ABSTRACT

NFIB v. Sebelius:
An Analysis of the Individual Mandate in the Affordable Care Act

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In June 2012 the Supreme Court ruled on the constitutionality of the Patient Protection and Affordable Care Act (ACA). This landmark case has set a new precedent that will have long-lasting effects on the relationship between the populace, Congress, and the Judicial Branch. In order to understand the details and implications of the decision, it is necessary first to review the case law, scholarly debate, and the arguments submitted to the Court. Only then is it possible to grasp Chief Justice Roberts' reasoning in the Majority Opinion. This thesis presents the necessary background information and attempts to clarify some of the complexities of the case so that readers may make their own informed judgments about the wisdom of the decision.

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NFIB V. SEBELIUS: AN ANALYSIS OF

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CHAPTER ONE

Introduction

President Obama signed the Patient Protection and Affordable Care Act (hereafter, ACA) into law on March 23, 2010. Soon after the passage of the bill, public and private institutions filed suit to challenge the constitutionality of the Act. In official nomenclature, the ACA case is referred to as the *National Federation of Independent Business (NFIB) v. Sebelius* (2010).[1] Several suits were brought against the ACA and were combined in *Sebelius* so that the Supreme Court could address the constitutionality of the whole act in one case.[2]

The ACA has many different aspects that in combination presumably lower the cost of healthcare premiums. The Act can be divided into two main sections: the individual mandate, or "minimum coverage provision" and the expansion of Medicaid. Though both parts were addressed in the Supreme Court case, the specifics of the Medicaid expansion will not be discussed in this analysis, as those were not central to the individual mandate debate.

In this Act, Congress attempted to regulate health insurance companies by passing two specific orders: community-rating and guaranteed-issue. Community-rating prescribes that insurance companies use a specific "method of setting premiums so that

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[1] National Federation of Independent Business v. Sebelius. 567 U.S. 11-363 (Supreme Court, June 28, 2012).

[2] The other case combined with *Sebelius* was *Department of Health and Human Services v. Florida* (2011).

risk is spread evenly across the community, with all individuals paying the same rate regardless of their health status and other factors such as age, gender, and lifestyle characteristics."[3] This guarantees that the overall price of premiums will be lowered. The second order "requires insurance companies to provide coverage to every individual market applicant, regardless of health status."[4] This guarantee-issue policy ensures that "all Americans have access to health insurance."[5] Prior to the ACA, health insurance companies were able to refuse coverage to individuals with pre-existing conditions; in addition, insurance companies were able to charge expensive premiums for high-risk individuals. This resulted in a large population of individuals who wanted health insurance but were not able to get reasonable coverage.

One of the questions surrounding the debate is whether or not the minimum coverage provision could be separated from the Act. If the provision can be severed, then the Court could rule on the constitutionality of the provision without touching the rest of the Act. This would allow Congress's ACA to be upheld independent of the Court's ruling on the minimum coverage provision. This discussion is referred to as the 'severability of the provision.'

Congress regulates health insurance companies by including the community-rating and guaranteed-issue in the ACA, but Congress argues that these two statutes

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[3] Foundation, Kaiser Family. "Health Insurance Market Reforms: Rate Restrictions." *The Henry J. Kaiser Family Foundation.* June 2012. http://www.kff.org/healthreform/upload/8328.pdf (accessed March 22, 2013).

[4] "In the Spotlight: ACA Insurance Reforms." *Blue Cross and Blue Shield of North Carolina.* July 13, 2011. https://www.bcbsnc.com/assets/hcr/pdfs/spotlight_insurance_reforms.pdf (accessed March 22, 2013).

[5] *Ibid.*

cannot stand alone. Together these policies would result in a large influx of high-risk individuals who would consume a large amount of health care services without paying large premiums. No longer would there be cost-shifting and risk-shifting—two events that will be addressed and explained later in this analysis—but without the individual mandate, health insurance companies would lose money covering the high-risk individuals at low premiums. This is why the minimum coverage mandate is a necessary counterpart to the community-rating and guaranteed-issue policies. By mandating that all individuals purchase health insurance, insurance companies are able to afford coverage of high-risk individuals at lower premiums, due to the influx of policyholders.

The community-rating and guaranteed-issue policies are the main regulatory directives of Congress on the insurance companies. Congress framed the minimum coverage mandate as an exercise of Congress's commerce power to regulate an individual's participation in the health insurance market. This is why the respondents filed suit against in the ACA: whether or not Congress has the constitutional authority to prescribe that its citizens purchase health insurance.

Recognizing the extreme importance of the case, the Supreme Court set aside six hours for arguments, which were heard over the course of three days. The first day addressed the possible application of the Anti-Injunction Act. Some lawmakers claimed that the Court could not address the health insurance case due to the fact that the penalty and policies had not yet gone into effect. So it was necessary for the Court first to resolve whether it rightfully possessed the authority to decide the matter. The second day was given to the individual mandate debate, and the final day was spent arguing the merits and possible application of the taxing power interpretation of the mandate. The central focus of this analysis is the individual mandate, but when sections of the Tax Law and the Anti-Injunction Act become relevant, they will be addressed and discussed as well.

The following two chapters of this analysis focus on staging the backdrop to the insurance statute debate. The second chapter presents the history of Supreme Court decisions concerning the Commerce Clause, identifying the essential precedents that relate to the current debate. The third chapter sets out the scholars' understandings of the Commerce Clause law prior to the argument of the case. Here I also introduce the basics of Tax Law and how it applies to the insurance statute debate.

Having described the underlying issues and character of the debate, the fourth chapter introduces arguments from the written briefs and oral arguments that were submitted to the Supreme Court. The Opinion of the Court, written by Chief Justice Roberts, is presented in the fifth chapter. The sixth chapter emphasizes the impact of the Court's opinion upon individuals, the understanding of the role of Congress, and the effects on the relationship between the government and its citizens. The final chapter summarizes and reviews the arguments presented in this thesis.

The goal of this analysis is to explore the arguments for and against the ACA in a fair and unbiased manner so that readers may become more aware of the nuances and implications of such rulings. Though my individual opinion will eventually be expressed, it is not given without extensive research and careful analysis so as to present a holistic opinion that is rooted in substantial logic not flimsy impressions.

CHAPTER TWO

History of the Commerce Clause

2.1 Pre-New Deal Doctrine

After the failure of the Articles of Confederation, the Framers of the Constitution understood that the central government needed to have more influence on interstate relations. During the Confederation, the states functioned so independently that each had its own currency and trade regulations. Though states were individually able to improve their economies, the federal government was unable to stop the national economy from suffering. To prevent history from repeating itself, the Framers gave the central government the ability to regulate interstate commerce by writing the Commerce Clause into the Constitution.

The Commerce Clause allowed the federal government to manage interstate commerce so that the national economy was stabilized, while still giving individual states policing power over their intrastate economy. Congress could invoke this broad economic regulatory power as long as it could "show that the regulated activity burdens, obstructs, or affects interstate commerce, however indirectly."[6] In addition to the power over interstate economic relations, the Framers gave Congress the authority to dictate economic relations with foreign nations.[7] For the entire nation to function as a singular

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[6] Epstein, Richard A. "The Proper Scope of the Commerce Power." *Virginia Law Review* (Virginia Law Review) 73, no. 8 (Nov 1987): 1387-1455. 1387.

[7] Epstein, Lee., and Thomas G. Walker. *Constitutional Law for a Changing America: Institutional Powers and Constraints.* Seventh Edition . Washington, DC: CQ PRess, 2007.

unit on the world stage, it would be necessary for the federal government to have sole authority over the matter. Thus the Commerce Clause not only gives Congress the power to regulate interstate economy but also to determine how the nation functions in international trade.

Anticipating that different and sometimes conflicting interpretations of the Constitution would arise, the Supreme Court stepped up as the interpretative authority of the Constitution. The Court reviews Congress's laws to determine their constitutionality and to dictate how the Constitution should be interpreted. Over the years, the Court's interpretation of the Commerce Clause has changed. It was not until almost forty years after the Constitution was ratified that the Commerce Clause was challenged.

In the case of *Gibbons v. Ogden* (1824), two owners of a steamboat, Livingston and Fulton, negotiated an exclusive and long-term contract with the New York State government declaring that Livingston and Fulton had the right to operate and license all steam-powered vessels in New York waters. Ogden, a steam-ferry operator, acquired a license from Livingston to operate within New York waters. Gibbons, who also operated a steam-ferry, did not have a license from Livingston and Fulton, but instead held a federal coasting license. Ogden brought suit against Gibbons in a New York Court claiming that Gibbons did not have a right to operate in New York waters with just a federal license. Gibbons challenged Ogden's claim that state-licensed monopoly overruled his federal license and the case eventually made it to the Supreme Court.[8]

This was the first time the Court would comment on the Commerce Clause and interpret the broad national power granted in the Constitution. Chief Justice Marshall

[8] Inc., Pearson Education. *History and Government - Supreme Court: Gibbons v. Ogden (1824).* 2005. http://www.infoplease.com/us/supreme-court/cases/ar12.html.

delivered the opinion and acknowledged that the commerce power was broad enough to include all interstate economic activity. "The genius and character of the whole government seem to be," he wrote, "that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states."[9] But Marshall also stressed that "completely internal commerce of a state," should be reserved for the state to govern. The power granted to the central government is the "power to regulate; that is to prescribe the rule by which commerce is to be governed….this power is complete in itself [and] may be exercised to its utmost extent, and acknowledges no limitation, other than [those which] are prescribed in the constitution."[10]

In this first interpretation of the Commerce Clause, Marshall's Court gave Congress broad powers believed necessary for the proper regulation of commerce. However, as noted by authors Rossum and Tarr, "it is likely that Marshall did not believe that Congress could use its commerce power to pursue exclusively noncommercial ends."[11] The second significant addition to Commerce Clause law from this case was Marshall's definition of commerce. Marshall defined Commerce as more than just the trafficking of goods; it is defined as "intercourse," which includes the shipping and navigation along with the contracts regulating buying and selling of goods.[12] Randy

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[9] *Gibbons v. Ogden.* 22 U.S. 1 (Supreme Court, March 2, 1824).

[10] *Ibid.*

[11] Rossum, Ralph A., and G. Alan Tarr. *American Constitutional Law: The Structure of Government.* Eighth Edition. Vol. 1. Boulder, CO: Westview Press, 2010. 377.

[12] *Gibbons v. Ogden.* 22 U.S. 1 (Supreme Court, March 2, 1824).

Barnett points out that though Marshall used the broadening term of ‘intercourse’ in the original definition, “commerce [was] still confined to the communication of something—whether goods, people, or messages—from one state to another” and was considered a “subset of economic activity that is distinct from the economic activities of manufacturing or agriculture.”[13]

It is important to note that Marshall’s definition requires that interstate commerce include the actual transfer of physical goods. Insurance, by contrast, has a different character; it is a contract of “indemnity against loss…entered into between the corporation~~s~~ and the assured, for a consideration paid by the latter” or as Barnett observes, insurance contracts are “mere contracts to pay money upon the occurrence of specified conditions.”[14] The Court dealt with the question of whether insurance was to be considered a commodity of commerce in *Paul v. Virginia* (1869). The Justices found that “issuing a policy of insurance [was] not a transaction of commerce” but was instead a “simple contract” because contracts “are not commodities to be shipped or forwarded from one State to another, and then put up for sale.”[15] Even if the two parties to the contract resided in different States “such contracts [were] not interstate transactions” and therefore were not subject to the regulation of Congress.[16]

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[13] Barnett, Randy E. "Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional." *New York University Journal of Law and Liberty* Vol. 5, no. 581 (September 2010): 581-637.

[14] *Paul v. Virginia* . 75 U.S. 168 (Supreme Court, November 1, 1869).; Barnett, Randy E. "Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional." *New York University Journal of Law and Liberty* Vol. 5, no. 581 (September 2010): 581-637.

[15] *Paul v. Virginia* . 75 U.S. 168 (Supreme Court, November 1, 1869).

[16] *Ibid.*

Despite its expansive definition in *Gibbons v. Ogden* (1824), the Court of the late nineteenth century and early twentieth century interpreted the Commerce Clause under the "doctrine of dual federalism."[17] This doctrine points out that the Framers purposefully separated the national and state governments, thus accomplishing two separate things. First, they reserved specific powers, including police powers, for the states. Second, they created a firm line between federal and state domains ensuring that neither would be allowed to interfere with each other's realm of power. The Court sought to reemphasize this separation of powers when presented with cases in which the national government had begun to commandeer state powers. Their goal was to rein in federal regulation and restrict the Commerce Clause powers.

With the industrialization of America, the Court faced variety of Commerce Clause cases. One such case was *United States v. E. C. Knight Company* (1895), in which the American Sugar Refining Company had purchased stock in four different Philadelphia sugar refineries and in effect controlled more than 98 percent of the nation's sugar-refining business.[18] The government claimed that this was a violation of the Sherman Anti-Trust Act (1890), which made monopolies illegal. In an eight to one decision, the Court held that "[t]he power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress [a] monopoly."[19] Seizing this opportunity, the Court curbed the central government's power still further by stating that "the fact that an article is manufactured

[17] Rossum, Ralph A., and G. Alan Tarr. *American Constitutional Law: The Structure of Government.* Eighth Edition. Vol. 1. Boulder, CO: Westview Press, 2010. 378.

[18] *Ibid.,* p. 393.

[19] *United States v. E. C. Knight Co.* 156 U.S. 1 (Supreme Court, January 21, 1895).

for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce."[20] The distinction between commerce and production removed major parts of the economy—such as manufacturing—from the federal government's control. The federal Commerce Clause power was no longer so broad and far-reaching as to include all commercial activities such as economic intrastate activities.

Subsequent decisions continued to limit the central government's control over commerce. In *Hammer v. Dagenhart* (1918) the Court reaffirmed its *United States v. E. C. Knight Company* ruling that "the mere fact that [articles were] intended for interstate commerce transportation does not make their production subject to federal control under the commerce power."[21] *Hammer v. Dagenhart* challenged the Federal Child Labor Act (FCLA) of 1916, which restricted the shipment of products produced from child labor. The Court recognized the federal government's purpose for passing the FCLA was to coerce States into using their police powers to abolish child labor. But the Court did not believe that the central government had the power "to require the States to exercise their polic[ing] power."[22] *Hammer v. Dagenhart* involved products that were manufactured in factories that used child labor, products that were indistinguishable in and of themselves from products made at other factories. Consistent with *United States v. E. C. Knight*, the Court recognized that Congress was unconstitutionally using commerce power to reach

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[20] *Ibid*.

[21] *Hammer v. Dagenhart.* 247 U.S. 251 (Supreme Court, June 3, 1918).

[22] *Ibid.*

the manufacturing realm of economic activity and struck down FCLA. The Court went further to say that the FCLA not only "transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend."[23] Anticipating the long-term effects of upholding such Acts, the Court concluded by observing that "if Congress can thus regulate matters entrusted to local authorities by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed."[24]

Theses cases show the Court's increased concern that the federal government was acquiring powers that exceeded those set out in the Constitution. The Court's efforts to limit federal control and reinstate dual federalism resulted in the restriction of the Commerce Clause. This narrow interpretation gave states the freedom to dictate their commercial activity without federal interference. For a decade, Wall Street continued to strengthen and the national and state economies flourished. But it soon came to a dramatic end. On Black Thursday in 1929 the national economy crashed and there was little the federal government could do to stop it. This pushed the United States into a depression that lasted for over ten years. In an effort to stabilize the economy and help its citizens, the federal government began to pass bills that extended its Commerce Clause powers in an effort to pull the country out of the Great Depression.

However, the Court would not allow it, believing that the Constitution simply did not grant the government such power. It proceeded to strike down three major Acts of

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[23] *Ibid.*

[24] *Ibid.*

Congress from 1935 to 1936. One of these was the National Industrial Recovery Act (NIRA), which came before the Supreme Court in the *Schechter Poultry Corp. v. United States* (1935). In an attempt to regulate the work force's weekly work hours, minimum wages and minimum age, Congress granted legislative powers to the President so that he could determine appropriate "codes of fair competition."[25] It was unprecedented for Congress to attempt to transfer its powers to another branch of government. In the opinion of the Court, Chief Justice Hughes stated, "Congress [was] not permitted to abdicate or to transfer to others the essential legislative functions with which it [was] thus vested."[26]

In addition to the 'transfer of legislative powers' aspect, there was another element of the NIRA that was under fire; namely, the claim of the Government that the meat commodity in the slaughterhouses of the Schechter Poultry Corporation fell within the realm of *interstate*—instead of intrastate—commerce. The Court focused on two questions in addressing the government's claims: first, whether Schechter Poultry's meat was an article of interstate commerce and second, whether the transaction of the meat commodity "affected" interstate commerce.

Addressing the first question, the Court noted that the meat in the slaughterhouse arrived in New York from other states, but that it came to 'rest' within the state and did not continue in the 'flow' of interstate commerce.[27] Because the commodity came to

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[25] *A. L. A. Schechter Poultry Corp. v. United States: Opinion of the Court.* 295 U.S. 495 (Supreme Court, May 27, 1935).

[26] *Ibid.*

[27] *Ibid.*

‘rest’, the Court ruled that Schechter Poultry’s meat was part of intrastate commerce and, therefore, outside the control of the interstate commerce regulation powers of Congress.[28]

In response to the second question, the Court considered the effect the transaction of meat would have upon interstate commerce. Chief Justice Hughes noted that “[t]he precise line can be drawn only as individual cases arise,” and he stressed that making a clear distinction between interstate and intrastate commerce was essential.[29] Otherwise, “there would be virtually no limit to the federal power.”[30] The result of *Schechter Poultry Corp. v. United States* (1935) was that the Court continued to restrict the power of the federal government in an attempt to adhere to a narrow interpretation of the Commerce Clause.

