

7-9-2012

## Part I: National Federation of Independent Business et al. v. Sebelius: A Summary of the Recent Healthcare Decision

Nicole Tachibana

Follow this and additional works at: <https://digitalcommons.du.edu/dlrforum>

---

### Recommended Citation

Nicole Tachibana, Part I: National Federation of Independent Business et al. v. Sebelius: A Summary of the Recent Healthcare Decision, 89 Denv. L. Rev. F. (2012), available at <https://www.denverlawreview.org/dlr-online-article/2012/7/9/part-i-national-federation-of-independent-business-et-al-v-s.html>

This Article is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review Forum by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

PART I: *NATIONAL FEDERATION OF INDEPENDENT BUSINESS  
ET AL. V. SEBELIUS*: A SUMMARY OF THE RECENT  
HEALTHCARE DECISION

NICOLE TACHIBANA<sup>1</sup>

All eyes were on the Supreme Court this summer as the Court prepared to decide an important decision during a contentious election year. The case was *National Federation of Independent Business et al. v. Sebelius*, and it decided the constitutionality of the 2010 Patient Protection and Affordable Care Act (PPACA).<sup>2</sup> PPACA was challenged as unconstitutional by twenty-six states. The Court's majority opinion, delivered by Chief Justice John Roberts, focused on two key parts of the Act: the individual mandate and the Medicare expansion. Below is a summary of the majority opinion.

A. PPACA'S "INDIVIDUAL MANDATE" IS NOT CONSTITUTIONAL UNDER  
THE COMMERCE CLAUSE BUT IS CONSTITUTIONAL UNDER CONGRESS'S  
TAXING POWER.

Chief Justice John Roberts delivered the majority opinion, joined by Justices Ruth Bader Ginsberg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. Roberts started by reiterating the mission of the Court: to simply decide whether Congress has the power under the Constitution to enact the challenged provisions. He discussed the Court's limited role of policing the boundaries while not considering whether the Act has sound policies. He stated that the "Court [is] vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments."<sup>3</sup> It is the sole responsibility of the Court to enforce the limits of federal power to those defined and enumerated within the Constitution and to strike down those acts that "transgress those limits."<sup>4</sup>

First, Roberts examined whether the Court had standing to hear the case. Under the Anti-Injunction Act,<sup>5</sup> suits that try to restrain the assessment or collection of any tax are barred. To prevent disruption to the "stream of revenue," the Anti-Injunction Act requires that individuals first pay the tax and then challenge the tax for a refund. Congress, how-

---

1. J.D. 2012, University of Denver Sturm College of Law. This is the first part in a multi-part series on the healthcare decision. This part focuses on the majority opinion. The next part will focus on the concurring and dissenting opinions.

2. 26 U.S.C. § 5000A (the section at issue is the so-called "individual mandate.").

3. *Nat'l Fed'n of Indep. Bus. et al. v. Sebelius*, 567 U.S. \_\_, \*6 (2012).

4. *Id.* at \*6.

5. 26 U.S.C. § 7421(a) provides, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person."

ever, did not refer to the payments under this Act as a “tax” but as a “shared responsibility payment”<sup>6</sup> or a “penalty” for those who refused to obtain health insurance. The Government argued, and the Court agreed, that PPACA’s statutory language directing the Secretary of the Treasury to use the same tools he uses to collect taxes to collect this “penalty” was not a mandate for the courts to apply the Anti-Injunction Act. This language was to be used by the Secretary as merely a guide on how to collect the penalty. Therefore, because PPACA’s statutory language did not mandate that the penalty be treated as a tax for the purposes of the Anti-Injunction Act, the suit was not barred, and the Court had standing to decide the substantive issues presented.

The Court addressed the Government’s first argument that the individual mandate was constitutional under the Commerce Clause and then addressed the Government’s second argument that, alternatively, the individual mandate was constitutional under Congress’s Taxing Power.

