COMMENTS

NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS: THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

> This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist.
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> — Chief Justice John Marshall, *McCulloch v. Maryland*[1]

> The taxing power of the Federal Government, my dear; the taxing power is sufficient for everything you want and need.
>
> — Justice Harlan Fiske Stone to Secretary of Labor Frances Perkins[2]

"In 2010, Congress enacted the Patient Protection and Affordable Care Act."[3] The Act, containing "10 titles[,] . . . over 900 pages[,] and . . . hundreds of provisions,"[4] had been the subject of intense public debate and political maneuvering, from at least as early as the time that President Barack Obama articulated to Congress the principles he believed should guide health care reform,[5] through the Act's controversial passage using budget reconciliation,[6] and up to the Supreme Court's ultimate decision over its constitutionality in *National Federation of Independent Business v. Sebelius*[7] (*NFIB*) in June 2012.[8] Two "key provisions" of the Act reached the Court for constitutional review: the "individual mandate" and the "Medicaid expansion."[9] In brief, the

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[1] 17 U.S. (4 Wheat.) 316, 405 (1819).

[2] FRANCES PERKINS, THE ROOSEVELT I KNEW 274 (Penguin Books 2011) (1946).

[3] Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2580 (2012) (citation omitted) (citing Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 26 and 42 U.S.C.)).

[4] *Id.*; *see also* THE HENRY J. KAISER FAMILY FOUND., SUMMARY OF NEW HEALTH REFORM LAW (2011), *available at* http://www.kff.org/healthreform/upload/8061.pdf.

[5] *See* President Barack Obama, Remarks by the President to a Joint Session of Congress on Health Care (Sept. 9, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-a-Joint-Session-of-Congress-on-Health-Care.

[6] *See, e.g.*, David M. Herszenhorn & Robert Pear, *Final Votes in Congress Cap Battle on Health Bill*, N.Y. TIMES (Mar. 25, 2010), http://www.nytimes.com/2010/03/26/health/policy/26health.html.

[7] 132 S. Ct. 2566.

[8] *See generally* Lyle Denniston, *Health Care: Time to Sum Up*, SCOTUSBLOG (June 26, 2012, 7:37 PM), http://www.scotusblog.com/2012/06/health-care-time-to-sum-up.

[9] *NFIB*, 132 S. Ct. at 2580; *see* 26 U.S.C. § 5000A (Supp. IV 2010) (individual mandate); 42 U.S.C. §§ 1396a(a)(10)(A)(i)(VIII), 1396a(k)(1), 1396d(y)(1), 1396u-7(b)(5), 18022(b) (2006 & Supp. IV 2010) (Medicaid expansion).

individual mandate "requires most Americans to maintain 'minimum essential' health insurance coverage"[10] or else "make a '[s]hared responsibility payment' to the Federal Government."[11] The Medicaid expansion "expand[ed] the scope of the Medicaid program and increase[d] the number of individuals the States must cover"[12] by dictating that any state that "d[id] not comply with the Act's new coverage requirements . . . [might] lose not only the federal funding for those requirements, but all of its federal Medicaid funds."[13]

"[M]inutes after the President signed" the Act into law,[14] "Florida and 12 other States filed a complaint in the Federal District Court for the Northern District of Florida."[15] Later, "13 more states, several individuals, and the National Federation of Independent Business" joined the original plaintiffs.[16] Having disposed of several of the plaintiffs' other claims in a prior ruling[17] — as well as the defendants' arguments that the individual mandate was a tax and that the challenge was therefore barred by the Anti-Injunction Act[18] — on January 31, 2011, Judge Vinson addressed the plaintiffs' arguments (1) that the Act's individual mandate violated the Commerce Clause and (2) that the Act's expansion of Medicaid "violate[d] the Spending Clause and principles of federalism protected under the Ninth and Tenth Amendments."[19] Despite disagreeing over "numerous facts," the parties had filed cross-motions for summary judgment, leading Judge Vinson to conclude that they "appear[ed] to agree that disposition of [the] case by summary judgment [was] appropriate" because issues of law were ultimately dispositive.[20]

Judge Vinson granted summary judgment to the defendants regarding the validity of the Medicaid expansion under the Spending Clause;

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[10] *NFIB*, 132 S. Ct. at 2580 (quoting 26 U.S.C. § 5000A (Supp. IV 2010)).