After the failure of the NIRA, Congress made another attempt to help the country get out of the depression with the passage of the Bituminous Coal Conservation Act (BCCA) of 1935. The BCCA claimed that the mining and distribution of the coal industry has a direct effect upon the general welfare and, therefore, is within the reach of the federal government because it should be regulated.[31] The manner of regulation was through the creation of an “excise tax” of 15% on coal purchases.[32] The Court reviewed the nature of the excise tax imposed by the BCCA and determined that the tax was not

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[28] *Ibid.*

[29] *Ibid.*

[30] *Ibid.*

[31] *Carter v. Carter Coal Co.* 298 U.S. 238 (Supreme Court, May 18, 1936).

[32] *Ibid.*

functioning as a tax, but was a "penalty to coerce submission."[33] The true purpose of the tax was not to tax, but to penalize; therefore, the Court held that the Act could "not be upheld as an expression of the taxing power."[34] The Court did attempt to uphold the Act upon the grounds of promoting General Welfare, but the Court found that "the Constitution grants to Congress no general power to regulate for the promotion of the general welfare."[35] This left the President Roosevelt and Congress with little power to help bring the Country out of the Great Depression.

2.2 New Deal Doctrine

Upon his first re-election in 1936, President Franklin D. Roosevelt decided to take matters into his own hands with the creation of a 'court-packing plan'. Roosevelt pushed to expand the number of Justices on the Supreme Court by bringing his Judicial Procedures Reform Bill (1937) before Congress.[36] By expanding the number of Justices on the bench, Roosevelt could nominate potential justices who supported broader interpretations of the Commerce Clause and would be sympathetic to his efforts. If Roosevelt succeeded in his court-packing plan, it would be easier for him to get his New Deal programs passed without a judicial roadblock. Roosevelt knew that he needed the approval of the Supreme Court to ensure his New Deal would be a success, but the current Court had repeatedly blocked Roosevelt's efforts. The Court and the President

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[33] *Ibid.*

[34] *Ibid*.

[35] *Ibid.*

[36] Sanburn, Josh. "FDR vs. The Supreme Court, 1937." *TIME.* July 27, 2011. http://www.time.com/time/specials/packages/article/0,28804,2085383_2085381_2085399,00.html.

were at an impasse. Either the Court could begin to allow Roosevelt's new programs to pass or wait for Roosevelt to force its hand with sympathetic new court members.

The Court had the opportunity to answer Roosevelt's demand when his National Labor Relations Act (NLRA) came across their docket in the case of *National Labor Relations Board v. Jones and Laughlin Steel Corporation* (1937). The Justices ruled to uphold the NLRA, signaling the beginning of a broader interpretation of the Commerce Clause. Rejecting the firm limit the Justices had been working to maintain on the federal government, the Court ruled that "[a]lthough activities may be intrastate in character when separately considered if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."[37] This broader view of the Commerce Clause was further solidified when two Justices retired and Roosevelt was allowed to appoint his own replacements. This marks the change in interpretation of the limits of Congress's authority. From this point on, the Court's subsequent cases continued to increase Congress's regulatory authority under the Commerce Clause at an almost exponential rate.

It did not take long for more landmark Commerce Clause cases to come across the Court's docket. The first two were *United States v. Darby Lumber* (1941) and *Wickard v. Filburn* (1942). Darby was a lumber company located in Georgia that challenged the Fair Labor Standards Act (FLSA) of 1938 on the grounds that Congress exceeded its Commerce Clause powers by interfering with local production and manufacturing matters that were solely within state's policing powers. But the Court disagreed. As identified by

[37] *National Labor Relations Board v. Jones and Laughlin Steel Corporation.* 301 U.S. 1 (Supreme Court, April 12, 1937).

Justice Stone, "the Fair Labor Standards Act set up a comprehensive legislative scheme for preventing" and thereby regulating "the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions…which fail[ed] to conform to standards set up by the Act."[38] The Court continued its broader interpretation of the commerce clause by ruling that Congress was within its Constitutional authority to relate the interstate transport of commodities.[39] In Justice Stone's opinion, the Court recognized that "while manufacture is not, of itself, interstate commerce, the shipment of manufactured goods interstate is such commerce, and the prohibition of such shipment by Congress is indubitably a regulation of the commerce."[40] *United States v. Darby* (1941) verified that *National Labor Relations Board v. Jones and Laughlin Steel Corporation* (1937) was not a one-time departure from historical precedent and that the new Court was going to continue to interpret the Commerce Clause in a broader sense than previous courts.

The next case to come across the Court's docket was *Wickard v. Filburn* (1942). In this case, the Court took a gigantic leap towards limitless Congressional regulation of commerce. Filburn was an individual farmer who was growing wheat under The Agricultural Adjustment Act (AAA) of 1938, which limited the amount of wheat an individual farmer could produce to sell. The Act sought to stabilize the price of wheat by ensuring that the volume of wheat was never too high or too low, factors that would cause dramatic shifts in wheat pricing. Filburn grew a surplus of wheat on his farm in

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[38] *United States v. Darby.* 312 U.S. 100 (Supreme Court, February 3, 1941).

[39] *Ibid.*

[40] *Ibid.*

order to keep the excess for his own consumption and only sell the amount that was dictated by the AAA. When penalized for growing excess wheat, Filburn refused to pay the fine, stating that the production of excess wheat for his own consumption was outside the reach of Congress's authority. The case eventually made it to the Supreme Court and the Court was given another opportunity to review Congress's regulatory power.

After hearing the case, the Court ruled that "even if the appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."[41] The Court grants Congress the power to regulate factors that indirectly affect commerce and lays the foundation for the establishment of such doctrines as the Substantial Effects Doctrine. Although Filburn's excess wheat production was small, the fact that his "contribution to the demand for wheat may be trivial by itself" was not enough to remove it "from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."[42] The ruling acknowledges that Filburn's output does not have a large effect on interstate commerce; yet the Justices argue that if there were a multitude of similarly trivial effects on commerce the result would be substantial. Therefore, the Court ruled to increase Congress's commerce power yet again, effectively allowing Congress "regulate whatever it please[ed]."[43]

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[41] *Wickard v. Filburn.* 317 U.S. 111 (Supreme Court, November 9, 1942).

[42] *Ibid.*

[43] Epstein, Richard A. "The Proper Scope of the Commerce Power." *Virginia Law Review* (Virginia Law Review) 73, no. 8 (Nov 1987): 1387-1455. 1396.

A few years later, the Court re-examined the precedent set forth in *Paul v. Virginia* (1869) concerning the authority of Congress to regulate insurance through the Commerce Clause. *Paul v. Virginia* ruled that insurance fell outside of the regulatory powers given to Congress through the Constitution because insurance contracts did not qualify as 'commerce'. But in *United States v. South-Eastern Underwriters* (1944), the new Court had the ability to readdress the relationship of insurance and the Commerce Clause.[44] In that opinion, Justice Black pointed out during the time period Constitution was written in the word 'commerce' was defined as the "businesses in which persons bought and sold, bargained and contracted."[45] Black reasoned that because the country's economy had developed since the 1869 case, so too had the insurance market. Insurance had "become one of the largest and most important branches of commerce" and was such an essential market that it "directly affect[ed] . . . many persons in all walks of life."[46] Looking to precedent, Black acknowledged that Congress "[could] regulate traffic though it consist[ed] of intangibles."[47] Seeking to invoke the Court's past precedents, Black stated that, "no commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception [with] the business of insurance."[48] With such a decisive statement, the Court overturned *Paul v. Virginia* (1869) and

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[44] *United States v. South-Eastern Underwriters.* 322 U.S. 533 (Supreme Court, June 5, 1944).

[45] *Ibid*.

[46] *Ibid.*

[47] *Ibid*.

[48] *Ibid.*

established a new precedent that left Congress free to regulate insurance as an extension of the Commerce Clause.

The Court continued to expand the power of the Commerce Clause in two more cases argued together during the fall term of 1964 in which the Court determined that Congress was within its authority under the Commerce Clause as a means of ensuring that private businesses follow the Civil Rights Act of 1964. In *Heart of Atlanta Motel v. United States* (1964), the owner of a private motel was restricting the motel's clientele to white persons. The majority of those using the motel's services were "transient interstate travelers."[49] The Court held that the interstate movement of persons falls under the definition of "commerce," and since "the protection of interstate commerce is within the regulatory power of Congress under the Commerce Clause," Congress was within its rights to use the Commerce Clause as a means of enforcing the Civil Rights Act.[50]

The second case to use the Commerce Clause to enforce the Civil Rights Act of 1964 was *Katzenbach v. McClung* (1964). McClung was a private owner of a restaurant that served sit-down meals for white persons, while only providing take-out for African-American persons. McClung's restaurant purchased almost half of its food from a local, out-of-state supplier. The Court held that the power of the Congress to regulate interstate commerce "extends to activities of retail establishments, including restaurants, which directly or indirectly burden or obstruct interstate commerce."[51] After discussing the reasoning and process behind the decision, the Court concluded that the government had

[49] *Heart of Atlanta Motel, Inc. v. United States.* 379 U.S 241 (Supreme Court, December 14, 1964).

[50] *Katzenbach v. McClung.* 379 U.S. 294 (Supreme Court, December 14, 1964).

[51] *Ibid.*

a "rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce." [52] Therefore, Congress was not overstepping its authority by implementing the Civil Rights Act of 1964 through its the Commerce Clause power.

During the latter half of the twentieth century the Court's expansive interpretation remained constant and appeared as if it were only going to expand more. But that was until *United States v. Lopez* (1995) came across the Court's docket in the fall of 1995. Congress had passed the Gun-Free School Zones Act (GFSZA) of 1990, which made possession of a firearm within a school zone a federal offense. Lopez, a high school student, was delivering an unloaded .38 caliber firearm to another individual on the school campus when he was confronted and then indicted for to breaking the law under the GFSZA. Lopez was charged with possession of a firearm within a school zone, but Lopez motioned to dismiss the indictment because, he argued, the Gun-Free School Zone Act exceeded Congress's Commerce Clause power. In a divergence from recent interpretations, the Court agreed with Lopez. In the opinion Justice Rehnquist argued "to uphold the Government's contentions here, we would have to…convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[53] Unwilling to do so, the Court ruled in favor of Lopez and for the first time since pre-New Deal era, limits were placed on Congress's Commerce power.

The Court confirmed its *Lopez* decision in *United States v. Morrison (2000)*. Congress had argued that "through the Commerce Clause, Congress [could] regulate

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[52] *Ibid.*

[53] *United States v. Lopez.* 514 U.S. 549 (Supreme Court, April 26, 1995).

gender-motivated violence, it [could] also regulate all ordinary criminal activity and all areas of family law."[54] But the Court disagreed and restated its reasoning from *Lopez*: "Congress…may not regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce."[55] Through both *Lopez* and *Morrison*, the Court appeared to demonstrate a newfound readiness to reevaluate and restrict the amount power Congress had acquired over approximately sixty years.

But this supposed 'readiness' was short-lived. In 2005 the Court heard *Gonzales v. Raich* and again showed that it was willing to expand its interpretation of the Commerce Clause. Raich and Monson were growing marijuana on their respective properties for medical purposes in compliance with the laws set out in the Californian Compassionate Use Act (CCUA) of 1996. During a home visit of Monson's property, conducted by county deputy sheriffs and agents from the federal Drug Enforcement Administration, the deputy sheriffs determined that Monson's marijuana plants were in compliance with California law. Nevertheless, the federal officials seized and destroyed all of her plants through the authority of the Controlled Substances Act (CSA) of 1970. The CSA prohibited the possession, production, or purchase of marijuana and other such substances. Congress believed that "leaving home-consumed marijuana outside federal control would similarly affect [the] price and market conditions" of marijuana just as Filburn's home-consumed wheat production would affect the price of wheat.[56] The Court recognized the parallels between *Raich* and *Wickard v. Filburn* (1942) and used

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[54] *United States v. Morrison.* 529 U.S. 598 (Supreme Court, May 15, 2000).

[55] *Ibid.*

[56] *Gonzales v. Raich.* 545 U.S. 1 (Supreme Court, June 6, 2005).

precedent set out in *Wickard* as a basis for their ruling. Justice Stevens' opinion states, "as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority."[57] The difference between *Raich*-type ruling and *Lopez* or *Morrison*-type ruling is that the market Congress is seeking to regulate is an illegal market. But despite the illegality of the marijuana market, there is still a real and functional marijuana market. Therefore the Court found that a decision that kept in tune with the precedent set forth in *Wickard* was appropriate.

2.3 Conclusion

This chapter has presented the majority of the Commerce Clause cases that have collectively influenced the modern understanding of the Congress's authority to regulate commerce. The dramatic shift of interpretation in the New Deal era has critically altered the early Court's understanding of the relationship between the state and the federal government. Prior to New Deal doctrine, the central government was one of very distinct limited powers. This allowed states to dictate their individual policies and regulations regarding local commercial activity.

At first the federal government was only supposed to get involved when regulation of economic relations between states was necessary. The freedom allowed states to be individualized and it gave the citizens the opportunity to determine what regulations they thought were necessary by deciding what state to live in. If a citizen took issue with one state's regulation policies, that citizen was free to move to another state.

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[57] *Ibid*.

But with advancements in technology and industrial production, the federal government began to feel it was necessary to establish a broad regulatory structure.

With the economic crisis of the Great Depression, problems issuing from a lack of federal regulation began to appear more pressing. Though the turn of the century Court had worked hard to keep the federal government's commerce powers within a tight limit, the economic crisis spurred the government to take extreme measures. Thus Roosevelt's court-packing plan was born. Although the Judicial Procedures Reform Bill (1937) never made out of Congress and into law, it played a dramatic role in shaping the nation's future. Roosevelt was sending a clear message to the Court, so instead of defying the executive branch and leaving the federal government helpless to address the national crisis, the Court changed its tune. It did not take long for the carefully secured restrictions to be dismantled. Every subsequent Commerce Clause case has continued to add to the expansive federal authority, with the exception of *Lopez* and *Morrison*.

It is with this historical background in mind that the Supreme Court scrutinized the ACA. In order to properly understand the reasoning of the Court and to properly capture the backdrop of the ACA, it is important to understand what the historical precedents have said about Commerce Clause law. The purpose of this chapter has thus been to present the historical foundation for Commerce Law Theory in such a way that the trends and general interpretations will be evident in succeeding chapters.

CHAPTER THREE

Scope of the Commerce Clause

3.1 Commerce Clause and Substantial Effects Doctrine

The original definition of commerce was given by Chief Justice Marshall in *Gibbons v. Ogden* (1824). There, Marshall identified commerce as more than just the trafficking of goods, maintaining that it also included the shipping of goods and contracts regulating buying and selling. As American society and manufacturing progressed, the Court decided that Marshall's simple definition was no longer adequate to describe the scope of activities within the regulatory power of the Commerce Clause. Various Courts have added to and expounded upon the circumstances in which Congress may exercise its regulatory power. However, the exact line between what can and cannot be reached under the Commerce Clause has remained fluid. To better grasp the significance of the June 2013 Affordable Care Act decision, it is imperative to identify how leading political scientists understood the scope of the Commerce Clause prior to that decision.

Just as the Supreme Court Justices look at past precedents when deciding a case, scholars also study the past to better predict what may or may not be within the reach of Congress. Several case-specific factors must be taken into consideration in predicting the ruling of the Court. First, an activity must be classified as either "interstate" or "intrastate." Second, it must be deemed economic or non-economic. And finally, one must determine whether it is, in fact, "activity" or instead, the absence of activity.

With respect to the first distinction, the Constitution itself directly gives Congress the power to regulate interstate commerce, which is easily identified as commerce between states. Interstate commerce comprises not only transfer of physical goods across state lines, but also the shipping, manufacturing, production, purchasing and selling of goods amongst states.[58] Notably, contracts, specifically insurance contracts, were not originally included within the definition of interstate commerce. Even when the participants resided in different states, insurance contracts were not categorized as interstate commerce because "issuing a policy of insurance [was] not a transaction of commerce."[59] However, the discussion on the nature of insurance continued, and in *United States v. South-Eastern Underwriters* (1944) the Supreme Court ruled that insurance contracts are commercial in nature and should be included within the definition of interstate commerce.[60] Therefore, all activities and contracts of insurance that concern the trafficking of goods or services across state lines are outlined as interstate commerce.

The definition of intrastate commerce, on the other hand, is much less clear. Intrastate regulation was originally part of a State's police powers, but with the implementation of the New Deal, the Court took the opportunity to introduce a new doctrine called the "substantial effects" doctrine. This states that Congress can regulate intrastate commerce so long as the "'economic activity substantially affects interstate commerce."[61] The groundwork for this doctrine was laid in *United States v. Darby* (1941) when the Court first mentioned that intrastate economic activity could have any effect

[58] *Gibbons v. Ogden.* 22 U.S. 1 (Supreme Court, March 2, 1824).

[59] *Paul v. Virginia.* 75 U.S. 168 (Supreme Court, November 1, 1869).

[60] *United States v. South-Eastern Underwriters.* 322 U.S. 533 (Supreme Court, June 5, 1944).

[61] Barnett, Randy E. "Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional." *New York University Journal of Law and Liberty* Vol. 5, no. 581 (September 2010): 581-637. 596.

upon the interstate commerce. The *Darby* decision was reaffirmed by the Justices in *Wickard v. Filburn* (1942) when they noted that "although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.'"[62] And so, the justification for the substantial effects doctrine was given, and it has continued as the dominant way of interpreting Congress's regulatory authority. This doctrine effectively gives Congress the ability to regulate both interstate and intrastate commerce as long as Congress can prove that there is some sort of substantial effect upon interstate commerce.

The substantial effects doctrine, however, has implications for more than just the distinction between intrastate and interstate commerce. It also relates to the question of whether Congress has the power to regulate *non-economic* activity. Such a scenario presented itself in *United States v. Lopez* (1995) when Congress argued it could restrict the possession of firearms in school zones through the commerce clause.[63] Though the possession of the gun is a non-economic activity, the government argued the possession of a firearm had effects on interstate commerce and was therefore within the reach of the commerce clause. At first glance it might seem obvious that any non-economic activity would fall outside the reach of the Commerce Clause. But what if the non-economic activity had substantial effects upon the interstate commerce? Does this mean that

[62] *Wickard v. Filburn.* 317 U.S. 111 (Supreme Court, November 9, 1942).

