

National Federation of Independent Business v Sebelius (2012)

FACTS OF THE CASE In 2010 Congress passed the Patient Protection and Affordable Care Act. This law included several components designed to make health insurance more available and to reduce the costs of health insurance and health care. One of these components required almost all Americans to maintain a minimum level of health insurance. Anyone who didn't have the minimum level of insurance would have to pay a penalty (except for people below a certain income level), starting in 2014. The law also prohibited insurance companies from denying coverage to sick people and from charging them more than others in their communities.

Individuals and several states sued, arguing that Congress did not have the constitutional power to require individuals to buy health insurance. The federal government said that Congress had the power to pass the law under the Commerce Clause, which allows Congress to regulate interstate commerce. Opponents of the law argued that choosing not to purchase health insurance is a noneconomic, intrastate activity.

ISSUE

Under the Commerce Clause, can Congress require individuals to purchase health insurance?

ARGUMENTS

OPINION A We rule for the federal government—the Affordable Care Act is constitutional. Under the Commerce Clause, Congress may regulate “activities that substantially affect interstate commerce.” The health care market is huge and nationwide. The decision not to buy health insurance is a form of economic activity. Almost all Americans will inevitably need medical services at some point in their lives, and hospitals are required to treat sick people, even when they cannot pay.

As a group, uninsured people consume and cannot pay for billions of dollars' worth of health care every year. The costs of that unpaid care are shifted onto the rest of society and have a substantial effect on interstate commerce.

Upholding this law will not allow Congress to force people to buy other things. Buying health insurance is a unique economic activity. Everyone consumes health care, but no one knows when and how much they will need.

OPINION B We rule that the requirement that Americans purchase health insurance is unconstitutional. This law is not regulating people who are engaged in commerce. It is forcing people to engage in commerce against their will. People who do not have health insurance are not engaging in economic activity.

If this law were upheld, there would be no limit on Congress's Commerce Clause power. If Congress can force people to buy insurance, it could force people to buy anything. Whether we buy something will always affect the national market for things, so Congress could use the same logic to force individuals to purchase cars to improve the auto industry.

The states are traditionally responsible for protecting the health and safety of their citizens, and that division of powers is designed to limit the federal government's ability to interfere with issues central to individual liberty.

EXPLORING THE ESSENTIAL QUESTION

Evaluating Read each of the two sample opinions in this case. First, explain how this case illustrates the question of how powers should be divided among different levels of government. Next, decide which opinion you think should be the majority (winning) opinion and which one you think should be the dissenting opinion. Explain your choice.

YOU BE 
the **JUDGE**

Bill of Rights in Action



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THE CONTINUING STRUGGLE FOR U.S. HEALTH-CARE REFORM

FOR 100 YEARS, EFFORTS HAVE BEEN MADE TO REFORM HEALTH CARE IN THE U.S. TODAY, A DEBATE RAGES WHETHER THE FEDERAL GOVERNMENT OR FREE MARKET SHOULD TAKE THE LEAD IN REFORMING THE NATION'S HEALTH-CARE SYSTEM.

During the Progressive Era in the early 1900s, reformers tried to pass state health insurance laws to cover industrial workers, but these laws were defeated. In the 1912 presidential election, the Progressive Party promised health insurance for all Americans. This proposal died with the collapse of the party after its election defeat.

Reformers tried to include a national health-care program in the Social Security Act during the New Deal. But President Franklin Roosevelt, a Democrat, dropped this reform to focus on others. President Harry Truman, also a Democrat, revived the idea in 1949, but it was denounced as "socialized medicine" and failed.

Throughout World War II, a labor shortage and government wage freeze prompted employers to offer free or inexpensive private health insurance to

attract workers. Private employer-provided insurance slowly expanded after the war to become the main way most Americans got medical coverage.

In 1954, during the presidency of Dwight Eisenhower, a Republican, Congress passed tax reforms that excluded employer-paid health insurance premiums for employees from taxation. This provided an incentive for employers to provide health insurance to their workers.

In other reforms, both Democrats and Republicans joined to pass laws to provide health care for certain groups. These include active military personnel, veterans, Native Americans, those over



Former President Theodore Roosevelt ran for president in 1912 on the Progressive Party ticket. The party's platform called for health insurance for all Americans.