*i. Avoiding the “impetuous vortex”: Congress does not have the power under the Commerce Clause to compel individuals to become engaged in interstate activity.*

The Government argued that the individual mandate was constitutional under Congress’s Commerce Clause power. Congress was faced with an expensive cost-shifting issue: hospitals under certain state and federal laws are required to provide care regardless of the patient’s ability to pay. This results in uninsured patients receiving care that they cannot pay for. This cost is passed on to the insurers in the form of higher rates. The insurers then pass the costs to the insured in the form of higher premiums. Congress estimated that care for uninsured patients “raises family health insurance premiums, on average, by over \$1,000 per year.”<sup>7</sup> Insurance companies, in addition, are reluctant to add to their burden by insuring those individuals most in need of health insurance, those with preexisting conditions. The result is individuals go uninsured and seek medical treatment that they cannot afford, which ultimately increases the burden on the system as a whole by contributing to higher rates for all.

Congress created PPACA’s individual mandate as a cure to these issues. First, Congress required that insurance companies insure those with preexisting conditions. Then Congress mandated a certain level of care in the form of minimum essential insurance coverage. This is a very expensive proposition: insure more people and provide more benefits to those people. These goals can only be accomplished by requiring healthy individuals, who do not normally seek health insurance, to pay into the system as well. This is where the individual mandate comes into play. The

---

6. 26 U.S.C. § 5000A(b)(1) refers to the penalty as the “shared responsibility payment.”

7. *Nat’l Fed’n of Indep. Bus.*, 567 U.S. \_\_\_,\*16.

individual mandate requires that individuals without insurance either get insurance or pay a penalty. This extra infusion of income, from presumably healthier people who use fewer benefits, allows the insurance companies to afford to cover more benefits for more people.

Roberts pointed out that “Congress has never attempted to rely [on the Commerce Clause] to compel individuals not engaged in commerce to purchase an unwanted product.”<sup>8</sup> Examining the Commerce Clause, he stated that the Commerce Clause empowers Congress to “regulate Commerce” under Article I, Section 8, clause 3. There is no mention of the power to create commerce. Roberts argued that the term “regulate” does not equate to the term “create.” He pointed to some of Congress’s other powers to support this distinction. For instance, Congress has the power to coin money (to create) and the power to regulate the value thereof (to regulate); both the power to create and regulate are conferred by the Constitution. Here, the individual mandate does not regulate but seeks to create; it “compels individuals to *become* active in commerce by purchasing a product.”<sup>9</sup>

Roberts refused to permit Congress to construe the Commerce Clause in this manner. Doing so would grant Congress powers that are “new and potentially vast”<sup>10</sup> and allow Congress to draw all activities into the Commerce Clause’s domain and its “impetuous vortex.”<sup>11</sup>

Because Roberts dismissed the Commerce Clause argument, the Necessary and Proper Clause argument failed as well. The Necessary and Proper Clause, granting Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution”<sup>12</sup> its enumerated powers, does not carry any substantive and independent powers of its own. It can only properly work in conjunction with a valid enumerated action by Congress. Here, Congress’s actions under the Commerce Clause were improper and could not be saved solely by the Necessary and Proper Clause.

*ii. The individual mandate lives another day: Congress has the power under the Taxing Power to tax individuals who forgo health insurance.*

Roberts next turned to the Government’s argument that the individual mandate merely imposes a tax on individuals who forgo health insurance, a valid use of the federal government’s taxing power to “lay and collect Taxes.”<sup>13</sup> Borrowing from the language of Justices Joseph Story

---

8. *Id.* at \*18.

9. *Id.* at \*20 (emphasis in original).

10. *Id.* at \*20.

11. *Id.* at \*23.

12. U.S. CONST. art. I, § 8, cl. 18.

13. U.S. CONST. art. I, § 8, cl. 1.

and Oliver Wendell Holmes, Jr., Roberts acknowledged the doctrine of constitutional avoidance. Under this doctrine, when a statute has more than one possible, reasonable meaning, courts in their role of interpreting the laws should adopt the meaning that does not violate the constitution in order to save a statute from unconstitutionally.

PPACA's plain language commands individuals to purchase insurance. Interpreting the individual mandate as a command under the Commerce Clause is invalid, according to Roberts Congress cannot compel individuals to become engaged in commerce by purchasing a product. This reading of the Act is unconstitutional. However, Roberts pointed out that the Government's second argument, that this was a tax and valid under Congress's taxing power, is a reasonable interpretation of the Act.<sup>14</sup> Under the doctrine of constitutional avoidance, this reasonable reading of the Act would save the act.