[63] *United States v. Lopez.* 514 U.S. 549 (Supreme Court, April 26, 1995).

through the substantial effects doctrine Congress may reach non-economic activity too? The Court turned to the Necessary and Proper Clause to answer these questions.

3.2 Commerce Clause with the Necessary and Proper Clause

If the Commerce Clause is considered in isolation, it is hard to see the justification for any regulation of clearly non-economic activity. However, some scholars have suggested that combining the Commerce Clause with the "Necessary and Proper" clause might provide a ground for arguing that Congress could regulate non-economic activity.[64] They argue that such non-economic activity can be regulated as long as Congress proves that it is necessitated by the greater regulatory scheme.[65] This addition to the substantial effects doctrine allows Congress to regulate local non-economic activity deemed necessary to the regulatory scheme of the intrastate economic activity that substantially affects interstate commerce.

But as with most things in politics, there is no consensus among scholars on whether the Necessary and Proper Clause should be joined to the Commerce Clause. Balkin reaffirms this idea by quoting Justice Scalia's concurrence in *Gonzales v. Raich* (2005): "'Congress may regulate even *non-economic local activity* if that regulation is a

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[64] Jack M Balkin, David B. Rivkin, Jr., and Lee A. Casey. "A Healthy Debate: The Constitutionality of an Individual Mandate." *University of Pennsylvannia Law Review: PENNumbra* Vol. 158, no. 93 (2009): 93-118.; Barnett, Randy E. "Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional." *New York University Journal of Law and Liberty* Vol. 5, no. 581 (September 2010): 581-637.; Tribe, Laurence H. "The Constitutionality of the Patient Protenction and Affordable Care Act: Swimming in the Stream of Commerce." *Harvard Journal of Law & Public Policy* 35, no. 3 (2012): 873-886.

[65] Barnett, Randy E. "Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional." *New York University Journal of Law and Liberty* Vol. 5, no. 581 (September 2010): 581-637.

necessary part of a more general regulation of interstate commerce.'"[66] Randy Barnett disagrees, because he thinks that the Necessary and Proper Clause means only that Congress has a "right to pass such laws as are necessary and proper to accomplish the objects entrusted to it."[67] It does not mean, Barnett argues, that Congress has unbridled power to regulate whatever it deems necessary, "for no government has a right to do merely what it pleases."[68]

The debate prior to the ACA decision, then, had centered largely on the distinctions between interstate and intrastate activity as well as between economic and non-economic activity. The next logical question had to be whether the Necessary and Proper Clause could extend the Commerce Clause to include *inactivity*.

This debate arose because of the unique nature of the health insurance market. Insurance markets in general do not exactly contain the transactions of commerce such as the transfer of physical goods or services. Insurance is instead a contract stating that the insurer will pay for goods or services in the event that the insured needs such goods or services due to specific events stipulated in the contract. Like all insurance, the health insurance market is an insurance market where the insurer is contracted to pay for healthcare services *in the event* that the insured becomes ill or injured.

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[66] Jack M Balkin, David B. Rivkin, Jr., and Lee A. Casey. "A Healthy Debate: The Constitutionality of an Individual Mandate." *University of Pennsylvannia Law Review: PENNumbra* Vol. 158, no. 93 (2009): 93-118. (Italics not in original source.)

[67] Barnett, Randy E. "Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional." *New York University Journal of Law and Liberty* Vol. 5, no. 581 (September 2010): 581-637. 599.

[68] *Ibid.,* p. 599.

Against this background, the debate among scholars concerns whether *failing* to purchase health insurance should be considered just as much of an activity as the decision *to* purchase health insurance. The difference is that one is by nature markedly less active—simply the "not having purchased it"—whereas the other is definitely active—"the decision to purchase" health insurance. The Affordable Care Act marked the first time there had been discussion about whether Congress has the right to regulate the omission of an act because the non-act (the inactivity of one person or class of people) affects the greater regulatory scheme. Those who refrain from purchasing healthcare insurance are doing so to save money. But by not participating in the insurance market, Balkin argues, such persons are "clearly affect[ing] [the] risk pools nationwide, [which] drives up costs for insurers and [the] insured, and has a substantial cumulative effect on interstate commerce. Therefore, Congress may reach it under the Commerce Clause."[69]

These arguments only deal with whether it is *necessary* for Congress to regulate its citizen's participation in health insurance; it does not cover whether it is *proper*. The Necessary and Proper Clause can only be joined with the Commerce Clause if the regulation is proven *necessary* and the mechanism is deemed *proper*. The Court set out a guideline for determining whether a law was proper in *McCulloch v. Maryland* (1819) when Chief Justice Marshall argued that a law is "within the scope of the constitution…[when Congress uses] all mean[s] which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the

[69] Jack M Balkin, David B. Rivkin, Jr., and Lee A. Casey. "A Healthy Debate: The Constitutionality of an Individual Mandate." *University of Pennsylvannia Law Review: PENNumbra* Vol. 158, no. 93 (2009): 93-118.

constitution."[70] Though Marshall's comments give a general definition concerning the character of the mechanisms employed by Congress, Marshall does not precisely spell out what is proper. It is left to Congress to make laws it believes is in line with the Constitution and it is the Court's duty to then assess the laws and pass judgment.

When this Court looked at the ACA and weighed the *proper*-ness of the mechanisms employed by Congress, it had more than just Marshall's words to refer to. The Court has also developed the anti-commandeering principle, which protects the states and state law enforcement from coerced participation in federal programs.[71] In 1992, Congress attempted to use the Commerce Clause to force States to dispose of nuclear waste. But in *New York v. United States* (1992), the Court recognized that Congress may not "commandeer the States' legislative processes by directly compelling them to enact and enforce a federal regulatory program."[72] It was not *proper* for Congress to compel the States to adhere to a mandate and it "constituted unconstitutional commandeering of state legislatures."[73]

The anti-commandeering principle was mentioned again in *Printz v. United States* (1997) when Congress ordered state law enforcement to perform background checks on

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[70] *McCulloch v. Maryland.* 17 U.S. (4 Wheat.) 316 (Supreme Court, March 6, 1819).

[71] *New York v. United States.* 488 U.S. 1041 (Supreme Court, June 19, 1992).;

Printz v. United States. 521 U.S. 898 (Supreme Court, June 27, 1997).

[72] *New York v. United States.* 488 U.S. 1041 (Supreme Court, June 19, 1992).

[73] Barnett, Randy E. "Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional." *New York University Journal of Law and Liberty* Vol. 5, no. 581 (September 2010): 581-637. 622.

all gun buyers.[74] The Court later held that Congress did not have the ability to mandate that States implement a federal program, at least without proper compensation for the work.[75] Barnett notes that Justice Scalia emphasizes that no matter how "necessary Congress might deem [an act] to be, imposing mandates on state legislatures and executive officers [is] an improper means to the end of regulating commerce among the several states."[76] It is the Court's duty to look critically at the laws passed by Congress, and even if Congress deems a mechanism necessary for the greater regulatory scheme, the Court must determine whether such a mechanism is truly *proper*. With guideposts such as the "in the spirit of the Constitution"[77] and the anti-commandeering principle, the Court analyzed the mandate in the ACA that compelled individuals to purchase health insurance.

3.3 Taxing Power

3.3.1 Overview of Tax Law

The main focus of this chapter is to present the interpretation and understanding of the application of the Commerce Clause prior to the June ruling. Due to the reasoning used in the decision, it becomes necessary to provide background concerning tax power.

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[74] *Ibid.,* p. 622.

[75] *Printz v. United States.* 521 U.S. 898 (1997); (Supreme Court, June 27, 1997).

[76] Barnett, Randy E. "Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional." *New York University Journal of Law and Liberty* Vol. 5, no. 581 (September 2010): 581-637. 624.

[77] *McCulloch v. Maryland.* 17 U.S. (4 Wheat.) 316 (Supreme Court, March 6, 1819).

Within the Constitution, Congress is given the right to "lay and collect Taxes…[to] provide for the…general welfare of the United States."[78] The understanding of this clause has been debated and argued over the decades. Robert Levy feels that the clause simply "authorizes Congress to raise revenue in support of the specifically enumerated powers that follow it" instead of giving Congress an "independent power to tax for the general welfare;" a distinction, Levy claims, is imperative to understand when analyzing taxing law. [79] Balkin agrees that "Congress acts within its constitutional powers when it raises revenue through taxation and redistributes it to serve the general welfare," but he clashes with Levy in his interpretation of what that power really looks like saying that "Congress has wide discretion to decide which taxes and expenditures serve the general welfare."[80] The difference between these two scholars is that Balkin considers the Taxing Clause, as an extensive power given to Congress to dictate what it feels constitutes 'serving the general welfare.' Levy is much more conservative in his interpretation of the clause, believing that Congress has restricted powers when dictating what is taxable.

Lets now turn to the three types of taxes: income, direct and excise taxes. The income tax was implemented in 1913 by the Sixteenth Amendment, and is used to

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[78] "The Constitution of the United States," Article 1, Section 8, Clause 1.

[79] Levy, Robert A. *The Case Against President Obama's Health Care Reform: A Primer for Nonlawyers.* Washington D.C.: Cato Institute , 2011. p.3.

[80] Jack M Balkin, David B. Rivkin, Jr., and Lee A. Casey "A Healthy Debate: The Constitutionality of an Individual Mandate." *University of Pennsylvannia Law Review: PENNumbra* Vol. 158, no. 93 (2009): 93-118. 102.

“generate revenue for the federal budget.”[81] These taxes are applied to the gross income of an individual or corporation and, by definition, must be “triggered by income.”[82] Direct taxes, by contrast, are strictly outlawed by the Constitution unless the States receive an apportioned amount of the revenue. By definition, “any nonincome tax imposed by the federal government on individuals is a direct tax.”[83] Strictly speaking, income taxes are direct taxes, but the Sixteenth Amendment authorized them by giving the federal government the power to “levy unapportioned direct taxes on *income.*”[84] The understanding of direct taxes is important to the discussion of the ACA because some scholars argue that the individual mandate, if considered a tax, is in fact a direct tax and is therefore unconstitutional. Other scholars reason that the Constitution “does not forbid all direct taxes, only those that are not apportioned among the states”[85] meaning that the individual mandate would be constitutional even as a direct tax if it was apportioned among the states.

The last type of tax Congress can levy upon the American people is an excise tax. These taxes are collected when an individual purchases specified products. For example, when items such as gasoline, liquor, and cigarettes are purchased, the purchaser must pay

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[81] Staff. "Income Tax Law: An Overview." *Legal Information Institute.* August 2010. http://www.law.cornell.edu/wex/income_tax.

[82] Levy, Robert A. *The Case Against President Obama's Health Care Reform: A Primer for Nonlawyers.* Washington D.C.: Cato Institute , 2011. p4.

[83] Jack M Balkin, David B. Rivkin, Jr., and Lee A. Casey "A Healthy Debate: The Constitutionality of an Individual Mandate." *University of Pennsylvannia Law Review: PENNumbra* Vol. 158, no. 93 (2009): 93-118. 102.

[84] *Ibid.*, p. 111.

[85] *Ibid.*

an excise tax at the point of sale. This makes an excise tax unique because it is not collected by the Internal Revenue Service during tax season, but is instead levied at the time of the transaction.

Proponents of the ACA have sought to characterize the ‘penalty’ used to enforce the individual mandate as an “excise tax on individuals without essential health benefits coverage.”[86] Therefore this tax is not a “tax on the ownership of real or personal property; it is a tax on the decision not to purchase insurance.”[87] This changes the character of an excise tax; prior to the conception of the ACA, excise taxes were only levied upon specific transactions involving particular products. But the ACA is instead establishing an excise tax on “a particular event: the failure to pay premiums into a qualified health care plan in a given month.”[88] The departure from the traditional interpretation of an excise tax has caught the attention of many scholars. One responded by pointing out that “excise taxes are imposed on transactions; to call a tax imposed on individuals an excise tax is intellectually incoherent.”[89]

The discussion of taxes is not complete without including the debate concerning Congress’s authority to implement a tax that reaches past the regulatory powers of the Commerce Clause. Some scholars feel that Congress cannot use “a tax to regulate conduct that is otherwise indisputably beyond its regulatory power.”[90] As seen in the

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[86] *Ibid*., p. 111.

[87] *Ibid*., p. 116.

[88] *Ibid*., p. 116.

[89] *Ibid*., p. 111.

[90] *Ibid*., p. 100.

Bailey v. Drexel Furniture (1922) in which the "Supreme Court ruled that Congress could not impose a 'tax' in order to penalize conduct (the utilization of child labor) that it could not regulate under the Commerce Clause."[91] The same logic would apply to the health insurance debate. Congress cannot use a tax to extent its commerce power. Balkin disagrees, he believes that a "tax with regulatory purposes will not be held unconstitutional when the tax on its face seeks to raise revenue."[92] But the true nature of the 'penalty' is still unclear.

3.3.2 Penalty vs. Tax

The last discussion setting up the background to the ACA decision is the debate surrounding the nature and application of the penalty. Within the ACA, Congress sought to use a penalty as a means of encouraging uninsured persons to purchase health insurance. Upon failure to do so, they would be penalized an apportioned amount of their income, which would be collected by the Internal Revenue Service.

Many scholars have an issue with Congress using a 'penalty' as a means of encouraging an action because of the connotations and implications found in the word *penalty*. Penalties are normally "an exaction imposed by statute as punishment for an unlawful act;"[93] therefore, to use a 'penalty' to encourage the purchase of health insurance, the ACA is declaring that it is unlawful to not have health insurance. By comparison, a tax carries with it a different connotation and implication because they are "pecuniary burden[s] laid upon individuals or property for the purpose of supporting the

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[91] *Ibid*., p. 100.

[92] *Ibid*., p. 104.

[93] *United States v. La Franca.* 282 U.S. 568 (1931, February 24, 1931).

Government."[94] Taxes do not make a distinction between lawful and unlawful actions; they are used for the purpose of raising revenue.

The revenue raising nature of taxes becomes a discussion point for scholars when looking at the ACA. The ACA includes an individual mandate that orders individuals to purchase health insurance. If individuals fail to obtain health insurance they will be charged a penalty. As Balkin points out, the ACA implements programs that "costs the government money" and believes that the "tax [or penalty] on uninsured persons *is* a genuine revenue-raising device."[95] Barnett disagrees because "nowhere [is] the purpose of the penalty separately identified as raising revenue," even in the revenue raising section of the ACA, the mandate is not "listed as a source of revenue."[96] Instead, the purpose of the penalty in the ACA is to "enforce the health insurance requirement," implying, as Barnett believes, that the penalty "cannot possibly be construed as a tax."[97]

After the passage of the ACA, proponents of the Act have attempted to categorize the penalty as an excise tax. The Joint Committee on Taxation released an explanation of the ACA in which the individual mandate was renamed the "Excise Tax on Individuals

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[94] New Jersey v. Anderson, 203 U.S. 483, 492 (1906)

[95] Jack M Balkin, David B. Rivkin, Jr., and Lee A. Casey "A Healthy Debate: The Constitutionality of an Individual Mandate." *University of Pennsylvannia Law Review: PENNumbra* Vol. 158, no. 93 (2009): 93-118. 102. 103 (Emphasis in original source.)

[96] Barnett, Randy E. "Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional." *New York University Journal of Law and Liberty* Vol. 5, no. 581 (September 2010): 581-637. 612.

[97] *Ibid.,* p. 610.

Without Essential Health Benefits Coverage."[98] Identifying the individual mandate as an excise tax deals with some of the Constitutional concerns brought up in the Commerce Clause objections. If the mandate is not perceived as an extension of the Commerce Clause regulatory power but instead as an excise tax, then there is no need to determine the 'nature of the activity' in regards to the interstate or intrastate, economic or non-economic and activity or inactivity debates. But that is only if the penalty can truly be classified as an excise tax. Despite the Joint Committee's attempts to forgo debate, Barnett still believes that since "the statute never describes the regulatory 'penalty' it imposes for violating the mandate an 'excise tax'" and is "expressly called a 'penalty,'" the penalty cannot be categorized as a tax. [99] Because of this debate, it is necessary to discuss tax power in conjunction with the Commerce Clause in order to properly lay the background for the Supreme Court decision.

3.3.3 Court's Power to Re-characterize

Within the ACA, the 'penalty' is identified as an extension of Congress's power to regulate commerce. Nowhere in the Act itself is the 'penalty' identified as a tax nor is it expressed as an extension of tax power. This may seem unimportant, but when looking at the decision of the Supreme Court, it is vital to understand what powers the Court has to re-characterize a law passed by Congress.

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[98] Joint Committee On Taxation, Technical Explanation Of The Revenue Provisions Of The "Reconciliation Act Of 2010," As Amended, In Combination With The "Patient Protection And Affordable Care Act," JCX-18-10 (2010).

[99] Barnett, Randy E. "Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional." *New York University Journal of Law and Liberty* Vol. 5, no. 581 (September 2010): 581-637. 608.

Respondents to the Act noticed that the ‘penalty’ is not characterized as a tax but as regulation of commerce. Therefore, the Court could only decide whether the ‘penalty’ was constitutional under Commerce Clause power. It does not matter that proponents of the Act tried to redefine the ‘penalty’ as a tax after the signing of the Act into law, because the Court can only look at the nomenclature of the Act itself. Some scholars believe that the Judicial Branch, like the other two branches of the government, is limited and that “there is simply no authority for the Court to recharacterize a regulation as a tax.”[100] They feel that the Court cannot look at a piece of legislation, identify it as unconstitutional, look at any wording in which it would be constitutional and then change the legislation so that the law can be seen as constitutional. For “never before has the Court looked behind Congress’s unconstitutional assertion of its commerce power to see if a measure could have been justified as a tax. For that matter, never before has a “tax” penalty been used to mandate, rather than discourage or prohibit, economic activity.”[101]

Other scholars feel the Court is entitled to do what it can to uphold a legislative act of Congress. Proponents of the Act do not think it matters that the Act does not spell out the ‘penalty’ as a tax because they believe “Congress can create an individual mandate under either its powers to tax and spend for the general welfare or its powers to regulate commerce among the several states.”[102] This difference of opinion is vital to

[100] *Ibid.,* p. 612.