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65 (Medicare), the poor (Medicaid), and children from low-income families who do not qualify for Medicaid.

In 1974, President Richard Nixon, a Republican, failed to get Congress to pass his proposal requiring most employers to pay for worker health insurance premiums. In 1979, Sen. Ted Kennedy, a Democrat, also failed to get Congress to pass his expanded version of Nixon's plan.

In 1986, Congress passed the Emergency Medical Treatment Act. This required hospital emergency rooms (ERs) to treat people even if they did not have insurance and could not pay. This law shifted the cost of treating uninsured ER patients to the

HEALTH-CARE REFORM

This edition of *Bill of Rights in Action* looks at the issue of health-care reform. The first article explores the recently passed Affordable Care Act and conservative and liberal alternatives to it. The second article examines the recent Supreme Court decision on the Affordable Care Act. The last article compares health-care systems in other nations.

The Continuing Struggle for U.S. Health-Care Reform
The U.S. Supreme Court's Decision on the Affordable Care Act
Health Care: What Do Other Countries Do?

Guest writer Lucy Eisenberg, Esq., contributed the article on the Supreme Court decision. Our longtime contributor Carlton Martz wrote the other articles.

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taxpayer as well as to insured individuals who had to pay higher premiums.

In 1993, as insurance premiums were skyrocketing, President Bill Clinton, a Democrat, proposed a new comprehensive health reform bill. But political differences and fierce opposition from insurance companies sank his plan before it even reached a vote in Congress.

In 2006, the Republican governor of Massachusetts, Mitt Romney, led an effort to enact health-care reform that would potentially cover all citizens in his state. The law mandated that all adults buy health insurance if they did not have it provided at work or by a government program. The state aided those who needed help in purchasing insurance. Those who refused to get health-care coverage were subject to a penalty.

The chief purpose of this so-called "individual mandate" was to enlarge the pool of those paying insurance premiums to include both healthy and sick persons, including patients with pre-existing medical conditions. Without the individual mandate, insurance companies would have had to raise insurance premiums to very high levels to insure people with costly pre-existing conditions. With the mandate, premiums are much lower because healthy people with few medical claims are also paying into the system.

Affordable Care Act

Early in his first term, President Barack Obama moved to reform the U.S. health-care system, which was made up mainly of for-profit insurance companies plus tax-supported government programs. Critics argued that the system, when compared to systems in other developed nations, is much more costly and does not cover every person. The number of uninsured Americans has kept growing, from 35 million in 1990 to about 50 million in 2010. Those typically not covered included low-income families, self-employed people, workers in companies without insurance, the unemployed, and persons with pre-existing medical conditions who were denied coverage by insurance companies.

Obama's proposed plan was similar to the one adopted in Massachusetts.

The main priority of Obama's reform effort was to reduce the number of Americans without any health-care insurance by 30 million.

Narrowly passed by Congress in 2010, the Affordable Care Act is scheduled to take full effect in 2014. Among its provisions, the act:

- Mandates that all individuals who do not have any health-care coverage purchase at least a minimum insurance plan or pay a penalty.
- Sets up online state-operated exchanges where uninsured individuals and small businesses may buy insurance from among approved competing private plans; federal tax credits are available for individuals and small businesses that need help in buying insurance.
- Requires companies with more than 50 employees to pay a penalty if they do not offer workers an insurance benefit.
- Prohibits insurance companies from denying insurance to anyone because of a pre-existing health condition and bans lifetime or annual limits on benefits.
- Requires insurance companies and Medicare to provide free preventive care and immunizations.
- Requires insurance companies to spend 80–85 percent of the premiums they receive on medical care (and if they fail to do so, they must refund the excess to policyholders).
- Allows parents to keep their children on their health insurance policies until age 26.

The main priority of Obama's reform effort was to reduce the number of Americans without any health-care insurance by 30 million.

- Requires states to add more low-income individuals and families to state Medicaid programs; these people who were not poor enough to qualify for Medicaid before the new law, were estimated to make up about half those Americans who lacked insurance.

To pay for this major reform, the Affordable Care Act requires new taxes and fees on some groups, including higher income Medicare beneficiaries, insurance companies, and manufacturers of drugs and certain medical equipment.