[11] *Id.* (alteration in original) (quoting 26 U.S.C. § 5000A(b)(1) (Supp. IV 2010)).

[12] *Id.* at 2581.

[13] *Id.* at 2582 (citing 42 U.S.C. § 1396c (2006)).

[14] Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1263 (N.D. Fla. 2011).

[15] *NFIB*, 132 S. Ct. at 2580.

[16] *Id.*

[17] *See Bondi*, 780 F. Supp. 2d at 1265 (citing Florida *ex rel.* McCollum v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120 (N.D. Fla. 2010)). In addition to the plaintiffs' Commerce Clause argument against the individual mandate and Spending Clause argument against the Medicaid expansion, the plaintiffs had previously asserted violations of substantive due process, of the Constitution's prohibition on unapportioned direct taxes, of the Ninth and Tenth Amendments, and of state sovereignty. *See McCollum*, 716 F. Supp. 2d at 1129–30.

[18] 26 U.S.C. § 7421(a) (2006); *see Bondi*, 780 F. Supp. 2d at 1265 n.4. The Anti-Injunction Act provides that, save for one of several enumerated exceptions, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a).

[19] *Bondi*, 780 F. Supp. 2d at 1265.

[20] *Id.*

however, he granted summary judgment to the plaintiffs as to their requests for declaratory relief regarding the individual mandate.[21] Addressing the Medicaid expansion first, Judge Vinson "join[ed] all courts to have considered this issue" in rejecting the plaintiffs' argument that the federal government's threat to withhold all Medicaid funding for noncompliance with the Act was impermissibly coercive.[22] While expressing sympathy for the states' lack of power relative to the federal government due to the latter's "enormous economic advantage," he concluded that absent Supreme Court revision of its Spending Clause jurisprudence, "the states have little recourse to remaining the very junior partner in this partnership."[23]

Next, analyzing the validity of the individual mandate, Judge Vinson found that, because "[i]t would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause,"[24] the mandate's constitutionality "turn[ed] on whether the failure to buy health insurance is 'activity.'"[25] Rejecting each of the federal government's arguments that the behavior regulated by the Act was indeed activity,[26] the court held that "[t]he individual mandate [was] outside Congress' Commerce Clause power, and it [could not] be otherwise authorized by an assertion of power under the Necessary and Proper Clause."[27] Because of this constitutional failure, Judge Vinson held that the proper remedy was for the entire Act — not merely the individual mandate or a handful of provisions — to be voided,[28] since ultimately "the individual mandate and the remaining provisions are all inextricably bound together in purpose and must stand or fall as a single unit."[29]

The Court of Appeals for the Eleventh Circuit affirmed in part and reversed in part.[30] First, the court affirmed the district court's Medicaid-expansion holding, concluding that rather than suffering coercion, "Medicaid-participating states have a real choice — not just in

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[21] *Id.* at 1307. Judge Vinson did not, however, grant the plaintiffs injunctive relief as to the individual mandate because "the award of declaratory relief [was] adequate and separate injunctive relief [was] not necessary." *Id.* at 1305.

[22] *Id.* at 1269.

[23] *Id.*

[24] *Id.* at 1286.

[25] *Id.* at 1287.

[26] *See id.* at 1287–95.

[27] *Id.* at 1298–99.

[28] *Id.* at 1306.

[29] *Id.* at 1305.

[30] Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1328 (11th Cir. 2011). Chief Judge Dubina and Judge Hull authored the majority opinion jointly, *id.* at 1240 n.1, while Judge Marcus issued a separate opinion concurring in part and dissenting in part, *id.* at 1328 n.1 (Marcus, J., concurring in part and dissenting in part).

theory but in fact — to participate in the Act's Medicaid expansion."[31] Second, the court, in accord with the district court, "conclude[d] that the individual mandate contained in the Act exceeds Congress's enumerated commerce power."[32] Third, the court held that the individual mandate could not be upheld as a tax,[33] emphasizing that "all of the federal courts, which have otherwise reached sharply divergent conclusions on the constitutionality of the individual mandate, have spoken on this issue with clarion uniformity."[34] Notwithstanding the breadth of Congress's power to tax, the power was inapplicable: both the statutory text and the Act's legislative history "overwhelmingly establish[ed] that the individual mandate is not a tax, but rather a penalty."[35]