[101] *Ibid.*, p. 613.

[102] Jack M Balkin, David B. Rivkin, Jr., and Lee A. Casey "A Healthy Debate: The Constitutionality of an Individual Mandate." *University of Pennsylvannia Law Review: PENNumbra* Vol. 158, no. 93 (2009): 93-118. 108.

understand when looking at the decision of the Court. One limits the Court's power, the other allows the Court to act in some legislative manner.

3.4 Conclusion

The objective of this chapter is to provide background into how the proponents and respondents went about formulating their respective arguments. Both sides needed to be familiar with the most up to date understanding and interpretation of Commerce and Taxing law so that their individual arguments would be substantive enough to present to the Supreme Court. After working with their respective sides, the proponents and respondents submitted briefs to the Supreme Court as a preface to the oral arguments. The arguments synthesized from the briefs and the oral debates are presented in the next chapter.

CHAPTER FOUR

Arguments Presented to the Supreme Court

4.1 Character of the Healthcare Market

The Proponent, General Verrilli, and the Respondents, Mr. Carvin and Mr. Clement, submitted their conflicting positions to the Supreme Court for deliberation.[103] As the case circulated amongst the lower courts, it became clear that what was at issue was the application of two constitutional doctrines: the Commerce Clause and the Taxing Power. Before identifying the specifics of Verrilli's and the Respondents' arguments, it is important to clarify the unique relationship of the health insurance market to the healthcare market. Unlike other commercial industries, the healthcare market involves both planned and unplanned consumption of services. The health insurance market attempts to incorporate both aspects of consumption into the insurance plans. But when uninsured individuals participate in the healthcare market, the market participants are necessarily affected; this phenomenon results in cost shifting.

4.1.1 The Cost-Shifting Phenomenon

When an individual enters into a contract with an insurance company, the individual begins to pay into a policy. As the policyholder consumes health care services, insurance companies cover the cost of the services specified within the contract. The cost of services received is at a negotiated rate. The hospital and the insurance company work together to arrive at a price for specified services; this negotiated cost allows the

[103] From now on Mr. Carvin an Mr. Clement will be referred to as "the Respondents".

insurance company to pay less in exchange for encouraging its policyholders to receive care at specific hospitals.

When uncompensated health care services are rendered, the hospital needs to resolve the difference. To do this, the hospital negotiates a different rate with the insurance company. Let's say, for example, that the health care service's base cost—the cost excluding the effects of uncompensated care—was $5,000. The hospital and insurance company could hypothetically negotiate the rate down to $3,000. But because of the reality of uncompensated care, the hospital only negotiates the rate down to $4,000. This difference in negotiated rate reflects the first type of cost shifting to offset the uncompensated care.

The second shift in costs comes between the insurance company and the policyholder. Because the actual negotiated cost between the hospital and insurance company is higher than what the original base negotiated cost would have been without uncompensated care costs, the insurance company resolves the difference by increasing insurance premiums. To recoup uncompensated care, the overall shifting of costs—from the hospital to the insurance company and from the insurance company to the policyholder—results in "raising the average family's annual health insurance premiums by more than $1000."[104]

The first two instances of cost shifting occur as a direct result of uncompensated care, but there is also a shifting among policyholders that stems from the comparable risk that policyholders pose to insurance company; this is referred to as risk-shifting. Individuals do not purchase insurance policies at the same premium, the premiums are

[104] Solicitor General Donald B. Verrilli, Jr. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Brief For Petitioners." no. 11-398. 2012. 19.

specific to the amount of risk the individual poses to the insurance company. Individuals who have a greater probability of health problems have a higher premium and are placed into a high-risk pool. Individuals with a low risk of encountering health issues pay a lower premium because they will probably be consuming a smaller amount of health care services. When the number of individuals in the low-risk pools is great, insurance companies have a larger influx of payments that can be used to subsidize the health care cost of the high-risk pools. For insurance companies to have enough money to pay for the services, the number of individuals in the high-risk pools must be less than the number of individuals in the low-risk pools. If the low-risk pool is too small, then the insurance company does not have enough money to subsidize the high-risk pool.

Prior to the ACA, there were a large number of young, healthy uninsured Americans who had financially decided they could not afford health insurance. Because they were young and healthy, this group of uninsured persons understood that they were not likely to be consuming a large amount of healthcare services. If there were any health care needs, the young and healthy budgeted to pay out of pocket for such services instead of paying for an insurance policy, because this was financially more affordable. If this group of individuals, which will be referred to as the healthy uninsured, had decided to participate in the health insurance market, they would be added to the low-risk pools. This would provide the insurance companies with a large influx of paying policyholders who are not consuming health care. The result would be an increased ability to subsidize the high-risk pools at a lower rate. Subsequently, the insurance companies would be able to lower the premiums of the high-risk pools and the overall price of the premiums would decrease. Additionally, high-risk individuals who were originally refused coverage would be able to purchase a policy because insurance companies have the ability to subsidize those high-risk individuals.

Another consequence of stipulating that everyone must purchase insurance is that the occurrence of uncompensated care should approach zero. No longer will hospitals have to account for uncompensated care, because all individuals are expected to have purchased health insurance. The result is that cost shifting between the hospital and the insurance company is eliminated.

The ACA attempts to address these incidents of cost-shifting and risk-shifting in an effort to decrease the overall cost of the health care and insurances premiums.[105] Clement argues that the reality of cost-shifting and risk-shifting is not a unique characteristic of the healthcare market but that the same cost-shifting occurs in the car market. He observes that "[w]hen [individuals]…decid[e] not [to] go buy a car, [they are] causing the labor market in Detroit to go south. [They are possibly] causing somebody to lose their job, and . . . everybody [will] to have to pay for it under welfare."[106] But Verrilli argues that the healthcare market is categorically different because "[i]n markets for those goods, there [is] no pre-existing economic activity analogous to the uncompensated consumption of health care, and thus no substantial economic effect like the massive risk-shifting and cost-shifting that occurs in the health-care and health-

[105] Solicitor General Donald B. Verrilli, Jr. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Reply Brief For Petitioners." no. 11-398. 2012. 1.

[106] Verrilli, Jr., Donald B., Paul D. Clement, and Carvin A. Michael . *Oral Argument Before the Supreme Court of the United States.* 2012. 71.20-25.

insurance markets."[107] Because of the unique character of the entire health market, Verrilli continues, Congress has the right to "address longstanding economic distortions that have resulted in massive cost-shifting (in a national market that constitutes 17% of the Nation's gross domestic product) and have denied millions of Americans access to affordable health care."[108]

But Congress and the ACA assume that simply being uninsured causes the cost-shifting. Healthy uninsured individuals who consume healthcare services apportion funds to cover the cost of their annual health care. When uninsured individuals consume more than their apportioned funds or had not set funds aside in the first place, a payment plan is set up. Uninsured individuals make payments over time to pay off their medical bills. The cost-shifting phenomenon does not occur unless the uninsured individual defaults on the payments. Carvin points this out as the root of the cost-shifting when he says that "whenever individuals fail to pay for services rendered, the costs from their default are "shifted" to the provider and its other customers."[109]

Whether it is the defaulting of the individual on payments or the uninsured nature of individual that causes the cost-shifting, Verrilli argues that it does not matter because individuals are unable to predict "the frequency, timing, and magnitude of an [their]

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[107] Solicitor General Donald B. Verrilli, Jr.. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Reply Brief For Petitioners." no. 11-398. 2012. 6.

[108] *Ibid*. p. 1.

[109] Carvin, Michael A. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Brief For Private Respondents." no. 11-398. 2012. 55.

demand for health care services."[110] Individuals are, in Verrilli's opinion, "potentially never more than an instant from the 'point of consumption' of health care" and that it is always "impossible to predict which of us will need it during any period of time."[111] Therefore, Verrilli believes that since "health insurance is the principal mechanism for meeting these unpredictable and often expensive liabilities, it was reasonable for Congress to invoke that same mechanism to address the problem of uncompensated care."[112]

The Respondents acknowledge that the consumption of health services is unpredictable, but they point out that "the health care market is hardly the only market that fits that description."[113] Life insurance and burial insurance are universally applicable markets. No one can predict when he or she will die and the expenses will always be "paid for one way or another even if individuals fail to plan for them."[114] The Respondents point out that the same logic Congress uses for the health insurance requirement could be used to regulate other markets through mandates participation. They observe that "it would be no less reasonable for Congress to conclude that mandates

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[110] Solicitor General Donald B. Verrilli, Jr. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Brief For Petitioners." no. 11-398. 2012. 35.

[111] *Ibid*., p. 43.

[112] *Ibid*., p. 19.

[113] Clement, Paul D. "On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit: Brief For State Respondents." no. 11-398. 2012. 47.

[114] *Ibid*., p. 47.

requiring individuals to finance those needs before they arise would help alleviate the inevitable cost-shifting that occurs when individuals fail to do so."[115]

But Congress would not be restricted to universal markets; Congress could also use this reasoning to regulate markets where insurance is not universal but vital.[116] Individuals living in a flood zone will inevitably have to face flood-related losses; "those losses are likely to be shifted to the rest of society through mechanisms such as publicly funded disaster relief."[117] These and other examples are not distinguishable "on the ground that the need is less universal or the potential for cost-shifting of a lesser magnitude, but those are differences in degree not kind." [118] The Respondents' point is that neither the supposedly unique cost-shifting phenomenon that occurs in health care nor the fact that Congress is the root cause of cost-shifting can justify Congress's insistence on regulating it.[119]

As mentioned before, uninsured individuals defaulting on their healthcare payments results in the cost-shifting phenomenon. But why are hospitals providing healthcare services to individuals that the hospital will not be compensated for? With the passage of the Emergency Medical Treatment and Active Labor Act (EMTALA) in 1986, Congress required all hospital emergency rooms to treat individuals who needed help

[115] *Ibid*., p. 47.

[116] *Ibid*., p. 47.

[117] *Ibid*., p. 47-48.

[118] Ibid., p. 48.

[119] Ibid., p. 49.

even if those individuals did not have the ability to pay for such services.[120] Because of the EMTALA, a population of uninsured individuals now uses the emergency room as a means of receiving primary care. These individuals cannot pay for the care and often end up defaulting on payments, resulting in the shifting of costs. The Respondents believe that "Congress can hardly expand its constitutional authority by creating problems that it lacks the power to fix."[121] This would lead to a limitless amount of implied power that Congress was not given in the Constitution.

4.2 Commerce Clause

The most prominent debate surrounding the insurance requirement statute concerns conflicting interpretations of the Commerce Clause and the authority it imparts to Congress. [122] Though the Commerce Clause specifically limits Congress's regulation to *interstate* economic activities, current understandings give Congress an extension of regulatory authority through the Necessary and Proper Clause and Substantial Effects Doctrine.

4.2.1 Necessity of the Statute

For the Necessary and Proper Clause to be properly invoked the proponents of the ACA had to communicate the extreme necessity of the minimum coverage provision. The minimum coverage requirement is essential to the overall success of the ACA because

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[120] "Emergency Medical Treatment & Labor Act." *CMS.gov* . 2012. http://www.cms.gov/Regulations-and-Guidance/Legislation/EMTALA/index.html.

[121] *Ibid*., p. 49.

[122] The terms "individual mandate" and "minimum coverage requirement" will be used interchangeably.

none of the other aspects of the ACA—the community rating and the guaranteed issue—work without the minimum coverage provision. “Congress found that without a minimum coverage provision, ‘many individuals would wait to purchase health insurance until they needed care,’ taking advantage of the Act’s guaranteed-issue and community-rating provisions.”[123] The resulting effects on the entire market would be severe. Congress asserts that the statute is necessary to the greater regulation scheme of interstate commerce. Verrilli points out that if individuals waited to purchase the health insurance, they would sabotage the Act’s sole purpose by driving up the premiums and thereby, “threatening the viability of that market.”[124] Verrilli argues that because he has shown that the “provision is necessary to make the Act’s reforms effective” the ACA is then an “independently valid economic regulation” which makes the statute “plainly constitutional.”[125]

In response to Verrilli, the respondents demonstrate that there are other alternatives Congress could have implemented to effectively subsidize the guaranteed-issue and community rating provisions. Clement points out that the “most straightforward [alternative] would be to figure out what amount of subsidy to the insurance industry is necessary to pay for guaranteed issue and community rating. Once calculate[d], the amount of that subsidy could [be applied as] a tax that's spread generally through

[123] Solicitor General Donald B. Verrilli, Jr. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Brief For Petitioners." no. 11-398. 2012. 29.

[124] *Ibid*., p. 29.

[125] *Ibid*., p. 25.

everybody to raise the revenue to pay for that subsidy."[126] Because there are alternatives to fund the provisions of the ACA, the mandate is no longer a necessary part of the regulatory scheme.

a. Substantial Effects Doctrine. The necessity of implementing the statute is closely linked to the substantial effects doctrine. The substantial effects doctrine provides Congress with the ability to regulate a wide range of activity, for the Court has held many times that "[t]he power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce.'"[127] Verrilli argues that the principle of substantial effect can be applied to the uninsured individual's relationship with the health insurance market.

The proponents of the ACA frame the health insurance market as a means of paying for healthcare services by saying "the minimum coverage provision itself regulates economic conduct with substantial effects on interstate commerce—the manner in which individuals finance and pay for services in the health care market."[128] Verrilli believes that Congress has a "rational basis for concluding that practices of 'forego[ing] health insurance' and 'attempt[ing] to self-insure' has a substantial and deleterious effect on interstate commerce."[129]\ The uninsured "actively participate in the health care

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[126] Verrilli, Jr., Donald B., Paul D. Clement, and Carvin A. Michael . *Oral Argument Before the Supreme Court of the United States.* 2012. 60.8-15.

[127] Solicitor General Donald B. Verrilli, Jr. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Brief For Petitioners." no. 11-398. 2012. 25.

[128] *Ibid*., p. 25.

[129] *Ibid*., p. 34.

market, but they pay only a fraction of the cost of the services they consume."[130] This leads to cost and risk shifting, which affects the rest of the market participants.

Verrilli does not see a difference in the degree of participation of an individual in the health insurance market between an insured and an uninsured individual, for "[n]o one is inactive when deciding how to pay for health care, as self-insurance and private insurance are two forms of action for addressing the same risk."[131] To Verrilli, all individuals participate in the health insurance market either by purchasing a policy or self-insuring. Since self-insuring has substantial effects on the interstate health insurance market, Verrilli believes that the substantial effects doctrine can be applied to the situation and justification for Congress's regulation can be found. It is because of the substantial effect on the interstate insurance market that Congress has the "power under the Commerce Clause to regulate" the market by requiring all individuals to have health insurance.[132]

In contrast, the respondents do not believe that uninsured individuals are actively participating in the health insurance market. Choosing to forgo participation in any market can potentially have substantial effects on interstate commerce. Just as in Clement's car example, "deciding not to buy a car, caus[es] the labor market in Detroit to go south" which ends in "somebody los[ing] their job, [resulting in] everybody hav[ing]

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[130] *Ibid.*, p. 34

[131] Solicitor General Donald B. Verrilli, Jr. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Reply Brief For Petitioners." no. 11-398. 2012. 6.

[132] Solicitor General Donald B. Verrilli, Jr. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Brief For Petitioners." no. 11-398. 2012. 34.

to pay for it under welfare."[133] The health insurance market is not unique in that characteristic, but Congress does not try to regulate individuals who forgo active participation in other markets because members of Congress know that such coercion is outside the reach of their regulatory power.

Drawing upon past cases and hypothetical examples, Carvin states "*Wickard* illustrates the fundamental distinction between obstructing commerce and not participating in commerce."[134] In *Wickard*, the Court characterized the "'substantial effects' doctrine [as the] authorized restriction of Filburn's intrastate wheat production because that economic activity, in the aggregate, was impairing Congress' goal of raising interstate wheat prices."[135] Carvin goes on to rearticulate his point by saying that "the 'substantial effects' doctrine allows Congress to regulate local bootleggers because of their aggregate harm to the interstate liquor market," but it does "not conscript teetotalers merely because conditions in the liquor market would be improved if more people imbibed."[136] This parallels Congress's attempts to justify its exercise of commerce power by asserting that the statute is necessary to "lower premiums by forcing healthy individuals to participate in the insurance risk pool." [137] But despite all of Congress's

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[133] Verrilli, Jr., Donald B., Paul D. Clement, and Carvin A. Michael. *Oral Argument Before the Supreme Court of the United States.* 2012. 71.20-25.

[134] Carvin, Michael A. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Brief For Private Respondents." no. 11-398. 2012. 29-30.

[135] *Ibid*., 29-30.

[136] Carvin, Michael A. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Brief For Private Respondents." no. 11-398. 2012. 30.

[137] *Ibid*., p. 28.

attempts, the respondents feel “none of these rationales satisfies the ‘substantial effects’ doctrine.”[138]

b. Planned vs. Unplanned Consumption. The proponents of the Act characterize the healthcare market as one of unexpected catastrophe. Though the mandate may coerce individuals—under fear of penalty—to participate in the health insurance market, Congress uses the market’s variable character to point out that the individual’s consumption of the market is unpredictable. Proponents believe that the unpredictability of consumption makes the market all-inclusive, which justifies Congress’s regulation. By stating that an individual can never predict when he or she is going to get sick and need a doctor, the proponents are painting a generic picture of the health care market. Mr. Clement does not agree that the entire market is so irregular; he states that the proponents are “assum[ing] that the only thing that's at issue here is emergency room visits.”[139] No advance planning can account for emergency room visits, but this is only a small portion of the entire healthcare market and a tiny fraction of the overall cost. The rest of the healthcare market is distinctly predictable, since most individuals choose to make appointments for preventative care and for other ordinary doctor’s visits.