The new health-care law also attempts to cut medical costs. A new Center for Medicare and Medicaid Innovation will test reforms such as compensating Medicare doctors for effective treatments rather than paying them a fee for each separate medical service whether it is needed or not. The law also cuts payments to private insurers of Medicare Advantage programs and pays hospitals less if they discharge and re-admit too many patients.

Republicans in Congress strongly opposed Obama's Affordable Care Act, which they dubbed "Obamacare." They called the law a "government takeover of health care."

Republicans argued that the mandate for businesses to provide insurance would put a costly burden on them and prompt many not to hire more workers. Many employers providing insurance, the Republicans claimed, would find it cheaper to drop this benefit and pay the penalty, causing millions of workers to lose their job-related coverage. They also condemned the reform for costing trillions of dollars.

The biggest Republican criticism of the new health-care law was its individual mandate that requires everyone without health-care coverage to buy insurance. Opponents of the law went to court, arguing that this mandate and its penalty were unconstitutional.

In June 2012, the U.S. Supreme Court decided 5–4 that the Affordable Care Act was constitutional. The majority ruled that the penalty for not buying insurance was a tax and therefore constitutional under Congress' taxing power. In another part of the

majority decision, however, the justices struck down the provision that gave the federal government the power to cut a state's Medicaid funding if it refused to add more low-income people to its Medicaid rolls.

Free-Market Reform

The Supreme Court decision did not end the controversy over the Affordable Care Act. If successful in winning the presidency and control of in the 2012 elections, Republicans vow to "repeal and replace" the act.

While there is as yet no official Republican plan to replace the Affordable Care Act, numerous conservative groups have developed replacement plans, which might influence proposed replacement legislation.

A major element of these plans is to assure more reliance on free-market principles to reduce the rapidly rising medical costs and insurance premiums. Conservatives place most of the blame for rising costs on government spending for health-care programs like Medicare and Medicaid.

Defined Contribution

Conservatives argue that people with insurance should be more aware of the real costs of their health care so they will use medical services only when really needed and thus reduce overall demand. They reason that reducing demand for these services will push down medical costs and insurance premiums.

One way to do this is to gradually shift from employer-provided insurance to an employer "defined contribution." Under this plan, employers will give a cash amount to their workers each year to shop for their own insurance to match their needs.

Conservatives say that managing one's own health insurance policy motivates the worker to keep co-payments and other out-of-pocket charges as low as possible. This will reduce the spending that pushes up medical costs. By having their own insurance, workers will not lose their insurance if they are laid off or move on to another company.

One criticism of defined contribution is that the insurance coverage the worker needs may cost more than what the employer contributes.

Health Savings Accounts (HSAs)

One way to reduce health insurance costs is through high deductible health insurance policies. This kind of insurance requires the patient to pay medical expenses each year out of pocket up to a certain amount, say \$3,000, before the insurance benefits take effect. Because the insurance company does not have to pay for any medical services until the deductible amount is reached, the premiums are quite low compared to traditional medical insurance.

A Health Savings Account makes a high-deductible policy more desirable. It allows people to deposit money into HSAs, and this money is not subject to federal taxes. They can withdraw money from the account to pay for their annual out-of-pocket medical expenses.

Some criticize HSAs since they tend to benefit healthy and higher income persons. Those with chronic medical conditions or with low incomes would probably have difficulty keeping enough money in their accounts to cover large out-of-pocket expenses.

Premium Support for Medicare and Medicaid

One proposed free-market solution for the costly Medicare and Medicaid programs is to shift their beneficiaries from open-ended government health care to individual insurance policies. Proposals call for the federal government to give those with Medicare "premium support." This is a set amount of money each year to pay the premiums for a basic private insurance policy geared to the person's needs. Similar proposals would send federal block grants to the states to subsidize the poor receiving Medicaid to buy their own insurance.

A key idea behind premium support is to encourage the elderly and poor to become more aware of their medical costs so they will not overuse health-care services. Supporters of this free-market alternative say this approach will sharply reduce soaring U.S. health insurance costs.