Roberts instead turned to the substance and application of the "share responsibility payment" to determine the correct interpretation. Using a three-part functional approach found in *Bailey v. Drexel Furniture*,<sup>15</sup> the Court examined whether the tax or exaction: (1) imposed an exceedingly heavy burden for a small infraction; (2) had a scienter requirement typically found in punitive statutes as a punishment; and (3) was enforced by an agency responsible for punishing violations rather than collecting revenue.<sup>16</sup> For example, in *Drexel Furniture*, the company employed children. Congress passed a statute that provided a 10% "tax" on the company's net income for hiring even one child (an exceedingly heavy burden); this tax only applied to those who knowingly employed children (scienter); and the tax was collected by the Department of Labor (not a revenue collecting agency).<sup>17</sup> The Court found that this was not a tax and was not authorized under Congress's taxing power.

---

14. While a label of a "tax" in the statutory language would require the Anti-Injunction Act to come into play, the Court was not constrained by that label. The Court has previously sustained "surcharges" as a tax despite the statutory designation. *New York v. United States*, 505 U.S. 144, 171 (1992) ("[T]he Secretary's collection of a percentage of the surcharge, is no more than a federal tax on interstate commerce, which petitioners do not claim to be an invalid exercise of either Congress' commerce or taxing power."). The Court has also sustained "licensee fees" as a tax under the *License Tax Cases*, 72 U.S. (1 Wall.) 462, 471 (1866) ("The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law, if he pays it.").

15. *Bailey v. Drexel Furniture*, 259 U.S. 20, 38 (1922) ("The difference between a tax and a penalty is sometimes difficult to define, and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another." *Id.*).

16. *Id.*

17. *Id.*

Turning to the individual mandate, the amount due under PPACA's penalty is not an exceedingly heavy burden as the penalty will be less than the price of insurance as set by statute. Second, the penalty does not contain scienter requirement. Finally, the payment is collected by the Internal Revenue Service (IRS), but the IRS is statutorily prohibited from imposing any form of criminal sanctions for failing to pay this penalty. Under this three-part functional approach, according to Roberts, this "penalty" can reasonably and properly be called a tax.<sup>18</sup>

Roberts turned again to the reason he rejected the Government's Commerce Clause argument: inactivity. He stated, "If it is troubling to interpret the Commerce Clause as authorizing Congress to regulate those who abstain from commerce, perhaps it should be similarly troubling to permit Congress to impose a tax for not doing something."<sup>19</sup>

He answered this concern in three parts. First, the Constitution does not provide any guarantees that the federal government cannot tax inactivity, while the Commerce Clause protects individuals from regulation if the individuals choose not to engage in the regulated activity. Second, the Courts have placed limits on Congress's taxing power. As discussed above, Congress's use of the taxing power as a punitive measure exceeds Congress's authority under the taxing power. That is not the case here. Third, the taxing power and power to regulate commerce have different limits. When Congress regulates commerce under the Commerce Clause, it can "bring its full weight to bear."<sup>20</sup> This means Congress has to full power to regulate that behavior, including all criminal sanctions. Here, Congress limited the power exercised under PPACA to merely paying the penalty. Congress expressly limited the Secretary of Treasury's power to collect the penalty, not authorizing any criminal sanctions or fines for nonpayment.

Roberts concluded by simply stating, "[PPACA's] requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness."<sup>21</sup>

B. "A GUN TO THE HEAD": MEDICARE EXPANSION CONDITIONS CROSS THE LINE FROM PERSUASION TO COERCION.

Roberts next addressed the concern over the Government's use of the Spending Clause to coerce the States into expanding their Medicaid coverage. Generally, Congress has the power under the Spending Clause

---

18. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. \_\_, \*36.

19. *Id.* at \*41.

20. *Id.* at \*43.

21. *Id.* at \*44.