Thus healthcare can be divided into two general categories: planned consumption and unplanned consumption. The planned consumption of healthcare involves the individual purposefully making an appointment with a doctor. Though individuals cannot predict when they will become sick, the act of making an appointment to see a doctor

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[138] *Ibid*., p. 28.

[139] Verrilli, Jr., Donald B., Paul D. Clement, and Carvin A. Michael . *Oral Argument Before the Supreme Court of the United States* . 2012. 86.10-11.

means that the consumption of healthcare services can no longer be classified as unpredictable. The sickness is unpredictable but the consumption of healthcare is not. This distinction is important because many healthy self-insured individuals account for general sickness and set aside funds to pay for the care they receive.

By contrast, the emergency room represents unplanned consumption of health care services. Accidents, epidemics and other emergency situations result in patients consuming health care services that were completely unplanned. When self-insured individuals receive this care, they do not always have the allotted funds ready to cover the cost of the treatment. But of course uninsured patients are not turned away from the emergency room, and if they default on payments the cost-shifting begins to occur. The emergency room, however, is only a small portion of the overall healthcare system. It accounts for only about 2% of all health care costs and it is the only place where there is truly unplanned consumption of healthcare services.[140]

The proponents characterize the entire healthcare market as unpredictable participation, but that "[assumes] that the only thing that's at issue here is emergency room visits and the only thing that's being imposed is catastrophic care coverage."[141] The respondents instead look at the character of the entire healthcare market. Both planned and unplanned consumption of healthcare exists and the respondents recognize that everyone will eventually enter this market. They note that "commerce regulation within its proper sphere may prevent harm before it occurs [but that] does not support the

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[140] Kliff, Sarah. "Is emergency room are actually a great deal?" *The Washington Post.* October 9, 2012. http://www.washingtonpost.com/blogs/wonkblog/wp/2012/10/09/why-emergency-room-care-might-be-a-great-deal/

[141] Verrilli, Jr., Donald B., Paul D. Clement, and Carvin A. Michael. *Oral Argument Before the Supreme Court of the United States.* 2012. 86.10-11.

radically different proposition that the reach of the commerce power extends to individuals outside its sphere simply because some will predictably come within it eventually."[142] Predicted participation is not actual active participation, which means that uninsured individuals are outside the market and are not within the reach of Commerce power.

4.2.2 Properness of the Statute

The second half of the Necessary and Proper Clause invoked by Congress requires that the ACA not only be considered a 'necessary' but also a 'proper' exercise of the Commerce Clause. The proponents of the ACA acknowledge that Congress "may not commandeer States or their officers (and thereby infringe state sovereignty)."[143] The ACA is an appropriate exercise of Congress's authority, they argue, because "the Constitution provides Congress [with] 'ample power' to exercise authority 'directly upon the citizens.'"[144] Proponents do not believe that the ACA is an improper use of Congress's power because it is using "its 'substantial powers to govern the Nation directly,' by 'acting directly on the people,' in conformity with the constitutional structure."[145] The proponents think that Congress has the ability to regulate the people directly, especially when the Act is beneficial to the general welfare of the Nation.

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[142] Carvin, Michael A. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Brief For Private Respondents." no. 11-398. 2012. 52.

[143] Solicitor General Donald B. Verrilli, Jr. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Brief For Petitioners." no. 11-398. 2012. 9.

[144] *Ibid*., p. 9.

[145] Solicitor General Donald B. Verrilli, Jr. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Reply Brief For Petitioners." no. 11-398. 2012. 9.

The respondents do not agree that the Act meets the mandatory 'properness' to order to be upheld as a proper use of commerce power. The result of the ACA is that everyone gains health insurance and the overall price of premiums goes down, but the "law doesn't somehow become redeemed because it has beneficial policy effects in the health care market."[146] For the respondents, the ends do not justify the means. The respondents think that the Act forces individuals into the health insurance market in a manner that is beyond Congress's authority. It would be similar to Congress mandating that all individuals purchase a car in order to support the Detroit market for cars, and thereby create jobs. This would result in a decrease of individuals on welfare and lowering of the subsidy to cover those on welfare.

The proponents acknowledge that "the mandate was designed not just to target individuals who want or need health insurance, but also to 'broaden the health insurance risk pool to include healthy individuals,' who are less likely to use the insurance that they nonetheless must purchase."[147] Congress claims that the cost-shifting is justification for Congress's regulation, but in fact the cost-shifting that Congress claims to eliminate is merely transferred. Prior to the ACA, all market participants subsidized the compensated care. With the enactment of the ACA, the young and healthy have been *forced* into the market and thereby subsidize the rest of the population. To uphold such an Act would imply that Congress has the authority to force individuals into any market and "could

[146] Verrilli, Jr., Donald B., Paul D. Clement, and Carvin A. Michael . *Oral Argument Before the Supreme Court of the United States* . 2012. 82.25-83.2

[147] Clement, Paul D. "On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit: Brief For State Respondents." no. 11-398. 2012. 6.

mandate any product's purchase."[148] This is highly improper because the cost-shifting issue is not eliminated and Congress is allowed to promote commerce by prescribing participation.

The respondents think that the proponents seek to justify this 'forced participation' by claiming that all individuals will predictably enter the market, so that "requiring insurance today and requiring it at a future point of sale amounts to policy differences in degree, not kind."[149] Respondents do not agree with the conclusion of Congress, however,"[that] the substance of commerce regulation within its proper sphere may prevent harm before it occurs does not support the radically different proposition that the reach of the commerce power extends to individuals outside its sphere simply because some will predictably come within it eventually."[150] If so, they reason, Congress could use this reasoning to predict participation in other markets and Congressional authority would be limitless.

4.2.3 Limiting Principle

The Court has always been hesitant to approve an extension of Congress's powers when a clear limiting principle cannot be established. The burden of proof is therefore on the proponents to show that the ACA is not giving Congress unrestricted power. Verrilli argues that the Act is "not a power that threatens to obliterate the line between 'what is

[148] Carvin, Michael A. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Brief For Private Respondents." no. 11-398. 2012. 32.

[149] Solicitor General Donald B. Verrilli, Jr. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Brief For Petitioners." no. 11-398. 2012. 38.

[150] Carvin, Michael A. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Brief For Private Respondents." no. 11-398. 2012. 52.

truly national and what is truly local, because Congress can exercise it only when enacting comprehensive regulation that is within its commerce power."[151] Verrilli sees the limiting principle as the use of such a statute in a commercial regulatory setting.

The respondents do not accept this as a sturdy limiting factor. Their concern is that refusing to purchase any product "always negatively affect[s] the product's seller relative to compelling individuals to buy from the seller" and will always have a substantial effect on interstate commerce. [152] This means that Congress could use similar reasoning to justify other mandates. The result would be essentially unlimited power because of Congress's claim that "the justification for why this is a valid regulation of commerce is in no way limited to this market."[153] If the Act were upheld under the Commerce Clause, then Congress would have an essentially unrestrained power to compel individuals to enter markets.

Congress attempts to reach 'inactivity' by "relabeling non-participation in economic activity as an 'economic decision' to be a non-participant."[154] By doing so Congress is able to avoid the discussion surrounding the activity vs. inactivity debate. But the respondents are not so quick to agree to the 'renaming'. Simply renaming an 'inactivity' as an 'activity', does not make it so. The respondents do not believe that the

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[151] Solicitor General Donald B. Verrilli, Jr. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Brief For Petitioners." no. 11-398. 2012. 26.

[152] Carvin, Michael A. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Brief For Private Respondents." no. 11-398. 2012. 32.

[153] *National Federation of Indepentent Business v. Sebelius.* 567 U.S. 11-393 (Oral Argument) (Supreme Court) (March 27, 2012).

[154] Carvin, Michael A. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Brief For Private Respondents." no. 11-398. 2012. 33.

‘relabeling’ allows Congress to reach the uninsured individuals; doing so would mean limitless power to mandate individuals to enter any market deemed beneficial for the general welfare.

4.3 Taxing Power

The last major aspect of the debate presented to the Supreme Court is the discussion surrounding Congress’s taxing power. Congress’s ability to tax is distinguished from its power under the Commerce Clause. Therefore, it provides an alternative approach for justifying the ACA. Prior to the Court’s official decision in June of 2012, the Commerce Clause had been considered most important in the debate over the constitutionality of the individual mandate. In fact, it was through the power to tax that the Court eventually found grounds for upholding the statute.

The writers of the ACA stipulated that the penalty was to be collected by the Internal Revenue Service (IRS) as a part of an individual’s tax return. By having the IRS collect the ‘penalty’, the proponents are able to label the statute as an “amend[ment] [to] the Internal Revenue Code.”[155] Verrilli emphasizes that all “non-exempted individual who must file a federal income tax return will owe a monetary penalty, in addition to the income tax itself, for any months in which the taxpayer or dependents lack minimum coverage.”[156] The character of such a statute seems to clearly be worded as a tax. But the respondents take issue here because the statute was passed through Congress as a ‘penalty,’ not as a tax.

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[155] Solicitor General Donald B. Verrilli, Jr. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Brief For Petitioners." no. 11-398. 2012. 53.

[156] *Ibid*., p. 53.

On May 4, 2010, just six weeks after the President Obama signed the ACA into law, the Joint Committee On Taxation published a technical explanation of the ACA and attempted to rename the penalty as a tax.[157] Throughout the entire passing of the bill, "Congress and the President refused to invoke the tax power, by consistently treating the mandate's 'penalty' differently from the ACA's 'taxes.'"[158] The idea of renaming the penalty as a tax, after the passage of the Act, seems to go against the spirit of the ACA for "neither Congress nor the President intended the 'penalty' to be treated as a 'tax.'"[159] The respondents believe that the proponents do not have a "license to rewrite a statute in a way that bears no resemblance to the enacted text and is 'plainly contrary to the intent of Congress.'"[160]

The fear of the respondents is that Congress could attempt to use a similar path to enact other 'penalties' by turning them into 'taxes'. Within Clement's *Brief For State Respondents On The Minimum Coverage Provision*, he presents the dangers of renaming such a 'penalty' as a 'tax':

> "The reason why the mandate's penalty provision is not labeled a tax, is not structured as a tax, and is not grounded in Congress' tax power, and why the President emphatically assured the public that it is not a tax, is because the political branches lacked the public support to enact a tax. To eliminate the mandate and convert its penalty provision into a tax therefore would create more

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[157] Taxation, Joint Committee on. "Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as Amended, in Combination with the "Patient Protection and Affordable Care Act" ." *The Joint Committee On Taxation: Congress of the United States.* May 4, 2010.

[158] Carvin, Michael A. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Brief For Private Respondents." no. 11-398. 2012. 64.

[159] *Ibid*., p. 65.

[160] Solicitor General Donald B. Verrilli, Jr. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Brief For Petitioners." no. 11-398. 2012. 56.

> constitutional problems than it would avoid, as it would license Congress to use the courts to impose taxes that it lacks the political support to enact, thus eliminating the most potent constraint on Congress' vast tax power."[161]

Upholding the proponents' relabeling claim would remove a major limiting principle of taxing power and would give Congress a way to bypass popular opinion. The respondents fear such a possibility, as it would mean an extension of Congressional power.

Another less prominent part of the respondents' argument against the ACA is more subtle. They believe that Congress's claimed authority to mandate health insurance under fear of penalty is unconstitutional, but their issue is not with the 'penalty' *per se* (the mere enforcement of the statute) but with the statute itself. The respondents "are challenging the mandate, not the penalty [because] [t]he mandate is a distinct regulatory requirement that must be supported by a distinct regulatory authority."[162]

This distinction may seem unimportant, but by attacking Congress's "authority to regulate" claim, the respondents separate the mandate from the penalty. For the respondents, the penalty represents the enforcement of the mandate, but if they can show that the mandate itself is unconstitutional, then it would be unnecessary to argue about the enforcement of the statute through the means of a penalty. In separating the two, the respondents and the proponents are, in some ways, arguing about two different topics. The respondents focus solely on the unconstitutionality of the mandate. On the other hand, the proponents appear to think that if they can show that the *enforcement* of the mandate is constitutional, then the mandate must be within Congress's authority. The proponents almost work from penalty to mandate in their argument, whereas the

[161] Clement, Paul D. "On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit: Brief For State Respondents." no. 11-398. 2012. 56.

[162] *Ibid*., p. 51.

respondents focus mostly on the mandate. But to be comprehensive in their argument, the respondents continue to substantiate their objection to the ACA by showing how taxing power does not provide Congress with the authority to enact such a statute and penalty.

Verrilli supports the re-characterization of the 'penalty' as a tax, but for a new 'tax' to be constitutional, Verrilli must show that the penalty has the characteristics of a tax. Looking at the nature of the penalty, Verrilli believes that "[t]he practical operation of the minimum coverage provision is as a tax law."[163] He reasons that the penalty is "fully integrated into the tax system" and functions as a tax because it "will raise substantial revenue, and triggers only tax consequences for non-compliance."[164] The penalty is within the tax system because the penalty functions as an addition to the Internal Revenue Code, meaning that the penalty is to be collected with the federal income tax and insurance coverage is to be reported by the individual on his or her federal tax refund. Though lower courts have argued that the aim of the statute is to "reduc[e] the number of uninsured people, not [to] rais[e] revenue," Verrilli does not believe that a tax "cease[s] to be valid merely because it regulates, discourages, or even definitely deters the activities taxed."[165] The concern is whether the penalty truly raises revenue, for one of the required characteristics of a tax is that it brings in revenue. Verrilli is not as concerned with this specification as are the respondents, for he argues that as "long as the statute is [']productive of *some* revenue,['] Congress may exercise its taxing

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[163] Solicitor General Donald B. Verrilli, Jr. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Brief For Petitioners." no. 11-398. 2012. 52.

[164] *Ibid*., p. 52.

[165] *Ibid*., p. 54.; United States v. Sanchez, 340 U.S. 42, 44 (1950)

powers irrespective of any 'collateral inquiry as to the measure of the regulatory effect of a tax.'"[166]

The respondents do not accept the penalty as a mechanism that truly raises revenue. Their objection is based on what is listed—or not listed—in the revenue raising section of the ACA. In the ACA, under Title IX – Revenue Provisions, Congress named a total of twenty-three revenue-raising mechanisms used by the Act; none of these named the penalty as a mechanism.[167] The respondents point out that since the Act does not list the 'penalty' among its provisions, then the penalty should not be considered a revenue raising mechanism and therefore the penalty fails to be characterized as a tax.

In addition, the penalty, if considered a tax, needs to be recognized as a constitutional tax. The respondents recognize that "[t]he Constitution distinguishes between [']direct['] taxes and indirect [']Duties, Imposts and Excises,['] and requires direct taxes to be apportioned according to population."[168] The proponents argue that the penalty would be considered an indirect tax, more specifically an excise tax, but the respondents do not agree. The penalty would "instead be a direct tax on an individual's wealth, simply because the individual chooses to keep that wealth rather than spend it to purchase insurance," for "[a]ny so-called [']tax['] on failing to purchase insurance would

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[166] Solicitor General Donald B. Verrilli, Jr. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Brief For Petitioners." no. 11-398. 2012. 55. (Emphasis added).

[167] Congress. "Patient Portection and Affordable Care Act." Washington D.C., December 24, 2009. Title IX.

[168] Clement, Paul D. "On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit: Brief For State Respondents." no. 11-398. 2012. 62.

be a direct tax."[169] Such a tax is unconstitutional; therefore, the respondents conclude that the penalty cannot be upheld through taxing power.

4.4 Conclusion

The purpose of this chapter has been to present the opposing arguments submitted to the Supreme Court for decision. General Verrilli, Mr. Clement and Mr. Carvin all offered briefs and oral arguments to the Justices in an attempt to demonstrate support for their respective side. Because of the well-crafted nature of both arguments, the Court was left with a difficult decision. It took many weeks for the Court to finally decide the fate of the ACA, and the final decision was handed down on June 28, 2012.

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[169] Clement, Paul D. "On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit: Brief For State Respondents." no. 11-398. 2012. 62.; Carvin, Michael A. "On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit: Brief For Private Respondents." no. 11-398. 2012. 66.

CHAPTER FIVE

Opinion of the Court

The Court deliberated for three months before announcing its Opinion on June 28, 2012. Chief Justice Roberts organizes the Opinion into three parts: Part I, Part II and Part III, with Part III having A, B, C, and D subsections. Roberts begins the Opinion by acknowledging that *NFIB v. Sebelius* (2012) challenges "two powers that the Constitution does grant the Federal Government but which must be read carefully to avoid creating a general federal authority akin to the police power."[170] In order to "[r]esolv[e] this controversy [we must] examine both the limits of the Government's power, and our own limited role in policing those boundaries."[171]

5.1 Anti-Injunction Act

Before addressing the case's specifics, the Court had to ensure that it possessed the authority to rule on the merits of the case. The debate on the first day of oral arguments addressed the possible application of the Anti-Injunction Act (AIA) of 1867 to the Affordable Care Act's (ACA) penalty.

The AIA "prohibits a person from filing a lawsuit that restrains the assessment or collection of tax. Accordingly, a person is permitted to file a lawsuit only after making

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National Federation of Indepentent Business v. Sebelius. 567 U.S. 11-393 (Supreme Court, June 28, 2012) p. 4.

171 *Ibid*., p. 2.

the tax payments."[172] The Supreme Court confirms the precedent in *Flora v. United States* (1958), where it coins a test for the Court to use as the "full-payment rule."[173] Individuals who want to file suit against a specific tax can only do so once they have paid the full amount of the tax; thus individuals file for a refund after the collection of the tax rather than attempting to bar the collection of the tax in the first place.