Critics of Medicare and Medicaid premium support point out that medical coverage would likely be less than under the current government-run programs. Also, there is no guarantee that



National Health Institute

In 2010, about 50 million Americans did not have health insurance.

the government premium support amount would grow to keep pace with the price of insurance.

Additional Proposed Free-Market Reforms

There are many other reforms proposed as free-market alternatives to the Affordable Care Act approaches. These include:

- Ending the current practice that insurance can only be purchased in the state where one lives rather than nationwide.
- Reducing costly lawsuits against doctors by reforming malpractice standards.
- Encouraging states to subsidize insurance for high risk pools of people with pre-existing conditions.
- Eliminating the employer-provided insurance tax break and shifting it to the workers themselves as a federal tax deduction for their annual premiums.

Those opposing reliance on the free market for health-care reform say that it focuses almost entirely on containing the costs of those who already have insurance. Free-market reformers direct very little of their attention, say the critics, on the 50 million Americans who are uninsured. ➤

Medicare for All?

Conservatives are not the only critics of the Affordable Care Act. Some liberals object to the law for not guaranteeing health care for all. After the Supreme Court decision, some states declared they would not add more low-income people to their Medicaid programs. This may result in millions of people remaining without health care.

As early as 2003, legislation was introduced in Congress to create a universal "single-payer" health-care system. This means all Americans would have government guaranteed health insurance. They would choose their doctors, hospitals, and other medical providers. The federal government would pay all the providers for their services.

Thus, the government would be the single payer of medical expenses rather than hundreds of insurance companies and multiple government health-care programs. Basically, this is how Medicare for those over 65 already works. Some call this single-payer system "Medicare for All."

The money currently budgeted for Medicare and the other government health-care programs plus additional payroll and other taxes would finance this new national health-care system. No one would have to pay premiums for private health insurance.

Currently, private insurance premiums are inflated by marketing, administrative costs for reviewing medical claims, and company profits. The current Medicare system for the elderly spends much less on administration than the private insurance companies. Medicare is also non-profit, as a single-payer system would be.

Under Medicare for All, all those with pre-existing conditions would be covered. Workers who lost their jobs would still have health insurance. Everyone who used the ER would have their bills paid by the government. In short, every American would be covered, and the problem of people not having health insurance would disappear overnight.

Some free-market conservatives call the single-payer idea "socialism," although the government would not employ the doctors or own the hospi-

tals as is the case in socialist systems. The federal government would, however, take over most of the U.S. health insurance industry. For-profit insurance companies could only sell policies with medical services not covered by the single-payer plan.

Some critics predict that since everyone will be covered by the single-payer system, there would soon be a shortage of doctors and hospitals to care for all the additional patients. This could then lead to long waiting times for non-urgent care and surgeries as is the case in Canada, which has a single-payer system. Many also raise concerns about how much a system would cost in additional taxes.

* * * * *

Why has comprehensive health-care reform been so difficult to achieve in the United States? All the other economically developed countries already have national health-care systems that cover every citizen.

One reason for Americans' resisting health-care reform has been the opposition and conflicts among special interests. These include the private insurance industry, drug companies, doctors, hospitals, employers, unions, and even the government.

Another reason is that since World War II, a majority of Americans have had some form of private or government health-care coverage. They have tended

to resist reforms they fear might increase their costs or lower their benefits.

Finally, the current debate over health-care reform highlights a major political division in the country. This is the conflict between those who want the government versus those who want the free market to take the lead in health-care reform. At the present time, neither side has won over the American public.

FOR DISCUSSION AND WRITING

1. Why do you think the U.S. has never adopted a reform that guarantees health care for every citizen?
2. What effects could the rapidly rising health-care costs and the growing numbers of uninsured persons have on the United States?
3. Do you tend to favor the federal government or free market in taking the lead for health-care reform? Why?

For Further Reading

Haugen, David and Musser, Susan, eds. *Health Care* (Opposing Viewpoints Series). Detroit: Gale, 2012.

Starr, Paul. *Remedy and Reaction: The Peculiar American Struggle Over Health Care Reform*. New Haven, Conn.: Yale University Press, 2011.

ACTIVITY

Health-Care Reform for the U.S.

Students in small groups will discuss and decide on the best health-care reform for the United States. Each group should review the article and then discuss each of the following options.