The Eleventh Circuit reversed, however, the district court's judgment that the individual mandate could not be severed from the rest of the Act.[36] In doing so, the court applied the Supreme Court's "well-established" severability inquiry: unconstitutional provisions should be severed "[u]nless it is *evident* that the Legislature would not have enacted those provisions which are within its power, independently of that which is not . . . if what is left is *fully operative as a law*."[37] Because of the plaintiffs' failure to carry the "heavy burden needed to rebut the presumption of severability," the court "conclude[d] that the district court erred in its wholesale invalidation of the Act."[38]

The Supreme Court "granted certiorari to review [the Eleventh Circuit's judgment] with respect to both the individual mandate and the Medicaid expansion."[39] After holding three days of oral argument in March 2012,[40] on June 28, 2012 — the last day of the October 2011 Term — the Court affirmed the Eleventh Circuit in part and reversed in part.[41] Chief Justice Roberts announced the judgment of the Court,

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[31] *Id.* at 1268 (majority opinion) (citing South Dakota v. Dole, 483 U.S. 203, 211 (1987)).

[32] *Id.* at 1311.

[33] *See id.* at 1313–14.

[34] *Id.* at 1314.

[35] *Id.*

[36] *See id.* at 1328.

[37] *Id.* at 1321 (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987)) (internal quotation marks omitted).

[38] *Id.* at 1323.

[39] *NFIB*, 132 S. Ct. at 2582 (citing Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 603 (2011)). The case was combined with two other Eleventh Circuit cases, *Department of Health & Human Services v. Florida* and *Florida v. Department of Health & Human Services*, for which certiorari on the same issues had been granted. *See id.* at 2566.

[40] *See id.*

[41] *Id.* at 2609. The Court also noted that "[o]ther Courts of Appeals have also heard challenges to the individual mandate." *Id.* at 2581. The Sixth Circuit and the D.C. Circuit had upheld the mandate, while the Fourth Circuit had held that the Anti-Injunction Act precluded consideration of the issue. *Id.* (citing Thomas More Law Ctr. v. Obama, 651 F.3d 529 (6th Cir. 2011); Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011); Liberty Univ., Inc. v. Geithner, 671 F.3d 391 (4th Cir. 2011)).

writing an opinion in part for the Court, in part joined only by Justices Breyer and Kagan, and in part only for himself.[42] The Chief Justice first distanced the Court from the political controversy regarding the Act, noting that "[w]e do not consider whether the Act embodies sound policies. . . . We ask only whether Congress has the power under the Constitution to enact the challenged provisions."[43]

After describing the Act and the procedural history in the lower federal courts,[44] the Court first concluded that the Anti-Injunction Act did not prevent the Court's hearing the case, since Congress had not labeled the mandate as a tax.[45] While "Congress cannot change whether an exaction is a tax or a penalty for *constitutional* purposes simply by describing it as one or the other," the decision of "[h]ow [statutes like the Affordable Care Act and the Anti-Injunction Act] relate to each other is up to Congress."[46]

Next, writing only for himself, Chief Justice Roberts concluded that the Act's individual mandate could not be upheld under either the Commerce Clause or the Necessary and Proper Clause.[47] Reviewing the scope of Congress's commerce power, the Chief Justice reasoned that "[t]he power to *regulate* commerce presupposes the existence of commercial activity to be regulated."[48] Moreover, Court precedents "uniformly describe the power as reaching 'activity.'"[49] "The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce . . . on the ground that their failure to do so affects interstate commerce."[50] In reaching this understanding of the nature of the individual mandate, the Chief Justice rejected the federal government's arguments that all people are "active in the market for health care"[51] and that "almost all . . . will, at some unknown point in the future, engage in a health

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[42] *Id.* at 2575. Justice Ginsburg filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part. Justice Sotomayor joined that opinion in full, while Justices Breyer and Kagan joined all but Part V, in which Justice Ginsburg disagreed with Chief Justice Roberts's conclusion regarding the Act's Medicaid expansion. *See id.* at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[43] *Id.* at 2577 (majority opinion).

