

National Federation of Independent Business v Sebelius

June 29, 2012

In its decision announced June 28, the Supreme Court reviewed Congress's constitutional authority to enact two aspects of the Patient Protection and Affordable Care Act of 2010 (ACA): the individual mandate and the ACA's Medicaid coverage expansion. The individual mandate requires most Americans to maintain "minimal essential" health insurance coverage and provides for a "penalty," paid to the Internal Revenue Service, for non-compliance with the mandate beginning in 2014, with limited exceptions. The Medicaid expansion requires states to expand their coverage (with some of the costs being unreimbursed by the Act) as a condition of continued receipt of any Federal Medicaid funds. The following is a brief summary of the Court's ruling.

History

The same day that the President signed the ACA into law, Florida and twelve other states—later joined by thirteen more states, the National Federation of Independent Business, and several individuals--filed suit in the Northern District of Florida challenging Congress's authority to pass the ACA. The Florida District Court held that the individual mandate was not authorized by grants of Congressional authority in either the commerce clause or the taxing and spending clause. The District Court also found that the individual mandate could not be severed from the remainder of the ACA and therefore overturned the entire ACA. The Eleventh Circuit heard the appeal and agreed with the District Court's determination that the individual mandate was outside of Congress's authority, but held that the mandate was severable and upheld the remainder of the ACA. The Eleventh Circuit also ruled that the Medicaid expansion was constitutional and severable from the remainder of the ACA. In the alternative, in separate cases, the Sixth Circuit and the D.C. Circuit upheld the ACA as a constitutional exercise of Congress's authority. The Fourth Circuit ruled that the Anti-Injunction Act barred the Court from hearing the case.

Anti-Injunction Preliminary Ruling

As a preliminary matter, the Court addressed whether the Anti-Injunction Act prohibited the Court from reviewing the case, and held that the Anti-Injunction Act did not limit the Court's authority to hear the case. The Anti-Injunction Act typically bars plaintiffs from challenging the validity of taxes before the tax is actually paid. For purposes of the Anti-Injunction Act, the Court found that Congress did not intend for the penalty for non-compliance with the individual mandate to be treated as a tax because Congress labeled the exaction a penalty (not a tax), and throughout American law penalties have been treated differently from taxes. Further, the language indicating that the penalty should be treated as other penalties in the tax code was intended, according to the Court, to provide procedural guidance to the Secretary of the Treasury, rather than create a substantive rule for the treatment of the penalty. Thus, the Anti-Injunction Act did not bar the Court from hearing the case. With that matter decided, the Court went on to review the case.

Individual Mandate

The Government argued two separate grounds for its constitutional authority to enact the Affordable Care Act's individual mandate: (1) the individual mandate is a valid exercise of Congress's power to regulate interstate commerce and (2) the individual mandate is a valid exercise of Congress's power to tax.

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Ruling: The Commerce Clause does not authorize Congress to compel commercial activity

The Government's first argument is that the individual mandate is a valid exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause because the aggregate of individual decisions not to purchase health insurance creates a cost shifting problem that "has a substantial and deleterious effect on interstate commerce." While the expansive scope of the Commerce Clause is well established and allows Congress to regulate not only commerce among the states, but also activities that "have a substantial effect on interstate commerce," the Court here reinforced a "longstanding" limitation on the Commerce Clause's expansive scope, holding that Congress's power to regulate requires the existence of an activity to be regulated. Here, however, the individual mandate is not a valid exercise of the Commerce Clause because it compels activity where none existed (i.e., "compels individuals to become active in commerce by purchasing a product" rather than regulating existing commercial activity). The Court found the distinction between activity and inactivity appropriate because allowing the government to regulate what we do *and* what we do not do would "fundamentally chang[e] the relationship between the citizen and the Federal Government." Indeed, allowing Congress to "regulate individuals precisely *because* they are doing nothing ... would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and ... empower Congress to make those decisions for him."

The Court also rejected the Government's argument that "the uninsured as a class" are subject to regulation because they "are active in the market for health care, which they must regularly seek and obtain." The Court articulated two related reasons for rejecting this argument. First, Congress has power under the Commerce Clause only to regulate classes of activities rather than classes of individuals; therefore, Congress cannot regulate a class of individuals that is defined by its commercial inactivity. The Court further clarified that "any police power to regulate individuals as such, as opposed to their activities, remains vested in the states." Second, while Congress can regulate activities that it foresees having an effect on interstate commerce, it may not "dictate the conduct of an individual today because of prophesied future activity."