- A. The Affordable Care Act
- B. Free-Market Health-Care Reform
- C. Medicare for All
- D. Students design their own reform plan by selecting elements from the other options as well as their own ideas.

Be sure to consider the purposes, benefits, and costs of each option. Based on the discussion, choose the best option and prepare to present arguments defending the choice. The other groups will have an opportunity to ask questions, comment and criticize the choice. Continue the process until all groups have presented.

Take a class vote at the end of the activity to determine which option is considered best.

THE U.S. SUPREME COURT'S DECISION ON THE AFFORDABLE CARE ACT

IN 2010, CONGRESS PASSED AND PRESIDENT OBAMA SIGNED INTO LAW THE AFFORDABLE CARE ACT, THE FIRST MAJOR HEALTH-CARE REFORM IN ALMOST 50 YEARS. THE LAW WAS IMMEDIATELY CHALLENGED, AND IN JUNE 2012, THE U.S. SUPREME COURT RULED ON WHETHER THE LAW WAS CONSTITUTIONAL.

On June 28, 2012, hundreds of demonstrators gathered outside the Supreme Court waiting for the court to issue its ruling on the Affordable Care Act, the Obama administration's plan to reform health insurance. For three days in March, the Supreme Court had heard oral arguments on the challenges to the law. For weeks after the oral arguments, commentators had been trying to predict whether the court would strike down the federal law's mandate requiring everybody to have a government-approved level of health insurance. And there was constant speculation about whether Justice Kennedy, often a "swing vote," would side with the "liberal" justices and vote to uphold the law or join the "conservatives" to strike it down.

The ruling surprised almost everyone. In two separate opinions, a 5-4 majority of the court ruled that the "individual mandate" exceeded Congress' power under the commerce clause, but it did *not* strike down the law. Instead, a different majority voted 5 to 4 that the individual mandate, which imposes a financial "penalty" on adults who do not have insurance, could be considered a "tax" and was therefore within Congress' power to levy taxes. And the court upheld another key part of the law expanding the Medicaid program, but it struck down a part of the law that required states to participate in the expansion or risk losing *all* the Medicaid funds they were already receiving.

Making Health Care Affordable

When President Obama was elected, he promised to reform the



President Barack Obama signed the Affordable Care Act into law on March 23, 2010.

FDR Library and Museum

health care system. It was not an easy task. No president since Lyndon Johnson in 1965 (who signed Medicare and Medicaid into law) had been able to pass a major health-care reform law.

Congress held numerous debates, and the press reported about the pros and cons of the legislation that was being proposed. A bill, titled the Patient Protection and Affordable Care Act (ACA), finally passed in March 2010. The ACA was intended to make health care available and affordable to most of the 50 million Americans who were currently uninsured. The Congressional Budget Office (CBO) estimated that with the ACA in place, 32 million more Americans would have health-care coverage by 2019.

An important part of the ACA is to expand the Medicaid program. Medicaid is a joint federal-state program that provides medical care to certain needy people. The states pay part of the costs and the federal government pays an average of 57 percent of the cost. Under the ACA, Medicaid would be expanded to cover an estimated 16 million people who are currently uninsured.

The other key provisions in the ACA focus on making health insurance more affordable and accessible to people who are not poor enough to qualify for Medicaid. The law is designed to make buying insurance easier and less costly. Insurers could no longer deny coverage to people who are already sick — i.e., those with a "pre-existing condition." ▶

They could not charge sick people higher premiums. And they could not put a cap on the amount they will pay during a person's lifetime.

Perhaps most important, the law requires everyone to have insurance. People who don't have insurance through their employer or from a government health plan (like Medicare or Medicaid) must buy it from the market or pay a penalty. This provision is called the "individual mandate." Its purpose is to keep the cost of premiums as low as possible. If more people (including the relatively young and healthy) buy insurance, insurance companies have more money to pay for those who are sick, and the cost of premiums can be lower. The individual mandate became the most controversial part of the new law.

Road to the Supreme Court

On the same day that President Obama signed the ACA into law, the state of Florida filed a lawsuit against the federal government claiming that the individual mandate was unconstitutional. Florida was joined by 12 other states — and later by 13 more states, two individuals, and the National Federation of Independent Business. The Florida District Court ruled that Congress did not have the power under the commerce clause to require people to buy health insurance. The federal government appealed, and the 11th Circuit affirmed the lower court's opinion. Similar lawsuits were filed around the country, claiming that the individual mandate — and various other provisions of the law — were unconstitutional.