[44] *See id.* at 2580–82.

[45] *See id.* at 2583–84.

[46] *Id.* at 2583.

[47] *Id.* at 2591–93 (opinion of Roberts, C.J.).

[48] *Id.* at 2586.

[49] *Id.* at 2587; *see also id.* (citing United States v. Lopez, 514 U.S. 549, 560 (1995); Perez v. United States, 402 U.S. 146, 154 (1971); Wickard v. Filburn, 317 U.S. 111, 125 (1942); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

[50] *Id.*

[51] *Id.* at 2590 (quoting Brief for Petitioners (Minimum Coverage Provision) at 7, 18, 34, 50, Dep't of Health & Human Servs. v. Florida, 132 S. Ct. 2566 (2012) (No. 11-398)) (internal quotation marks omitted).

care transaction."[52] Similarly, rejecting Congress's purported authority under the Necessary and Proper Clause, the Chief Justice found the individual mandate not "proper" because allowing Congress to obtain the vast power asserted under the Commerce Clause through the alternative means of the Necessary and Proper Clause would "undermine the structure of government established by the Constitution."[53]

These legal conclusions, however, were "not the end of the matter" for Chief Justice Roberts.[54] Invoking the canon that "if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so,"[55] Chief Justice Roberts, still writing for himself only, found that "[g]ranting the Act the full measure of deference owed to federal statutes," the individual mandate could be read as imposing a tax.[56]

Writing again for a majority of the Court, the Chief Justice addressed the substantive reasons why the individual mandate could be upheld as a tax. First, he noted, although "the Act describes the payment as a 'penalty,' not a 'tax[,]' . . . that label . . . does not determine whether the payment may be viewed as an exercise of Congress's taxing power."[57] Instead, applying a "functional approach,"[58] the Court held that the individual mandate was a tax "for constitutional purposes"[59] based on the low cost of the exaction for not purchasing insurance, the mandate's lack of a scienter requirement, and the fact that individuals in violation of the statute would pay the exaction to the Internal Revenue Service like their other taxes.[60] In short, the Court concluded: "Our precedent demonstrates that Congress had the power to impose the exaction in § 5000A under the taxing power, and that § 5000A need not be read to do more than impose a tax. That is sufficient to sustain it."[61]

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[52] *Id.*

[53] *Id.* at 2592.

[54] *Id.* at 2593.

[55] *Id.*

[56] *Id.* at 2594. While Chief Justice Roberts's substantive analysis of the individual mandate under the taxing power commanded a majority of the Court, he elsewhere — writing again only for himself — emphasized that his Commerce Clause reasoning was necessary to his reaching the conclusion that the mandate could be sustained as a tax. *See id.* at 2600–01 ("It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question. And it is only because we have a duty to construe a statute to save it, if fairly possible, that § 5000A can be interpreted as a tax. Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction.").

[57] *Id.* at 2594 (majority opinion).

[58] *Id.* at 2595.

[59] *Id.*

[60] *See id.* at 2595–96.

[61] *Id.* at 2598.

Finally, writing for himself, Justice Breyer, and Justice Kagan,[62] the Chief Justice invalidated the Act's Medicaid expansion insofar as it would allow the Secretary of the Department of Health and Human Services "to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion."[63] While under previous Spending Clause jurisprudence the Court "ha[s] long recognized that Congress may use this power to grant federal funds to the States, and may condition such a grant upon the States' 'taking certain actions that Congress could not require them to take,'"[64] "Congress may not simply 'conscript state [agencies] into the national bureaucratic army'" through coercion.[65] Declining to demarcate precisely the line "where persuasion gives way to coercion,"[66] the Chief Justice concluded that, unlike in prior cases, "[i]n this case, the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement' — it is a gun to the head."[67] This invalid application of the Medicaid expansion, however, did not require invalidation of the entire Act: because it was not "evident" that Congress would not have wanted the Act to stand without the coercive terms of the Medicaid expan-

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[62] While the joint dissenters agreed that the Medicaid expansion was unconstitutional as written, *see id.* at 2666–67 (joint dissent), they did not join in that part of the Chief Justice's opinion, perhaps because they would have invalidated the Medicaid expansion in its entirety, not merely in the narrow application invalidated by the Chief Justice's reasoning, *compare id.* at 2607 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.) (noting that, "[i]n light of the Court's holding, the Secretary cannot apply § 1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion," but that the holding "does [not] affect the Secretary's ability to withdraw funds provided under the Affordable Care Act" for failure to comply), *with id.* at 2667 (joint dissent) ("The most natural remedy would be to invalidate the Medicaid Expansion.").