Finally, the Court rejected the Government's argument that the individual mandate should constitute an exception to the general rule because "health insurance and health care financing are 'inherently integrated.'" Even if inherently integrated, the Court held that the "connection between the mandate and subsequent commercial activity is too lacking."

Ruling: The Necessary and Proper Clause does not allow Congress to "create the necessary predicate to the exercise of an enumerated power."

The Government argued that the individual mandate is a valid exercise of the Necessary and Proper Clause because it is an "integral part" of the guaranteed-issue and community-rating insurance reforms that are a valid exercise of the Commerce Clause. The Court rejected this argument citing two reasons. First, the Necessary and Proper Clause vests Congress with authority to enact legislation that is *incidental* to its enumerated powers, but does not grant "substantive and independent powers beyond those specifically enumerated." Second, the individual mandate would permit Congress to "reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it," the mandate is not a proper means for effectuating insurance reforms under the Commerce Clause, even if necessary.

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Ruling: Regardless of Labels, the Shared Responsibility Payment is a Tax not a Penalty

Having dismissed the government's arguments that the individual mandate was within Congress's Commerce Clause powers, the Court turned to the second argument that the individual mandate may be upheld under Congress's enumerated power to "lay and collect Taxes." Taking the other side of its argument related to the Anti-Injunction Act above, this claim paints the mandate not as an order that individuals buy insurance, but rather as an imposition of a tax on those who do not buy that product. The Courts pointed out that the "only" consequence an individual has for not purchasing insurance is that he must make an additional payment to the IRS when he pays his taxes. This, the government asserts, "makes going without insurance just another thing the Government taxes, like buying gasoline or earning income."

Relying on historical precedence that courts should attempt to adopt any meaning of a statute that would render it constitutional, the Court found that the most straightforward reading of the individual mandate is that it commands individuals to purchase insurance. As such, it may be interpreted as a tax, and is therefore within Congress's taxing powers. Although called a penalty in the Act, the Court opined that word choice does not "control whether an exaction is within Congress's constitutional power to tax."

The Court described how the proposed IRS "penalty," titled in the ACA as a "shared responsibility payment," closely resembles a tax: 1) it is paid by taxpayers when filing their tax returns; 2) those who do not pay federal taxes because their household income is less than the IRS filing threshold are not subject to the payment; and 3) for those that do file, familiar factors are used to determine the amount paid, such as taxable income, number of dependents, and joint filing status. Finally, the shared responsibility payment is found in the Internal Revenue Code and enforced by the IRS.

Taking the characteristics of the shared responsibility payment into account, the Court confirmed that the shared responsibility payment falls within Congress's taxing power. In reaching this conclusion, the Court used a three-pronged test: 1) Does the "exaction" create a heavy burden; 2) Does the "exaction" only apply to those who knowingly act in a certain way; and 3) Who enforces the "exaction." The Court found the shared responsibility payment was not a heavy burden, as it is often "far less" than insurance payments and cannot, by law, be more than insurance payments. The shared responsibility payment also applies to everyone and is enforced by the IRS. Furthermore, while the tax may seek to influence individual conduct, the Court pointed out that this is nothing new, as other taxes (cigarette taxes, tariffs) have always sought to regulate activity. Finally, the Court addressed whether or not the shared responsibility payment is a penalty. As there are no negative legal consequences for not buying health insurance other than the tax, the Court concluded the payment is best understood not as a penalty, but rather as a tax citizens may lawfully choose to pay in lieu of buying health insurance.

The Court then assessed the constitutionality of the "shared responsibility payment" when viewed as a tax. The Court found that the shared responsibility payment is not a direct tax, as it is triggered only in special circumstances (earning a certain amount of income but not obtaining health insurance). The Court also asserted that, while the Commerce Clause may not authorize Congress to regulate inactivity, "the Constitution does not guarantee that individuals may avoid taxation through inactivity." Thus, unlike the Commerce Clause argument, the Court need only find if Congress *has* properly exercised its powers, not whether it *can*. The Court concluded that the shared responsibility payment may be characterized as a tax, and is thus within Congress's constitutional taxing powers.