In November 2011, the Supreme Court agreed to hear the case from the 11th Circuit. By that time, other appellate courts had made conflicting rulings — two Circuit Courts ruling that the mandate was constitutional and one other Circuit striking it down. Instead of following the usual practice of limiting oral argument on each case to one hour, the court scheduled three days and more than five hours for oral argument.

The first day of oral argument was devoted to a technical issue of law. The Anti-Injunction Act bars lawsuits "for the purpose of restraining the assessment or collection of any tax." In other

words, people who object to a tax may not sue until the government has actually collected the tax. If the Anti-Injunction Act applied to this case, it would have delayed the court from hearing the case until the health-care law was fully implemented. Neither the Obama administration nor those challenging the health-care law wanted the court to delay hearing the case. An independent lawyer was brought in to argue that the Anti-Injunction Act barred the lawsuit. All nine Supreme Court justices ultimately agreed that the Anti-Injunction Act did not apply to this case, and it did not need to be delayed.

Can the Government Make You Eat Broccoli?

On day two, the court heard arguments on the individual mandate. The question before the court was whether Congress can compel individuals to buy a product — i.e., health insurance — from private companies. Both parties focused on the commerce clause of the Constitution. It gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." (Art. 1, sec. 8, cl. 3)

Instead of following the usual practice of limiting oral argument on each case to one hour, the court scheduled three days and more than five hours for oral argument.

The government argued that the mandate was a valid exercise of Congress' power under the commerce clause. It noted that health-care spending amounted to about one-fifth of our national economy. Like it or not, almost all people require and receive health care at some time in their life. When people need health care and do not have insurance, they often don't pay the bills. And when hospitals don't get paid, they pass on the cost to insurers, and the result is that premiums for those who do have insurance go up. The government argued

that the decision not to buy insurance affects the market for insurance by increasing premiums for the insured and that the individual mandate would make premiums go down.

The states argued that the commerce clause only allows the regulation of activity, and not "inactivity." People who chose not to purchase insurance are not involved in commerce, and Congress does not have the power to regulate how people should spend their money. The states argued that giving Congress the power to impose the individual mandate would start down a slippery slope, where people could be required to buy all kinds of products. As Judge Vinson, in the Florida District Court wrote, "Congress could require people to buy and consume broccoli at regular intervals . . . because people who eat healthier tend to be healthier and . . . put less of a stress on the health care system."

The broccoli argument took hold. The word "broccoli" was mentioned multiple times during oral argument and also in the justices' written opinions. Ultimately Chief Justice Roberts ruled that the commerce clause did not authorize the individual mandate. "Congress," he wrote, "has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product [like broccoli.]" Though the commerce clause does give Congress broad power to regulate commerce, it does not give Congress the same power to regulate what we do *not* do. And therefore, Justice Roberts concluded, the ACA's individual mandate is unconstitutional. Four other justices agreed with this reasoning, although they did not join the chief justice's opinion.

Is a Penalty the Same as a Tax?

Even though the court majority ruled that the commerce clause did not authorize the individual mandate, that did not end the matter. The government also argued that the mandate could be upheld as within the power the Constitution gives to Congress "to lay and collect taxes." (Art. 1, sec. 8, cl. 1). And indeed the ACA provides that the "penalty" on a person who does not have insurance is paid to the

IRS and is “assessed and collected in the same manner” as a tax penalty.

The states objected to the government’s argument based on the wording of the ACA. The individual mandate section of the ACA does not use the word “tax.” It states that individuals must be covered by “minimum essential coverage,” and if they are not, “there is imposed on the taxpayer a penalty” in an amount determined by the IRS. The states argued that if Congress had intended to invoke its taxing power, it would have used the word “tax” and not the word “penalty.”

But Chief Justice Roberts disagreed, and four other justices agreed with him on that point. A law, he wrote, should not be struck down just because Congress used the wrong labels. Requiring an individual to pay a financial penalty for not obtaining health insurance “may reasonably be characterized as a tax.” And it is therefore constitutional under the taxing power. In support of his decision Justice Roberts quoted Justice Oliver Wendell Holmes:

It is well settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that which will save the Act.