The question the Court must answer is whether the ACA's penalty qualifies as a tax and therefore invokes the AIA, which is designed to "protect the Government's ability to collect a consistent stream of revenue."[174] If the AIA does apply, the Court will have to postpone the case and wait until the penalty is collected in full. But if the Court finds that the AIA does not apply to the case, then the Court will be able to rule on the matter and settle it immediately.

In the Opinion, Roberts emphasizes that "[b]efore turning to the merits" of the case the Court "need[s] to be sure [it has] the authority to do so."[175][176] The penalty enforcing the individual mandate is not applied until 2014, thus "the present challenge to the mandate…seeks to restrain the penalty's *future* collection."[177] However, Congress "chose to describe the [']shared responsibility payment['] imposed on those who forgo

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172 *Tax Anti-Injunction Act Law & Legal Definition.* 2013. http://definitions.uslegal.com/t/tax-anti-injunction-act/.

173 *Ibid*.

174 *National Federation of Independent Business v. Sebelius.* 567 U.S. 11-393 (Supreme Court, June 28, 2012). p. 11.

175 *Ibid.*

176 *Ibid.*

177 *Ibid*., p. 12; (Emphasis added).

health insurance not as a [‘]tax,[’] but as a [‘]penalty.[’]”[178] In Roberts’ view, Congress chose to make the distinction between a penalty and a tax. If they had wanted the AIA to apply, then they would have indicated this in the word they chose to designate it.

Roberts looks to Congress to determine how the ACA and the AIA “relate to each other…and the best evidence of Congress’s intent is the statutory text.”[179] He believes that “Congress’s decision to label this exaction a [‘]penalty[’] rather than a [‘]tax[’] is significant because the Affordable Care Act describes many other exactions it creates as [‘]taxes.[’]”[180] Therefore there “is no immediate reason to think that a statute applying to [‘]any tax[’] would apply to a [‘]penalty.[’]”[181] Roberts concludes that “[t]he Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the Anti-Injunction Act.”[182] This in turn means that “[t]he Anti-Injunction Act therefore does not apply to this suit, and [the Court] may proceed to the merits” of the case.[183]

5.2 The Individual Mandate and the Commerce Clause

Having determined that the Court possesses the authority to address the constitutionality of the ACA, Roberts turned to the Court’s ruling regarding the Commerce Clause with the Necessary and Proper Clause. Part III – A of the Opinion

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[178] *Ibid*., p. 12.

[179] *Ibid*., p. 13.

[180] *Ibid*., p. 12.

[181] *Ibid*., p. 12.

[182] *Ibid*., p. 15.

[183] *Ibid*., p. 15.

addresses the Commerce Clause and rules on the questions framed by the proponents and respondents.

5.2.1 Individual Mandate and the Scope of the Commerce Clause

Acknowledging that there is a shifting of costs among hospitals, insurers and policyholders, Roberts describes how the ACA's guarantee-issue and community-rating seek to resolve this issue. Though the government frames the individual mandate as an extension of the substantial effects doctrine by saying that "the failure to purchase insurance [']has a substantial and deleterious effect on interstate commerce[']" and though it is "well established that Congress has broad authority under the Clause," never before has Congress "attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product."[184] Just because this is the first time Congress has tried to make such an assertion does not mean that Congress is obviously wrong, but "sometimes [']the most telling indication of a severe constitutional problem . . . is the lack of historical precedent['] for Congress's action."[185]

Roberts believes that it is crucial to consider the "[']implications of the Government's arguments['] when confronted with such new conceptions of federal power."[186] Congress was given the power to regulate commerce through the Commerce Clause of the Constitution, but the "[t]he power to regulate commerce presupposes the existence of commercial activity to be regulated. If the power to "regulate" something included the power to create it, many of the provisions in the Constitution would be

[184] *Ibid.*, p. 17.

[185] *Ibid.*, p. 18.

[186] *Ibid*.

superfluous."[187] Though the Constitution does not explicitly state that Congress can regulate only existing commerce, the "language of the Constitution reflects" the implicit "understanding that the power to regulate assumes there is already something to be regulated."[188]

Despite the expansive interpretation of the Commerce Clause over the past decades, the Court's ruling have consistently "describe[d] the power as reaching [']activity.[']"[189] This is where the individual mandate deviates from past precedents. The mandate distinctly "compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce."[190] Upholding such a claim would "open a new and potentially vast domain to congressional authority."[191] The nature of *not* doing something is vastly different from choosing *to do* something; "in some cases [individuals] decide not to do something; in others they simply fail to do it."[192] The distinction is the difference between an activity and inactivity. Actively deciding to refrain from participating and just being inactive are indistinguishable with respect to commercial activity. In both cases the individual is not participating within an economic market and is therefore outside the regulation of the Commerce Clause.

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187 *Ibid*.

188 *Ibid*., p. 19.

189 *Ibid*.

190 *Ibid*., p. 20.

191 *Ibid*.,

192 *Ibid*., p. 21.

If such inactivity were ruled within the scope of the Commerce Clause, then it would "bring countless decisions an individual could *potentially* make within the scope of federal regulation, and—under the Government's theory—empower Congress to make those decisions for him [or her]."[193] Drawing a comparison between *Wickard* and this case, Roberts points out that "[t]he farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce."[194] If Filburn had not been participating in the wheat market by growing wheat under the Agricultural Adjustment Act (AAA) of 1938 and was instead just growing wheat for his own consumption, then it could have been argued that Filburn was outside the wheat market and therefore outside the reach of federal regulation.

Wickard, in effect, sets up a limit for the commerce power. The government may only regulate individuals who are actively participating in some market. In the ACA, the government's argument goes beyond that "limitation, by establishing that individuals may be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have them do."[195] The limitless nature of such a claim means that the "Government's logic [c]ould justify a mandatory purchase to solve almost any problem."[196]

Offering a theoretical example, Roberts presents another possible mandatory purchase related to the health care market: the mandatory purchase of vegetables.

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[193] *Ibid*. (Emphasis in the original.)

[194] *Ibid*. p. 22.

[195] *Ibid*., p. 22.

[196] *Ibid*.

Hypothetically, Congress could notice that “many Americans do not eat a balanced diet” and Congress would find that “[t]hat group makes up a larger percentage of the total population than those without health insurance. The failure of that group to have a healthy diet increases health care costs, to a greater extent than the failure of the uninsured to purchase insurance.”[197] Roberts says that Congress could “address the diet problem by ordering everyone to buy vegetables.”[198] The line of reasoning for the mandatory vegetable purchase and the individual mandate is indistinguishable. Both involve an inactivity having substantial effect on commerce and, under the Government’s reasoning, would be within the scope of the Commerce Clause.

Roberts does not agree. Although “Congress’s authority under the Commerce Clause has of course expanded with the growth of the national economy, our cases have [‘]always recognized that the power to regulate commerce, though broad indeed, has limits.[’]”[199] Roberts points out that:

> “People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce. [But] [u]nder the Government’s logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.”[200]

This is not a power that Roberts and the rest of the Court believe the Commerce Clause bestows upon Congress. Such logic would “permit Congress to reach beyond the natural extent of its authority” and would result in a limitless power to regulate all activity and

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[197] *Ibid*., p. 23.

[198] *Ibid*.

[199] *Ibid*.

[200] *Ibid*.

inactivity.[201] The result of such reasoning would "fundamentally chang[e] the relation between the citizen and the Federal Government."[202]

Addressing Congress's claim that the health care market is distinct from other markets, Roberts discusses the nature of sickness or injury. Though every individual will likely need healthcare at some point, this potentiality for future participation does not "authorize Congress to direct them to purchase particular products in those or other markets today."[203] Roberts sees Congress's ability to regulate commerce through the Commerce Clause as a limited power. It is not a "general license to regulate an individual from cradle to grave, simply because he [or she] will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States."[204] Roberts believes that it is the duty of the Court to ensure that there is a separation of powers between federal regulation and state policing powers.

5.2.2 Individual Mandate and the Necessary and Proper Clause

The government argued that Congress has the authority to regulate such 'non-activity' because of the necessity of the individual mandate to a greater regulatory scheme. Using this argument to uphold the individual mandate would mean that it is "not necessary to consider the effect that an individual's inactivity may have on interstate commerce; it is enough that Congress regulate commercial activity in a way that requires

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[201] *Ibid*.

[202] *Ibid*.

[203] *Ibid*.

[204] *Ibid*.

regulation of inactivity to be effective."[205] Roberts begins by recounting the Court's historical precedents that apply to the matter:

> "Although the Clause gives Congress authority to [']legislate on that vast mass of incidental powers which must be involved in the constitution,['] it does not license the exercise of any [']great substantive and independent powers['] beyond those specifically enumerated…We have thus upheld laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise'…But we have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution. Such laws, which are not [']consistent with the letter and spirit of the constitution.[']"[206]

Roberts employs these principles in evaluating the application of the Necessary and Proper Clause to the individual mandate. The difference between this case and prior cases is that "[e]ach of our prior cases [that] uph[eld] laws under that Clause involved exercises of authority derivative of, and in service to, a granted power."[207]

The individual mandate, however, does not fit within the category of these prior cases. It rather "vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power."[208] Providing Congress such power is unprecedented and would result in a Congress that is no longer "limited to regulating under the Commerce Clause those who by some preexisting activity bring themselves within the sphere of federal regulation."[209] Affording Congress the authority to "reach beyond the natural limit" in such a way as to bring non-participating individuals "within

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205 *Ibid*., p. 28.

206 *Ibid.,* p. 28-29.

207 *Ibid*., p. 29.

208 *Ibid*.

209 *Ibid*., p. 29.

its regulatory scope" would be to commandeer the fundamental policing powers of the states.[210] Even though Congress has demonstrated that the individual mandate is "[']necessary['] to the Act's insurance reforms, such an expansion of federal power is not a [']proper['] means for making those reforms effective."[211]

In an effort to show where the Government finds historical evidence for their argument, Roberts brings in the *Raich* precedent. In *Raich*, individuals argued that they were "exempt from that regulation on the ground that they engaged in only intrastate possession and consumption."[212] Roberts recounts the *Raich* opinion, which denies "any exemption, on the ground that marijuana is a fungible commodity, so that any marijuana could be readily diverted into the interstate market."[213] The efforts of Congress to regulate interstate marijuana would have been "substantially undercut if it could not also regulate intrastate possession and consumption."[214]

Therefore, Roberts reasons, *Raich* does not provide a historical precedent for this case because *Raich* is only concerned with the "constitutionality of [']individual applications of a concededly valid statutory scheme.[']"[215] This case is not dealing with an existing "valid statutory scheme"; instead, *NFIB v. Sebelius* (2012) creates a regulatory scheme and then claims that since it necessitates the creation of the individual mandate,

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210 *Ibid*.

211 *Ibid*. p. 30.

212 *Ibid*.

213 *Ibid*.

214 *Ibid*.

215 *Ibid*.

the individual mandate is Constitutional.

Roberts does not agree with this reasoning. As noted earlier, such reasoning "vests Congress with the extraordinary ability to create the necessary predicate," which reaches far beyond any of Congress's regulatory powers. Under neither the Commerce Clause nor the Necessary and Proper Clause does the Court find Constitutional evidence to support the individual mandate. Therefore, the Court holds that individual mandate is unconstitutional as an exercise of commerce power.

5.3 Statute as an Exercise of Taxing Power

In an alternative approach to the problem, Roberts addresses the possibility that a penalty could stand as an extension of Congress's taxing power. The Government asks the Court to "read the mandate not as ordering individuals to buy insurance, but rather as imposing a tax on those who do not buy that product."[216] According to this interpretation, the Court does not have to address the Commerce Clause. Instead, the Court can focus solely on the constitutionality of the ACA as an extension of the Taxing Clause. It is not unusual for the Court to be presented with multiple interpretations "[a]nd it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so."[217] So the question the Court must answer is whether or not the "alternative reading of the statute—that it only imposes a tax on those without insurance—is a reasonable one" and a "fairly possible" one.[218]

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[216] *Ibid*. p. 31

[217] *Ibid.*

[218] *Ibid*., p. 32.

To determine whether this alternate reading is legitimate, the Court compares the definition of a mandate with the definition of a tax. Failure to follow this mandate results in an "additional payment to the IRS when [individual] pays his [or her] taxes."[219] It does not mean that an individual, who has failed to purchase health insurance, is classified as a criminal.[220] According to this understanding, "the mandate is not a legal command to buy insurance. Rather, it makes going without insurance *just another thing* the Government taxes."[221] If on further examination and critique this statement holds true, then lacking health insurance "may be within Congress's constitutional power to tax."[222]

Looking closer at the character of the mandate, its appearance is "like a tax in many respects."[223] The penalty is collected by the IRS and is "paid into the Treasury by [']tax-payers['] when they file their tax returns."[224] Following the character of other taxes, the "shared responsibility payment"—another phrase used to refer to the "individual mandate" or "minimum coverage provision"—does not "apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code."[225] Just like taxes, the amount owed to the IRS is "determined by such familiar factors as taxable income, number of dependents,

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[219] *Ibid*.

[220] *Ibid*.

[221] *Ibid.* (Emphasis added.)

[222] *Ibid.*

[223] *Ibid.,* p. 33.

[224] *Ibid*.

[225] *Ibid*.

and joint filing status."[226] Such characteristics of the penalty result in "produc[ing] at least some revenue for the Government" despite the fact that the penalty is not listed under the revenue-raising provisions of the Act.[227]

If the penalty is indeed interpreted as a tax, Roberts must then address whether the Anti-Injunction Act applies. Congress is meticulous in deciding to label the "payment as a [']penalty,['] not a [']tax[']"; therefore, Roberts argues, the Court must follow Congress's lead in determining whether to "apply the Anti-Injunction Act to any particular statute."[228] Congress reveals its desire by its "choice of label" and thus Congress's 'penalty label' is "fatal to the application of the Anti-Injunction Act."[229]

However—and this is a crucial point—with Congress's choice to label the statute a penalty instead of a tax, the Court must address whether Congress has the authority to enact a statute through the taxing power *without* calling it a tax.[230] Looking for historical evidence, Roberts reviews the "License Tax Cases" as proof that the Court has held that "exactions not labeled taxes [are] nonetheless authorized by Congress's power to tax."[231] In the "License Tax Cases," the Court held that the creation of a statute necessitating the possession of a "federal licenses to sell liquor and lottery tickets—for which the licensee

[226] *Ibid.*

[227] *Ibid.*

[228] *Ibid.*

[229] *Ibid.*

[230] *Ibid.*, p. 34.

[231] *Ibid.*

had to pay a fee—could be sustained as exercises of the taxing power."[232] The next case that Roberts seeks to compare with *NFIB v. Sebelius* (2012) in order to offer more historical support is *Bailey v. Drexel Furniture* (1922).

Using the functional approach—analyzing the function of a statute without looking at the label—the Court determined that the "so-called tax on employing child laborers" was not a tax at all but was "actually a penalty."[233] In *Drexel Furniture* the Court looked at three practical features of the 'tax':

> First, the tax imposed an exceedingly heavy burden—10 percent of a company's net income—on those who employed children, no matter how small their infraction. Second, it imposed that exaction only on those who knowingly employed underage laborers [(this is a scienter requirement)]….Third, this [']tax['] was enforced in part by the Department of Labor, an agency responsible for punishing violations of labor laws, not collecting revenue.[234]

Similarly the Court can use the functional approach to determine whether or not the so-called penalty is actually a tax. Using these three features, Roberts turned a scrutinizing eye to the 'shared responsibility payment.' Considering the first characteristic, the payment "for most Americans…will be far less than the price of insurance, and, by statute, it can never be more. Second[ly], the individual mandate contains no scienter requirement."[235] The third feature dictates that in order for the statue to properly function as a tax it should be collected by the IRS and in fact, the statute does fit that character. Therefore by applying the "same analysis here" as was applied the *Drexel Furniture* case, the Court finds that "the shared responsibility payment may for constitutional purposes be

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232 *Ibid.*

233 *Ibid.*

234 *Ibid.,* p. 35.

235 *Ibid.*

considered a tax, not a penalty."[236]

Although the penalty functions as a tax, the payment can still be used to "affect individual conduct."[237] The payment is a means of influencing individuals to purchase insurance therefore "expand[ing] health insurance coverage" in addition to "rais[ing] considerable revenue" for the government.[238] This is not unheard of; in fact, Roberts acknowledges that "taxes that seek to influence conduct are nothing new" and therefore this payment cannot be struck down because it attempts to coerce people into the health insurance market.[239]

More functional proof that the payment is a tax is that "[w]hile the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful."[240] This is another distinction between penalties and taxes: "[']the concept of [a] penalty….means punishment for an unlawful act or omission[']" whereas the tax—in the context of this case—is payment "citizens may lawfully choose to pay in lieu of buying health insurance."[241] Congress clearly meant for individuals who choose to pay the penalty instead of purchasing health insurance still to be considered law-abiding citizens. For it is "estimated that four million people each year

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[236] *Ibid*.

[237] *Ibid.,* p. 36.

[238] *Ibid.,* p. 36.

[239] *Ibid.*

[240] *Ibid.,* p. 37.

[241] *Ibid.*

will choose to pay the IRS rather than buy insurance."[242] If Congress meant for all penalty-payers to be considered law-breakers, "[w]e would expect Congress to be troubled by [the] prospect…[of] creating four million outlaws."[243] Therefore reason suggests that "instead that the shared responsibility payment merely imposes a tax" as a lawful alternative to the purchase of health insurance.[244]

To fortify his opinion, Roberts' addresses some of the criticisms presented in the Justices dissent. The dissenters believe that Roberts is too quickly dismissing the fact that Congress did not use the correct labels in the structuring of the statute. The dissenters think that the Court "cannot uphold [the payment] as a tax because Congress did not [']frame['] it as such."[245] They believe that the Court should approach the statute in the same manner that Congress wrote it. Therefore, the dissenters hold that "even if the Constitution permits Congress to do exactly what [the Court] interpret[s] this statute to do, the law must be struck down because Congress used the wrong labels."[246]

Roberts is not so quick as to agree that Congress's labels should have any sway in how the Court rules on the case. Though Congress uses labels to craft policies, Roberts trusts that the Court should set aside the policy jargon and instead focus on the functioning of the statute. He believes it is simply the duty of the Court to determine whether Congress has the authority to enact a statute of such structure. Roberts then says

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[242] *Ibid.*

[243] *Ibid.*

[244] *Ibid.,* p. 38.