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Expanding Medicaid Coverage

The Affordable Care Act also contains provisions that increase state obligations under Medicaid. In brief summary, the current Medicaid program generally requires coverage of only particular groups of individuals—children, pregnant women, the blind, etc.—yet the Act expands the scope of the program to cover everyone under the age of 65 with a yearly income below 133% of the federal poverty line. The Act directs that this coverage must begin by 2014, and if the states do not comply, the federal government has the *authority to revoke* not just the new federal funding that comes with the expanded program, *but the entirety of a state's existing Medicaid funding as well*. The Act also requires that all new Medicaid recipients receive an “essential health benefits” package, which is a package that will satisfy the requirements of the individual mandate.

Ruling

The Supreme Court held that the provision threatening the withdrawal of all existing Medicaid funds in the event of state non-compliance with the new program is unconstitutional but made clear that the removal of the clause does not affect the rest of the new Medicaid initiative, which it left intact. The Supreme Court decided that the provision exceeded the bounds of federal encouragement and was in fact coercive action. While Congress can use funds to convince states to adopt certain policies, it cannot use its funds to exercise undue influence or coercive power over the states. Since the federal government was threatening to withhold *all* of a state's federal Medicaid funding, which accounts for at least 10% of the average state's overall budget, the Court determined that here the states were given no real choice whether or not to adopt the program.

The Dissent

Justice Scalia, Justice Kennedy, Justice Thomas, and Justice Alito (the Dissent) joined in filing an opinion dissenting to the Majority Opinion. For the following reasons the Dissent would strike down the entire Act as unconstitutional:

The Individual Mandate

The Dissent analyzed the Commerce Clause, and similar to the Majority concluded that Congress may not regulate commerce that does not exist (here, the purchase of healthcare insurance) by compelling its existence. The dissent determined that there is a difference between buying and selling health insurance, which could be subject to federal regulation under the Commerce Clause, and the failure to buy health insurance or the decision to forego participation in the health insurance market, which is not commercial activity and is not subject to federal regulation. Further, it was the Dissent's opinion that there are many ways other than the Individual Mandate to achieve the goals of the Act, such as surcharges upon entry into the health insurance system or denial of a full income tax credit. “Whereas the precise scope of the Commerce Clause and the Necessary and Proper Clause is uncertain, the proposition that the Federal Government cannot do everything is a fundamental precept.”

The Taxing Power

The Dissent disagreed with the Majority's decision to categorize the penalty as a tax for constitutional purposes. According to the Dissent, it is clear that the violation of the Act results in a penalty and not a tax; even though the Court will often strain to construe legislation to save it against constitutional attack, the Majority's decision judicially rewrites the Act. Neither does the IRS' collection of the “penalty” turn it into a tax because the IRS has collected penalties in the

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past that were not taxes. Also persuasive to the Dissent were previous versions of the Act which rejected the imposition of a tax in favor of the penalty, inferring that Congress did not intend the penalty to be a tax.

The Anti-Injunction Act

Because the Dissent determined that the minimum coverage provision is not a tax, the suits would not have the purpose of restraining the assessment or collection of any tax, and as a result, the Anti-Injunction Act would not prohibit the Court from hearing the case. The Dissent explained its disagreement with the Majority Opinion here in what it coined “verbal wizardry”—categorizing the penalty as a tax for purposes of Congress’s Taxing Power, but as a penalty for purposes of the Anti-Injunction Act.

The Medicaid Expansion

Similar to the Majority, the Dissent found it clear that the Medicaid expansion left States with no option to refuse the funds and as a result the Medicaid expansion exceeds Congress’s spending power. However, in opposition to the Majority, the Dissent disagreed with the Majority’s decision to “rewrite” the Medicaid Expansion so as to allow states to retain their pre-existing Medicaid funds if they reject the new Federal funding in the Act. The Dissent opined that such a “judicial rewrite” is not within the Court’s power.

Severability

Finally, the Dissent opined that because all provisions of the Act are closely interrelated, the unconstitutional provisions can not be severed from the remaining provisions and, as a result, the Act is invalid in its entirety.

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