Not Giving the States a Choice

Because of the individual mandate, many people who were previously uninsured will be buying health insurance. The ACA also increases the number of people with health coverage by expanding the Medicaid program.

Congress passed the original Medicaid act in 1965. The law gives states federal matching funds to provide health care to the poor. (The federal government pays between 50 and 83 percent of the states’ Medicaid costs). Before the ACA, only certain groups were covered: pregnant women, families with dependent children, and people who are sick and disabled. Adults without dependent children could not receive Medicaid no matter how low their income. The ACA made a big change in the existing law by requiring states to cover *all* adults with incomes below 133 percent of the

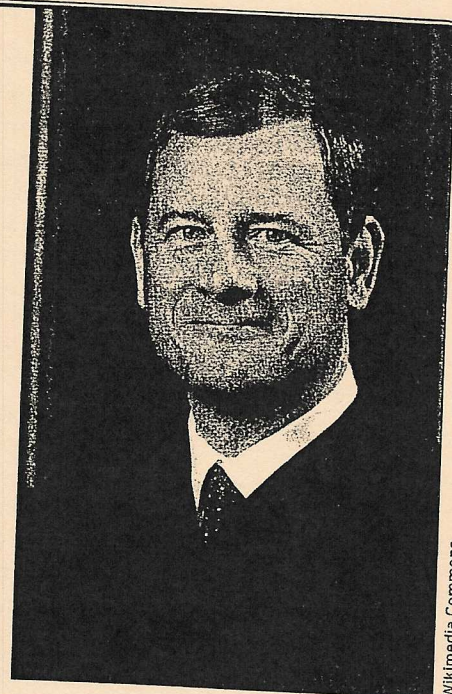
Federal Poverty Level (FPL). The federal government initially will pay 100 percent of the cost for the newly eligible adults (and 90 percent after 2020). This change is expected to provide coverage to 16 million people not previously covered.

The 26 states that challenged the ACA claimed that they should have a choice whether to make the big changes required by the ACA, but they don’t really have a choice because the law gives the federal government power to “withhold all or merely a portion of funding from a noncompliant state.” That means that if a state decides not to expand Medicaid, it could lose all of the federal funding it receives for its existing Medicaid program. For the average state, that would mean losing at least 10 percent of its entire budget. (In 2009, most states received more than \$1 billion each in federal Medicaid funding — and nearly one third received more than \$5 billion). With so much money at stake, the states claimed that they would have no real choice.

The government argued that the ACA is just one more of many amendments that over the years have been made to the Medicaid law. Moreover, when Congress originally passed the Social Security Act (of which Medicaid is a part), it reserved “the right to alter, amend or repeal any provision.”

But the states claimed that the ACA is not just an amendment to the existing Medicaid act, and further, under our federal system, there must be a limit on Congress’ power to use federal dollars to coerce states. The ACA, they claimed, exceeds that limit.

Chief Justice Roberts and six other justices agreed. The government does have power under the Constitution to “pay the Debts and provide for the common Defence and general Welfare of the United States . . .” (Art. 1, sec. 8, cl. 1). Congress, Roberts wrote, may use this power (the “Spending Power”) to grant funds to the states with the condition that the states take actions that Congress could not require them to take. But Congress may only go so far with financial inducements. When “pressure turns into compulsion,” he wrote, the legislation runs contrary to our system of federalism. For Roberts,



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Chief Justice John Roberts surprised many when he voted to uphold the Affordable Care Act’s individual mandate.

therefore, the Medicaid expansion provision of the ACA is constitutional, except for the financial penalty part that allows the government to withhold *all* Medicaid funding from states that choose not to expand their programs.

Saving the ACA With ‘Severability’

If one portion of a law is ruled to be unconstitutional, should the rest of the law still go into effect? The states argued that the answer is no. They claimed that if certain portions of the ACA were found to be unconstitutional, such as the individual mandate, the entire act should be struck down because those portions were not “severable.” Since the court ultimately held the mandate to be constitutional, the court did not have to decide the severability question with respect to the mandate.