[245] *Ibid.*

[246] *Ibid.,* p. 39

that:

> "No one would doubt that this law imposed a tax, and was within Congress's power to tax. That conclusion should not change simply because Congress used the word [']penalty['] to describe the payment. Interpreting such a law to be a tax would hardly [']impose a tax through judicial legislation.['] Rather, it would give practical effect to the Legislature's enactment."[247]

By responding thus, Roberts is dismissing the use of a textual analysis of the labels in regards to taxing power and is instead maintaining that the functional interpretation approach is enough to satisfy the question of constitutionality.

The next objection that Roberts responds to is the suggestion that "if the individual mandate imposes a tax, it is a direct tax, and it is unconstitutional because Congress made no effort to apportion it among the States."[248] But Roberts believes that when considered as a tax, the shared payment requirement "does not fall within any recognized category of direct tax."[249] The tax would not fall under the category of a capitalization, because "[c]apitations are taxes paid by every person, [']without regard to property, profession, or any other circumstance. The whole point of the shared responsibility payment is that it is triggered by specific circumstances—earning a certain amount of income but not obtaining health insurance; [therefore], [i]t is not a capitation."[250]

Roberts addresses the general concern over authorizing Congress to tax individuals who are choosing to abstain from an activity when it is so "troubling to

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[247] *Ibid.*

[248] *Ibid.*, p. 40.

[249] *Ibid.,* p. 41.

[250] *Ibid*.

interpret the Commerce Clause" as Congress's authority to "regulate those who abstain from commerce."[251] The first major aspect of the concern is that just because Congress cannot reach inactivity through the Commerce Clause does not mean that Congress cannot reach it through taxing power. It is true that the "Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity. But from its creation, the Constitution has made no such promise with respect to taxes."[252] Taxes have always been used to influence the purchase of products. For example, statutes such as "tax incentives" are already in use to promote the "purchas[e] [of] homes and professional educations."[253] Therefore, Roberts reasons that the Court is not breaking historical precedents by "upholding the individual mandate under the Taxing Clause" the Court is merely recognizing that "Congress [is using] an existing one."[254]

The second major concern with this interpretation of the individual mandate is that it gives Congress the "ability to use its taxing power to influence conduct…without limits."[255] Roberts ensures that the Court has previously dealt with determining such limits and that the historical precedents "police these limits aggressively."[256] Although, Roberts recognizes, "the breadth of Congress's power to tax is greater than its power to

[251] *Ibid.* p. 42.

[252] *Ibid.*

[253] *Ibid.*

[254] *Ibid.*

[255] *Ibid.*

[256] *Ibid.*

regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior" and therefore the concern over the limit of Congress's taxing power unnecessary.[257]

Having worked through all of the arguments submitted to the Court regarding the individual mandate, Roberts then continues with a discussion of the Medicaid expansion cases. This last major part of the opinion, Part IV – A through B, addresses the arguments submitted to the Court concerning the Medicaid case. The Medicaid expansion case was brought in conjunction with *NFIB v. Sebelius* to the Supreme Court for deliberation.

Though there was one majority opinion, which was written and read by Chief Justice Roberts, there was another concurrent opinion, written by Justice Ginsburg. Ginsburg, joined by Justices Sotomayor, Breyer and Kagan, states that she is "concurring in part, concurring in the judgment in part, and dissenting in part" with Chief Justice Roberts' opinion regarding the non-applicability of the Anti-Injunction Act and the constitutionality of the individual mandate through Taxing power. Therefore she joins in Parts I, II, III-C, but she disagrees with Roberts' conclusion that the Commerce Clause does not give Congress the authority to implement a statute such as the individual mandate.

While it is possible to write concurring opinions, it is also customary for the Justices, who held the minority vote, to write a dissent. Justice Scalia, Justice Kennedy, Justice Thomas and Justice Alito joined the dissent and outlined where they disagreed with the majority's reasoning.

[257] *Ibid.,* p. 43.

5.4 Conclusion

In a 5 to 4 decision, the Court ruled that the individual mandate was unconstitutional as an extension of Congress's Commerce Clause power, but that through the Taxing Power, the Court could uphold the penalty as an extension of taxing power. Thus the Court reversed in part and affirmed in part the judgment of the Eleventh Circuit Court of Appeals.

Roberts' opinion has received both criticism and praise since he presented it to the nation on June 28, 2012. Some scholars praise his clever use of doctrine to craft an intricate and nuanced opinion. Others criticize Roberts' for acting as a politician and unfairly manipulating doctrine to better suit his reasoning. Regardless, Roberts' opinion on the individual mandate is a landmark decision that will be held as a precedent by Courts. Scholars will use Roberts' reasoning to craft new doctrine concerning the scope of the Commerce Clause and the uses of the taxing power.

Because of the sophisticated nature of the opinion, it can be difficult to understand how Roberts came to such conclusions. In the subsequent chapter, I analyze and explore the details of Roberts' opinion so that it is easier to grasps the logical flow of his argument. Additionally, I present some of the insight I have gain after synthesizing all of the research I have done on this case.

CHAPTER SIX

Analysis of the Decision

6.1 Affordable Care and Religious Freedom

Though the Supreme Court handed down its decision on *NFIB v. Sebelius* (2012), the constitutional challenges to the ACA have not ended. As the debate surrounding the Commerce Clause and the Anti-Injunction Act has ceased, the discussion has turned to the connection between the ACA and religious freedom. The Court upheld the ACA under the taxing power, indicating that Congress has the right to tax individuals who fail to purchase health insurance and the right to tax companies that do not provide health insurance plans when the company has fifty or more employees. Liberty University—a conservative, Christian university in Virginia—and a number of other private individuals have filed against the ACA on the grounds that the Act infringes upon the religious freedom of the university and of the individual.[258]

The ACA places insurance regulations upon the university and requires the school to provide insurance plans that pays for contraception. Additionally, the University and individuals argue that money from the new regulations will be used to pay for abortions. Liberty University and the individual plaintiffs strongly oppose contraceptives and abortions because both go against their religious beliefs. In anticipation of such criticisms, the ACA included a narrowly defined 'religious employer' exemption. But the

[258] White, Adam R. "Second Round of Major Constitutional Challenges to the ACA Revitalized by the Supreme Court ." *Erickson and Sederstrom Law.* November 28, 2012. http://www.eslaw.com/news_detail?ID=85.

filers argue that the 'religious exception' is too narrow to provide all affected religious parties with the exemption.[259] In fact, it is only "houses of worship" that qualify.[260]

The specific part of the ACA that mandates that all insurance plans provide such coverage has been termed the "contraceptive mandate."[261] This component of the ACA states "all insurance plans must cover, at no charge, abortion-inducing drugs, contraceptives, sterilization, and patient education and counseling for women of reproductive age."[262] Even when religious institutions hold a strong belief against such practices, the Act requires that all religious institutions still pay for insurance that provides such measures or face the tax.

The question this raises is whether Congress has the right to tax individuals or institutions that refuse to comply with health insurance regulations, which directly contradict their religious beliefs. In the Opinion it is clear that the Court seeks to separate the mandate from the penalty. By separating the two, the Court is not providing Congress with the power to *mandate* that individuals or institutions purchase a commodity or insurance plan that infringes on their religious beliefs. Instead, the ACA provides Congress with the ability to *tax* those same individuals or institutions that do not choose to purchase the insurance or commodity. The plaintiffs in Virginia see this as a direct violation of the religious freedom clause found in Amendment One of the Constitution.

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[259] *Ibid.*

[260] Foundation, The Heritage. "OBAMACARE ANTI-CONSCIENCE MANDATE: An Assault on the Constitution." *The Heritage Foundation.* Feburary 21, 2012. http://www.heritage.org/research/factsheets/2012/02/obamacare-anti-conscience-mandate-an-assault-on-the-constitution.

[261] *Ibid*.

[262] *Ibid*.

Though the Court did not rule on this issue of religious freedom case in its June 2012 decision, it is still the Court's responsibility to examine the implications of its decision in its entirety. The decision of the Court grants Congress the power to tax religious institutions or individuals who refuse to provide insurance that covers contraceptives. Such power has never before been granted to Congress.[263]

6.2 Historical Juxtaposition

Although they may attempt to remain objective and uninfluenced by current events, the Justices cannot ignore the contemporary political situation. In 1935 Roosevelt questioned numerous Supreme Court decisions during a press conference and laid out the consequences of these decisions.[264] When the Court continued to strike down his programs, Roosevelt implemented his Court-packing plan beginning with the Judicial Procedure Reform Act of 1937 (hereafter, JPR). Roosevelt felt that the Court was wrongly stripping the federal government of the power necessary to lift the nation out of the Great Depression. He stated in one of his fireside chats that "the Court has more and more often and more and more boldly asserted a power to veto laws passed by the Congress and by state legislatures in complete disregard of this original limitation."[265]

Until *Wickard v. Filburn* (1942), the Court had adopted a very narrow interpretation of the Commerce Clause and had blocked all of Roosevelt's attempts to bring the country out of the depression. If Roosevelt's JPR had passed Congress, then he

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[263] *Lemon v. Kurtzman.* 403 U.S. 602 (1971) (Supreme Court, June 28, 1971).

[264] *Ibid*.; Roosevelt, Franklin D. "FDR Press Conference May 31, 1935." *Press Conference* . 1935.

[265] Roosevelt, President Franklin D. Fireside Chat: Delegation of Powers - United States. 1937.

would have been able to pack the Court with Justices who sympathized with his efforts. In effect, Roosevelt was attempting to force the Court's hand. He felt that the country had "reached the point as a nation where [it] must take action to save the Constitution from the Court and the Court from itself."[266] Roosevelt believed that the other two branches of government needed to find a way to retrieve a "Supreme Court, which [would] do justice under the Constitution and not over it."[267]

With the Court packing-plan in effect, the threatened Court dramatically changed course by upholding his legislation. In 1942, the Court handed down a decision in *Wickard* that fundamentally changed the interpretation of Congress's authority rooted in the Commerce Clause, as I have detailed in chapter two. With the exception of *Lopez* and *Morrison*, the Court has given Congress an almost unrestricted power to regulate whatever it wanted, so long as there were substantial effects on interstate commerce or the regulation was deemed both necessary and proper.

Interestingly, there is a marked similarity between President Roosevelt's comments surrounding the landmark case of *Wickard* and President Obama's statements concerning the Court prior to the ruling on the ACA. On April 2, 2012, just under three months before the Supreme Court announced its decision on the ACA, Obama held a Rose Garden press conference in which he stated that he was "confident that the Supreme Court [would] not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected

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[266] *Ibid*.

[267] *Ibid*.

Congress."[268] Obama warns that the Supreme Court should show judicial restraint so that an "unelected group of people [might not] somehow overturn a duly constituted and passed law."[269] Whether this is a demonstration of Obama's confidence in the constitutionality of ACA or a thinly veiled threat against the Court, it is worth recalling this speech in light of the verdict.

This was not, however, the first time President Obama has questioned the Court. In his State of the Union Address in 2010, he criticized a recent Court verdict claiming that it had "reversed a century of law" when it overturned the Citizens United case decided just a week before the Address.[270] Obama's outspoken expression of his disapproval mirrors Roosevelt's critiques of the Court. While one cannot say with certainty that that Roosevelt's comments and JPR Act influenced the Court to rethink its interpretation of the Constitution, one also cannot say that the same executive influence occurred in the Court's interpretation of the ACA. But the two scenarios can be juxtaposed as a way of highlighting questions about the proper relationship between the three branches of government.

It is not uncommon for the branches of government to critique one another in an attempt to ensure that all branches are upholding the Constitution. But when the Executive Branch begins questioning the Judicial Branch so publically, it sets the precedent for the Legislative Branch also to criticize the Court's rulings. During a press conference held by a few Democratic Senators on March 28, 2012, Senator Blumenthal

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[268] Obama, President Barack. *Harper and Calderon Rose Garden Press Conference - April 2, 2012.*

[269] *Ibid*.

[270] Obama, President Barack. *State of the Union Address 2010.* 2010.

(D-Conn.) stated that for the Court to overturn the ACA it "would not only have to stretch, it would have to abandon and completely overrule a lot of modern precedent, which would do grave damage to this court, in its credibility and power."[271] Blumenthal further commented that "[t]he court commands no armies, it has no money; it depends for its power on its credibility. The only reason people obey it is because it has that credibility."[272] Blumenthal's opinion is clear: if the Court chooses to overrule ACA, the credibility of the Judicial Branch will be hurt, and the result would be a loss of the Judicial Branch's authority.

Perhaps more damaging to the Court's reputation however, is when other branches of government criticize and (perhaps) intimidate the Judicial Branch into going along with the current legislative agenda. The American people do not benefit from hearing important government officials warn or condemn the Court; in fact, such comments taint the Court's decisions and cause people to wonder whether their decisions are politically influenced. That does not imply that the freedom of speech of all citizens should in any way be impeded. But it does suggest that the Legislative and Executive branches should treat the Judiciary with respect, rather than threats. This will help to insure the credibility of the Court in future cases.

Unlike the other branches of government, the Supreme Court is an appointed board of judges who hold their positions long after their appointing presidents have left office. It is meant to stand apart from the political partisanship of current political trends,

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[271] Kapur, Sahil. "Dems Warn Of 'Grave Damage' To SCOTUS If 'Obamacare' Is Struck Down." *TPM.* March 28, 2012. http://tpmdc.talkingpointsmemo.com/2012/03/dems-warn-of-grave-damage-to-scotus-if-obamacare-is-struck-down.php.

[272] *Ibid.*

so that the Court does not become merely another extension of the current political majority. Instead, the Court is to uphold the Constitution, evaluate the laws of Congress within the background of the Constitution and when necessary to decide, "what the law is."[273]

6.3 Textual v. Functional Approach

In the wake of the decision, many scholars have questioned and critiqued Roberts' reasoning in the majority opinion. Their main questions surround the logic behind the non-applicability of the Anti-Injunction Act (AIA) and the seemingly conflicting rationale behind the Court's decision to uphold the ACA through the taxing power. Commentators have attempted to synthesize the two rationales into an "interpretive paradox." This paradox places the textual approach and the functional approach on either end of the spectrum. Chief Justice Roberts uses both of these approaches to craft an innovative opinion.

6.3.1 Textual Approach and the Anti-Injunction Act

The Anti-Injunction Act (AIA) bars the filing of any lawsuit that interrupts the collection of a tax. Plaintiffs may file for refund after the collection of the tax, but not before. When reviewing the ACA's 'penalty', Roberts "avoids policy analysis and instead looks to the text of the statute and the intent of Congress to determine the meaning of the law."[274]

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[273] *Marbury v. Madison.* 5 U.S. 137 (Supreme Court, February 24, 1803).

[274] Huhn, Wilson Ray. "Realism Over Formalism and the Presumption of Constitutionality: Chief Justice Roberts' Opinion Upholding the Individual Mandate." *Akron Law Review*, October 2012.

Instead of looking at how the 'penalty' functions, Roberts uses Congress's nomenclature as a guide to understand how Congress intended the AIA and the ACA to apply to one another. Roberts believes that "[s]tatutes are the voice of the people governing themselves, and in the interpretation of statutes the courts must respect the intent of people's elected representatives."[275] Doing so ensures that Congress's statutes interact with one another in the manner Congress deems necessary. This method of interpreting the 'penalty' was called by scholar Wilson Huhn the "textual approach."[276]

Through the textual approach and in the context of the applicability of the AIA, Roberts reads the "text of the pertinent statute" of the 'penalty' as just that: a penalty, not a tax.[277] Roberts relies on "Congress's decision to label this exaction a 'penalty' rather than a 'tax'" as a telling sign that Congress does not want the AIA to apply to the ACA.[278] Roberts feels that just because the AIA applies to taxes, it does not follow that "a statute applying to 'any tax' would [also] apply to a 'penalty.'"[279] Congress was purposeful when it named the 'shared coverage payment' a 'penalty', for both the ACA and the AIA "are creatures of Congress's own creation. How they relate to each other is up to Congress, and the best evidence of Congress's intent is the statutory text."[280]

This textual approach allows Roberts to conclude that Congress did not intend for

[275] *Ibid*.

[276] *Ibid*.

[277] *National Federation of Indepentent Business v. Sebelius.* 567 U.S. 11-393 (Supreme Court, June 28, 2012).

[278] *Ibid.*

[279] *Ibid.*

[280] *Ibid*.

the AIA to apply to the ACA and, therefore, the Court should hold that the AIA does not apply to the ACA. Roberts uses this approach to decide that the 'shared coverage payment' is not a tax that is subject to the AIA. Yet a few pages later Roberts uses the *functional* approach of the 'payment' to conclude that the 'penalty' can be upheld through taxing power.

6.3.2 Functional Approach and Taxing Power

It is not within Congress's power to "change whether an exaction is a tax or a penalty for *constitutional* purposes simply by describing it as one or the other," writes Roberts, but Congress can use nomenclature to dictate how Congressionally passed statutes should interact with other laws that they have passed.[281] Setting aside the AIA applicability debate in the second part of his decision, Roberts looks at the *function* of the 'shared coverage payment' to determine the constitutionality of the statute. Roberts' analysis "made constitutionality turn upon the *actual effect* of the law, not the *category* that it might be relegated to."[282] In doing this, Roberts used the functional approach to uphold the 'payment' statute through taxing power.

