designed to solve.

The broad significance of this case can be found in the justices' views of the proper roles of the state and federal governments and not just in what they ruled about the ACA itself. The immediate effect is to return the constitutionally blessed ACA to the political realm. It is now up to Congress, the individual states, and especially the next president to determine the fate of the ACA. Because the case was decided by the vote of a single justice, however, the future of federal involvement in health care may also depend on the views of the next justice appointed to the Court.

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From the Department of Health Law, Bioethics, and Human Rights, Boston University School of Public Health, Boston.

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