[63] *Id.* at 2607 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.). Over the objection of the joint dissenters, the Court did not invalidate the Medicaid expansion in its entirety. *Compare id.* ("Today's holding does not affect the continued application of § 1396c to the existing Medicaid program. Nor does it affect the Secretary's ability to withdraw funds provided under the Affordable Care Act if a State that has chosen to participate in the expansion fails to comply with the requirements of that Act."), *with id.* at 2667–68 (joint dissent) ("We should not accept the Government's invitation to attempt to solve a constitutional problem by rewriting the Medicaid Expansion so as to allow States that reject it to retain their pre-existing Medicaid funds. . . . [T]he Government's remedy, now adopted by the Court, takes the [Act] and this Nation in a new direction and charts a course for federalism that the Court, not the Congress, has chosen; but under the Constitution, that power and authority do not rest with this Court.").

[64] *Id.* at 2601 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.) (quoting Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 (1999)).

[65] *Id.* at 2606–07 (alteration in original) (quoting Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 775 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part)).

[66] *Id.* at 2606.

[67] *Id.* at 2604.

sion,[68] Chief Justice Roberts "conclude[d] that the rest of the Act need not fall in light of our constitutional holding."[69]

Justice Ginsburg concurred in part, concurred in the judgment in part, and dissented in part.[70] Though agreeing with the Chief Justice that the individual mandate was "a proper exercise of Congress' taxing power," Justice Ginsburg would have held, alternatively, that the mandate was also justified under the Commerce Clause.[71] Emphasizing the nature of the Act as a response to "an economic and social problem that has plagued the Nation for decades,"[72] Justice Ginsburg criticized the Chief Justice's "reli[ance] on a newly minted constitutional doctrine"[73]: that the Commerce Clause could not "permit Congress to 'compe[l] individuals to become active in commerce by purchasing a product.'"[74] Moreover, Justice Ginsburg concluded, the validity of the individual mandate was "even plainer" when analyzed under the Necessary and Proper Clause "as a component of the entire [Act]."[75] Finally, writing only for herself and Justice Sotomayor, Justice Ginsburg criticized the Chief Justice for having, "*for the first time ever*[,] f[ound] an exercise of Congress' spending power unconstitutionally coercive."[76] Instead, Justice Ginsburg found that this case was like any other in that "Congress [was] simply requiring States to do what States have long been required to do to receive Medicaid funding: comply with the conditions Congress prescribes for participation."[77]

Justices Scalia, Kennedy, Thomas, and Alito dissented in a joint opinion.[78] Noting that both the Commerce Clause and taxing power issues were difficult,[79] the joint dissenters believed that "[t]he case is

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[68] *Id.* at 2607 (quoting Champlin Refining Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 234 (1932)) (internal quotation marks omitted).

[69] *Id.* at 2608.

[70] *Id.* at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justice Ginsburg was joined by Justice Sotomayor. Justices Breyer and Kagan joined Justice Ginsburg's opinion in full except for its discussion of the Medicaid expansion. Justice Ginsburg's lengthy opinion addressed the arguments of the Chief Justice and joint dissenters on a number of points not addressed in this short summation.

[71] *Id.*

[72] *Id.* at 2614.

[73] *Id.* at 2618.

[74] *Id.* (alteration in original) (quoting *id.* at 2587 (opinion of Roberts, C.J.)); *see also id.* at 2621 ("The Chief Justice's limitation of the commerce power to the regulation of those actively engaged in commerce finds no home in the text of the Constitution or our decisions.").

[75] *Id.* at 2625.

[76] *Id.* at 2630.