Roberts compares the ACA to *Drexel Furniture*, another case where the functional interpretation of a statute was used to determine whether an Act of Congress was constitutional. In comparing the two, Roberts sets aside the nomenclature of Congress and looks at the actual function of the 'payment' in order to determine whether

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[281] *National Federation of Indepentent Business v. Sebelius.* 567 U.S. 11-393 (Supreme Court, June 28, 2012). (Emphasis added)

[282] Huhn, Wilson Ray. "Realism Over Formalism and the Presumption of Constitutionality: Chief Justice Roberts' Opinion Upholding the Individual Mandate." *Akron Law Review*, October 2012. (Emphasis in original)

or not it is truly a tax. The constitutionality of the individual mandate will thus depend

> upon whether it is or is not a tax, and that determination is not up to Congress. As Chief Justice Roberts noted, if Congress were to enact a law without indicating whether it was a tax, the courts would obviously have to determine whether it was a tax in determining whether it was a proper enactment under the General Welfare Clause.[283]

Roberts in essence separates the decision into two different issues. First, he evaluates Congress's choice to label the statute a penalty. Second, he decides whether the statute, which he now calls a tax, is constitutional. By separating the two approaches, Roberts reasons that the 'shared coverage payment' is not a tax in the first context (and so does not become subject to the AIA) but *is* a tax in the context of constitutional review.

Through his comparison with *Drexel Furniture*, Roberts "identified three factors that distinguish a 'tax' from a 'penalty,' and found that the individual mandate satisfied all three elements."[284] Roberts classified a 'tax' as a statute that is "not so large as to utterly discourage the activity altogether; is collected by the taxing authorities; and is imposed on a strict liability basis regardless of the taxpayer's state of mind or level of culpability."[285] Since the mandate met all three requirements, Roberts concluded that it is in fact a tax because it functions as such.

6.3.3 Analysis of the Paradox

Justice Alito put the real question at issue here to General Verrilli during the oral arguments: "Has the Court ever held that something that is a tax for purposes of the

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[283] *Ibid*.

[284] *Ibid*.

[285] *Ibid*.

taxing power under the Constitution is not a tax under the Anti-Injunction Act?"[286] General Verrilli's answer was "no."[287] Verrilli went on to "distinguish questions of statutory interpretation from questions of constitutional interpretation," but the fact remains that the Court has never used two different interpretive approaches to come to two different conclusions concerning the nature of a single statute. [288]

Though it is not unprecedented for the Court to hold something as a "constitutional exercise of the taxing power whether or not it is called a tax," as seen in the "license tax cases," this marks the first time the Court has ruled that a statute can be an exercise of taxing power while not being subject to the AIA.[289] The dissenting Justices state that the issue this case addressed was not whether "Congress had the power to frame the minimum-coverage provision as a tax, but whether it did so."[290] This is a different question entirely. Never before has the Court held that a 'payment' is both

> [a] penalty for constitutional purposes [and] also a tax for constitutional purposes. In all our cases the two are mutually exclusive. The provision challenged under the Constitution is either a penalty or else a tax. Of course in many cases what was a regulatory mandate enforced by a penalty could have been imposed as a tax upon permissible action; or what was imposed as a tax upon permissible action could have been a regulatory mandate enforced by a penalty. But we know of no case, and the Government cites none, in which the imposition was, for

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286 *National Federation of Indepentent Business v. Sebelius.* 567 U.S. 11-393 (Oral Argument) (Supreme Court) (March 27, 2012).

287 *Ibid*.

288 Huhn, Wilson Ray. "Realism Over Formalism and the Presumption of Constitutionality: Chief Justice Roberts' Opinion Upholding the Individual Mandate." *Akron Law Review*, October 2012.

289 *National Federation of Indepentent Business v. Sebelius.* 567 U.S. 11-393 (Oral Argument) (Supreme Court) (March 27, 2012).

290 *Ibid*.

constitutional purposes, both. The two are mutually exclusive.[291]

The Justices point out that when deciding cases, the Court must only be concerned with what Congress has done, not what it *possibly* has the power to do. The Court "cannot rewrite the statute to be what it is not." This goes beyond interpretation by crossing over into statute rewriting and, in turn, opens the door for Judicial "tax-writing".[292]

Throughout the opinion, Roberts is concerned with showing Congress the "deference" it deserves.[293] Roberts uses "the canon of constitutional avoidance" as a guideline for the application of proper deference.[294] The principle of deference—or respect—is combined with constitutional avoidance doctrine to establish Roberts' understanding of the role of the Court in its relationship with the other Branches of government. The constitutional avoidance doctrine reaffirms the power of judicial review originally granted to the Supreme Court: the power to pronounce statutes unconstitutional. But this authority is not to be abused. The "principle of Separation of Powers cautions respect for the people's political choices and places a brake on the power of judicial review."[295] In this way, the doctrine of constitutional avoidance charges the Court to "(if possible) construe a statute in such a way as to render it constitutional."[296]

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291 *Ibid.*

292 *Ibid.*

293 Huhn, Wilson Ray. "Realism Over Formalism and the Presumption of Constitutionality: Chief Justice Roberts' Opinion Upholding the Individual Mandate." *Akron Law Review*, October 2012.

294 *Ibid.*

295 *Ibid.*

296 *Ibid.*

With this in mind, Roberts joins the majority opinion to uphold the 'shared coverage payment' under taxing power. In his opinion Roberts concedes that though this interpretation is not "the most natural interpretation of the mandate," the Court nevertheless had "the duty to ask whether it was [']fairly possible['] to construe that requirement to be a tax."[297]

6.5 Relationship Status

The decision of the Court to uphold the ACA will have long-lasting effects upon the nation and the interpretation of the Constitution. Understanding the background doctrine the Court used to make its decision provides the background for properly analyzing the verdict of the Court.

6.5.1 Revenue Raising and the Origination Clause

In order to protect the populous from a tyrannical government, the Framers of the Constitution sought to ensure that all revenue-raising statutes would come from the people. To "ensure that the [']power over the purse['] lay with the legislative body closer to the people," the Framers included the Origination Clause in the Constitution.[298] This clause states that "[a]ll Bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."[299] The dissenters emphasize that "[t]axes have never been popular and in part for

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[297] *National Federation of Indepentent Business v. Sebelius.* 567 U.S. 11-393 (Supreme Court, June 28, 2012).; Huhn, Wilson Ray. "Realism Over Formalism and the Presumption of Constitutionality: Chief Justice Roberts' Opinion Upholding the Individual Mandate." *Akron Law Review*, October 2012.

[298] Eastland, Terry. "Round Two: Another Constitutional Challendge to Obamacare." *The Weekly Standard* 18, no. 27 (March 2013).

[299] "The Constitution of the United States," Article I, Section 7, Clause 1

that reason, the Constitution requires tax increases to originate…in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next election, which is never more than two years off."[300]

Reviewing the passage of the ACA through Congress in light of this Clause, one can see that the first draft of the ACA was presented in the House of Representatives. But when the Bill went to the Senate, they "[struck and replaced] the entire text of a bill."[301] The dissenters believed that "Congress knew precisely what it was doing when it rejected an earlier version of this legislation that imposed a tax instead of a requirement-with-penalty."[302] Taxes are never popular, so to avoid the stigma, the Senate rewrote the statute. Although "technically [the Bill] originate[d] in the House," when the statute was "[s]ent to the Senate, the bill became something else. [I]ts entire text [was] deleted and replaced with [the] provisions that ultimately became the ACA."[303] Though it is not uncommon for the Senate to 'strike and replace' other statutes of the House's bills, the question remains whether such editing is bypassing the origination clause when dealing with bills that include revenue raising provisions.

Prior to the decision, the government argued that the ACA was not a revenue-

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[300] *National Federation of Indepentent Business v. Sebelius.* 567 U.S. 11-393 (Dissent) (Supreme Court, June 28, 2012).

[301] Eastland, Terry. "Round Two: Another Constitutional Challendge to Obamacare." *The Weekly Standard* 18, no. 27 (March 2013).

[302] *National Federation of Indepentent Business v. Sebelius.* 567 U.S. 11-393 (Dissent) (Supreme Court, June 28, 2012).

[303] Eastland, Terry. "Round Two: Another Constitutional Challendge to Obamacare." *The Weekly Standard* 18, no. 27 (March 2013).

raising bill; therefore, it would not matter where the bill originated. Only after Roberts upheld the mandate through taxing power did the origination issue really come to light. Roberts felt that so long as the payment provision "compl[ied] with the other requirements in the Constitution," just as all "tax[es] must," then ACA could be found constitutional.[304] If a later Court finds that the 'payment provision' did not originate in the House, then the entire constitutionality of the provision as a proper revenue raising tax could be called into question; and, in turn, the rest of the ACA. Roberts' disregard for the origination clause is one of the first instances where the voice of the populace is bypassed.

6.5.2 Bypassing the populace

The separation of powers outlined in the Constitution creates three branches of government that, together, ensure no one body oversteps its bounds of Constitutional power. The Judicial branch is unique from the other two branches of government, because the Bench contains appointed officials, whereas, the other two branches employ democratic elections.

Roberts is right that when a bill is passed through Congress, it is not the Court's "job to protect the people from the consequences of their political choices."[305] If the people do not agree with the decision of the elected officials, then it is their responsibility to throw the offending officials out of office. But what Roberts fails to recognize is the elected officials did not pass a tax because the proponents of the ACA did not have the

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[304] *National Federation of Indepentent Business v. Sebelius.* 567 U.S. 11-393 (Supreme Court, June 28, 2012).

[305] *Ibid*.

political popularity necessary to raise taxes 2.5%. Throughout the passage of the ACA through Congress, the President and proponents alike ensured the American people that the ACA's penalty was not a tax. It was only after the ACA passed that the Joint Committee on Taxation presented a technical explanation of the Act and characterized it as a tax.

Recharacterizing the act after securing its passage through Congress bypasses the opinions of the people. In this ruling Roberts has provided Congress with the ability to avoid popular opinion altogether. Through such "judicial legislation" the Court is "imposing a tax" on the people.[306] Effectively the Court's ruling is "invert[ing] the constitutional scheme, and [placing] the power to tax in the branch of government least accountable to the citizenry."[307]

Changing the structure of the "constitutional scheme" allows Congress to re-label other taxes as penalties in order to escape the political backlash associated with raising taxes. This allows Congress to circumvent popular vote and popular opinion on taxes by framing the functional structure of penalties as taxes. Roberts claims that he is invoking "constitutional avoidance" when he reframes the statute as a tax. The dissenters strongly disagree, pointing out that the Court feigns "judicial modesty." But it does not. This is, in the view of the dissenters, "a vast judicial overreaching."[308] Instead the Court has re-written a statute that "Congress did not enact and the public does not expect." The effect

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[306] *Ibid.* (Dissent)

[307] *Ibid.*

[308] *Ibid.*

of this is to undermine the most basic American ideal protected by the Constitution: liberty.

The Constitution is a protection that has "powerful meaning and vital relevance to the [current] times."[309] It preserves the structure of government so that the "restraints imposed by federalism and separation of powers" are enforced.[310] These are so often forgotten as a basis for the personal freedoms Americans enjoy. Thus the intrinsic value of the structure of government becomes "undervalued or even forgotten" by the people.[311]

The Court's ruling should have been guided by "caution, minimalism, and the understanding that the Federal Government is one of limited powers, [b]ut [instead] the Court's ruling undermines those values at every turn."[312] Without the structure and separation of powers, the core ideals of our nations' founding are lost. It is the responsibility of the Court to "remind [the] people that the Framers considered structural protections of freedom the most important ones."[313] Instead, the majority opinion undercuts this defense and ignores that "[t]he fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril."[314]

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[309] *Ibid.*

[310] *Ibid*.

[311] *Ibid*.

[312] *Ibid.*

[313] *Ibid.*

[314] *Ibid*.

CHAPTER SEVEN

Conclusion

Throughout this thesis I have argued the necessity of reviewing related case law and doctrine before coming to conclusions about the decision in *NFIB v. Sebelius* (2012). Though the Court did not ultimately use the Commerce Clause as the constitutional foundation for upholding the individual mandate, the history of commerce cases provides essential background for Roberts' majority opinion. It is worth briefly recalling the major turning points in this history.

In *Gibbons v. Ogden* (1824), the Court began to define the scope of the Congress's commerce power, affirming a broad commerce power and providing an initial definition of "commerce." Not until the early 20th century did the Court provide a narrower understanding and interpretation of the Commerce Clause. In three important cases, the Court reined in the federal government's power and redefined the limits of the Commerce Clause. But as the Great Depression continued to have a massive impact on American life, the government was left with little power to help the people. By 1937, President Roosevelt had become thoroughly frustrated that the Court refused to pass his New Deal legislation. It was then that he presented the Judicial Procedures Reform Act of 1937 which, had it passed, would have both expanded the number of justices sitting on the Bench and provided the President with the majority needed to authorize his programs. The 1942 decision of *Wickard v. Filburn* was a landmark case that established a new precedent for Congress's broad regulatory powers. Until the last few decades with cases such as *Lopez* and *Morrison*, the reach of Congress's commerce power appeared to be unlimited.

The interpretive doctrines that scholars have used to debate this case are also important to restate. Through the substantial effects doctrine, Congress has the authority to regulate any activity—economic or non-economic in character—so long as it can be shown that the activity has substantial effects on the interstate market. Congress has used this doctrine to pass many laws, including the Civil Rights Act of 1964. But Congress does not just have to rely on the Commerce Clause to find constitutional authority to regulate. When the commerce power is combined with the necessary and proper clause, Congress has the ability to reach activates so long as the regulation of the specific activity is necessary to a greater regulatory mechanism and so long as the regulation of that activity is a proper exercise of Congress's power. Through these doctrines, scholars have been able to compile a comprehensive understanding of the commerce power.

However, Congress is not limited to the Commerce Clause as the only means of regulation. All taxation contains some regulatory component. Through the taxing power, Congress has the authority to raise revenue and at the same time regulate specific activity. But these taxes must be reviewed with scrutiny so as not to become burdensome penalties. Through *Drexel Furniture*, the Court was able to devise a three-part test to help determine whether an act is functioning as a penalty or a tax.

Having reviewed the historical and scholarly background of the case, it is also vital to study the structure of the health insurance market in order to grasp the problems that the ACA is designed to address. The main target of the ACA is the cost and risk shifting phenomena that occurs among hospitals, insurance companies and policyholders. The large amount of uncompensated care provided by hospitals results in the shifting of costs to the insurance companies. From there, the shifting of costs and risk falls upon the policyholders. By mandating that all individuals purchase health insurance, the ACA ensures that there will be little to no uncompensated care given at hospitals, which arrests the cost-shifting. Without the individual mandate, the rest of the ACA's policies the fail to solve the cost shifting issue. That is why Solicitor General Verrilli argued that the individual mandate is necessary to a greater regulatory scheme.

Verrilli attempted to show that the minimum coverage provision was both a necessary and proper to exercise of Congress's regulatory commerce power. Verrilli showed that the insurance market is an interstate market and that the individual purchase insurance has substantial effects upon that same interstate market. Therefore, he concluded, that the individual decision to purchase health insurance should be within the reach of Congress's commerce power.

The respondents countered Verrilli's claim with the discussion of whether Congress has the authority to regulate both activity and *inactivity*. The individual mandate would be the first time Congress has attempted to regulate an individual's choice to *not* participate in a market. Such a claim reaches far beyond the current scope of the commerce power. The respondents also pointed out that the cost-shifting issue is a result of Congress's own making, but this does not mean that Congress can then overstep its authority to solve a problem it created. Congress could have used other policies to subsidize the ACA that would have been adequate, so the individual mandate is not truly necessary.

The properness of the statute was also debated before the Court. Proponents believed that such a statute was a proper use of Congress's powers because it resulted in the decrease of healthcare costs and an increase in the access of such healthcare. But the respondents were not swayed. Despite the fact that it is good to lower costs and make access easier, this does not mean that a statute is proper when it must force healthy individuals into an insurance market. These individuals are likely not to use the insurance themselves, but their payments will be used to subsidize those who are higher-risk.

Additionally, there is also the issue of whether the statute contains any limiting principle. Verrilli believes that the inherent limiting factor is that the regulation only applies to commerce. But that factor is not so clear, since Congress has used its regulatory powers to reach both economic and non-economic activity so long as there are substantial effects on interstate commerce. Now Congress has attempted to call every choice to *not participate* in a market an "active" economic decision. Therefore, Congress would be able to regulate both economic activity and inactivity. Such an extension of Congress's power would have no limit and would result in an unregulated federal policing power that should be reserved to the states.

In the first part of his opinion, Roberts agrees with the respondents that such power goes beyond Congressional commerce authority. Because Congress labels the mandate a penalty, Roberts believes that Congress did not intend for the Anti-Injunction Act to apply to the mandate. Through the use of the textual approach Roberts is able to conclude that the AIA does not apply to the statute and the Court does not have to postpone the lawsuit, as the AIA would have dictated.

However, in the second part of his opinion he finds that while the textual approach was applicable to the AIA debate, the "functional approach" should determine whether Congress has the constitutional authority through the taxing power. Upon application of the *Drexel Furniture* test, Roberts concluded that the 'penalty' used to enforce the mandate did not function as a penalty, but was instead a tax on individuals who do not have health insurance. Through this interpretation of the statute, Roberts believed that the ACA's individual mandate could be upheld through Congress's taxing power.

Using two conflicting approaches to decide that the mandate is both a tax and not a tax, *Sebelius* marks the first time the Court has held a statute to be a tax and in the same breath ruled that the AIA does not apply. Such a divergence implies that Congress and the Court can cleverly ignore Congress's statutes when they become inconvenient to the debate at hand. This is dangerous ground for the Court to tread.

But such dangers are only the beginning. With this swift decision, the Court has fundamentally changed the relationship between Congress, the populace and the Court. No longer does the Court appear to stand apart from the contemporary political influences; instead the Court has become an extension of the political influence. Such a breach in the foundational structure of the Separation of Powers will have long lasting effects upon the connection between the populace and the federal government. The restructuring resulting from this ruling demonstrates an unprecedented failure in checks and balances between the three branches of government. Though it is not the Court's job to protect the people from their choices of their elected officials, it is the Court's duty to protect the Constitution and the personal liberties of all the American people.

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