But the states also argued that the whole Medicaid expansion program of the ACA should be set aside, because the invalid financial penalty enforcement portion could not be severed from the rest. Roberts and four other justices, however, held that invalidating the financial penalty did not affect the Medicaid expansion portion

of the ACA because of a “severability” clause in the original Medicaid act. The clause specifies that if any section of the Medicaid law is held invalid, “the remainder of the chapter . . . shall not be affected thereby.” Therefore the rest of the states’ Medicaid programs are not affected, and the states that choose not to participate in the expansion will not lose the federal funds for those pre-existing programs. As far as the effect on the rest of the ACA, Roberts held that the test is whether Congress would have wanted to preserve the rest of the act. He determined that the answer was yes. Without the financial penalty, some states may choose not to participate in expanding Medicaid coverage. But “we do not believe that Congress would have wanted the whole Act to fall simply because some may choose not to participate.”

Aftermath

The Affordable Care Act was a hugely important milestone for the president. It was passed by a narrow margin in Congress. And it will affect millions of Americans.

The court faced a daunting task in ruling on the ACA case. The nine justices

expressed deep differences of opinion. Four justices (Scalia, Thomas, Alito, and Kennedy) joined in a strong dissent. Justices Ginsburg and Sotomayor voted with Roberts to uphold the law, but nevertheless wrote their own quite lengthy opinion, disagreeing with aspects of his reasoning. Nevertheless, in an exercise of judicial restraint, Roberts upheld a piece of legislation initiated by the executive branch and passed by Congress. The role of the court, Justice Roberts made clear, is not to strike down a law with which a member of the court does not agree. “It is not our role,” he wrote, “to forbid it or pass upon its wisdom.” Rather, whenever possible, the court should uphold legislation passed by Congress, which is elected by the people.

Some critics worry that the ACA decision will limit Congress’ power under the commerce clause. Others view this as a positive step, seeing the decision as the first significant limit on the federal government’s spending power. Some advocates of expanding health care are concerned about what will happen to low-income adults in states that choose to opt out of the Medicaid expansion. The future effects of the decision are difficult to predict.

What is clear is that by upholding the ACA, the court has allowed the first major expansion of health care in the United States in almost 50 years to remain in effect.

FOR DISCUSSION

1. What is the Affordable Care Act? What parts of it were challenged in court?
2. What is the interstate commerce clause? Do you agree with the court decision that the mandate in the ACA could not be upheld under the commerce clause? Explain.
3. The mandate was upheld on other grounds. What were they? Do you agree with the court? Explain.
4. What is Medicaid? How did the court rule on Medicaid expansion? Do you agree with the court? Explain.
5. How did the court rule on the issue of severability? Do you agree with the court? Explain.

ACTIVITY

The Commerce Clause

In his opinion for the court, Chief Justice John Roberts concluded that the individual mandate could not be upheld under the Constitution’s commerce clause. “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.’ ”

In this activity, students will look at several cases and decide whether Congress has the power *under the commerce clause* to enact this legislation. (For the purpose of the activity, students do not consider whether other parts of the Constitution give Congress the power to enact this legislation.) Divide the class into small groups. Each group should discuss the following questions for each case:

1. Does this law regulate interstate commerce? (Think of all the possible effects that it could have on interstate commerce.)
2. Does the law require anyone to engage in commercial activity that the person otherwise would not engage in?
3. Should this law be upheld under the interstate commerce clause? Explain.

Case #1: Auto insurance. Imagine that Congress has passed a law requiring that all truckers who drive on federally funded interstate highways buy automobile insurance.

Case #2: Flu shot. Imagine that a flu pandemic has broken out and threatens the health of everyone in the U.S. Congress passes a law requiring everyone to get a flu shot.

Case #3: Marijuana grown solely for personal use. In the Controlled Substances Act (1970), Congress banned (among other things) growing marijuana even solely for personal use. (*Gonzales v. Raich*, 2005)

Case #4: 1964 Civil Rights Act. Among other things, the act banned hotels, restaurants, theaters, retail stores, and other facilities open to the public from refusing service to anyone because of the person’s race, color, religion, or national origin. (*Heart of Atlanta Motel v. U.S.*, 1964)