“to pay the Debts and provide for the . . . general Welfare of the United States.”<sup>22</sup>

The Court has previously limited this power to respect the independent sovereignty of the states under the federal system. Therefore, it is well-settled that Congress is prohibited from “commandeering” a State government for its own federal purposes. Borrowing from contract law, the Court has held that commandeering can take the form of undue influence.<sup>23</sup> The State has the sovereign right to enter into a contract with the federal government to accept funds for the general welfare, and the federal government can place conditions on those funds. However, the State has the right to enter into the contract “voluntarily and knowingly.”<sup>24</sup> Additionally, the federal government can use incentives to achieve federal goals, but, as Roberts pointed out, “when pressure turns into compulsion, the legislation runs contrary to our system of federalism.”<sup>25</sup>

Turning to the Medicaid expansion, Roberts asked whether the financial inducement offered by Congress was so coercive as to cross the line from pressure or incentives into compulsion. Under PPACA, the section at issue was Section 1396c,<sup>26</sup> which provided that if a state’s Medicaid plan does not comply with the new PPACA requirements, the Secretary of Health and Human Services may cease to provide any further payments to the noncomplying state. The States are required to go from covering certain individuals—pregnant women, children, needy families, elderly, and the disabled—to providing “essential health benefits” packages to all individuals under 65-years-old who fall below 133 percent of the federal poverty line.<sup>27</sup>

PPACA provides that the funding for new recipients will initially be paid the federal government, decreasing to a minimum funding level of 90 percent.<sup>28</sup> The issue is that noncomplying states will not only lose this additional funding for noncompliance but will also lose all existing Medicaid funding for noncompliance. Roberts said that “the financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement’—it is a gun to the head.”<sup>29</sup> This “economic dragooning”

22. U.S. CONST. art. I, § 8, cl. 1.

23. *Nat’l Fed’n of Indep. Bus.*, 567 U.S. \_\_\_,\*47 (citing *Printz v. U.S.*, 521 U.S. 898, 933 (1997)).

24. *Id.*

25. *Id.* When the federal government requires the State to implement programs that achieve a federal program, it creates an accountability issue. Namely, the State officials will bear the brunt of public disapproval while federal officials “remain insulated from the electoral ramifications of their decision.” *Id.* at \*48.

26. 42 U.S.C. § 1396c.

27. *Nat’l Fed’n of Indep. Bus.*, 567 U.S. \_\_\_,\*45-46.

28. *Id.* at \*46.

29. *Id.* at \*51. Medicaid funding is an estimated 20 percent of the average State budget with the federal government covering 50 to 83 percent of these costs depending on the state. *Id.*

leaves the States with no real options and is the epitome of coercion by the federal government.

The Government also argued that the States agreed to any amendments to Medicaid when they originally accepted the Medicaid program. The original Medicaid provisions, after all, granted the Government the right to “alter, amend, or repeal” any provision.<sup>30</sup> Roberts acknowledged this power but stated that the statute contemplates a right to make adjustments as the program grew. However, Roberts pointed out, this alteration changes the program from one that provides for specifically needy groups to one that will provide for the “entire nonelderly population with income below 133 percent of the poverty level,”<sup>31</sup> creating a universal health insurance coverage under the existing Medicaid structure.

Robert struck down the provision allowing the Secretary to withdraw existing Medicaid funds for any noncomplying state. The States are, therefore, free to reject the Medicaid expansion requirements without fear of losing the entirety of the State Medicaid funding.

Roberts, striving to stay within the Constitutional limits of the Court’s power, turned to Congress’s intent on whether striking the offending provision required the Court to invalidate the entire Act. He stated that holding does not affect the continued application of the existing provisions and that merely limiting the financial pressure from the Medicaid expansion section brings PPACA into Constitutional compliance.

In sum, the majority of the Court was persuaded by the Government’s argument that the individual mandate was a valid use of Congresses Commerce Clause power. Roberts stated that this argument fails because Congress has the power to regulate commerce, not to create commerce. However, the individual mandate was saved by the Government’s second argument; the individual mandate can reasonably be interpreted as a tax. Next, Roberts struck down the conditions Congress placed in the Medicaid expansion funds, saying Congress unconstitutionally crossed the line. Instead of creating incentives to comply with the program, Congress’s coercive “all or nothing” proposition left the States with no real options. The Medicaid expansion conditions were severable from the rest of PPACA, leaving PPACA essentially intact.<sup>32</sup>

---

30. 42 U.S.C. § 1304.

31. *Id.* at \*53.

32. Part II of this article will address the concurring and the dissenting opinions.