[77] *Id.*

[78] *Id.* at 2642 (joint dissent). The joint dissenters' lengthy opinion addressed the arguments of the Chief Justice and Justice Ginsburg on a number of points not addressed in this short summation.

[79] *See id.* at 2642–43.

easy and straightforward . . . in another respect. What is absolutely clear . . . is that there are structural limits upon federal power" exceeded by the federal government's theories on both issues.[80] After explaining their conclusion that "forgo[ing] participation in an interstate market is not itself commercial activity . . . within Congress' power to regulate" under the Commerce Clause,[81] the joint dissenters disagreed with the Court's upholding the mandate under the taxing power, concluding that "'the terms of [the] act rende[r] it unavoidable' that Congress imposed a regulatory penalty, not a tax."[82]

The joint dissenters elsewhere — though not joining the Chief Justice's opinion on the issue — agreed with the Chief Justice that "the Medicaid Expansion, as enacted by Congress, is unconstitutional."[83] They took issue, however, with the Chief Justice's refusal to strike down the Medicaid expansion in its entirety, believing that authority to "rewrit[e] the Medicaid Expansion"[84] lay with Congress, not the Court.[85] Finally, the joint dissenters argued that, because the individual mandate and the Medicaid expansion "are invalid," "[i]t follows . . . that all other provisions of the Act must fall as well."[86] To the joint dissenters, neither the Act's larger provisions[87] nor its more minor pieces[88] could stand without those two "central provisions."[89]

Justice Thomas dissented briefly to reiterate his "view that 'the very notion of a substantial effects test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases.'"[90]

NFIB did not end the controversies over the Patient Protection and Affordable Care Act or the expansion of federal power that many argued the Act represented. In fact, the complex set of opinions in the

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[80] *Id.* at 2643.

[81] *Id.* at 2648; *see also id.* at 2646 ("If Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power, or in Hamilton's words, 'the hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor sacred nor profane.'" (quoting THE FEDERALIST NO. 33, at 202 (Alexander Hamilton) (Clinton Rossiter ed., 1961)) (omission in original)).

[82] *Id.* at 2655 (alterations in original) (citation omitted) (quoting Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 448 (1830)).

[83] *Id.* at 2666–67.

[84] *Id.* at 2667.

[85] *Id.* at 2668.

[86] *Id.*

[87] *See id.* at 2671–75.

[88] *See id.* at 2675–76; *see also id.* ("When we are confronted with such a so-called 'Christmas tree,' a law to which many nongermane ornaments have been attached, we think the proper rule must be that when the tree no longer exists the ornaments are superfluous.").

[89] *Id.* at 2668.

[90] *Id.* at 2677 (Thomas, J., dissenting) (quoting United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring)).

case added fuel to the fires of other controversies: Had the Chief Justice switched his vote? If so, why?[91] And could the Chief Justice's restriction of Congress's power under the Commerce Clause be squared with his saving the Act under a broad power to tax?[92]

In *To Tax, To Spend, To Regulate*, Professor Gillian Metzger offers two alternative accounts of Chief Justice Roberts's opinion in *NFIB*. On one account, his opinion is predominantly motivated by institutionalist concerns with preserving the legitimacy and stature of the Court. Professor Metzger argues that the analytic contrasts in the Chief Justice's treatment of the commerce, tax, and spending powers reflect two conflicting institutionalist imperatives: pulling the Court out of the political fray and underscoring the Court's role as enforcer of constitutional limits on Congress. On the other account, the different parts of the Chief Justice's opinion are closely linked and all share a libertarian resistance to compulsory measures in favor of choice and incentives. Professor Metzger contends that both accounts are true and that *NFIB*'s future impact may turn on which impulse — institutionalism or anticompulsion — proves more ascendant in the Chief Justice's approach to federal power. She also maintains that despite appearing to signal new judicial scrutiny of federal spending and regulatory measures, *NFIB*'s import will likely be more limited, and its prime impact will be felt in federal-state negotiations in the administrative sphere.

In *Affordable Convergence: "Reasonable Interpretation" and the Affordable Care Act*, Dean Martha Minow argues that Chief Justice Roberts's controlling opinion in the litigation over the Patient Protection and Affordable Care Act is historic not only in its bottom line, but also in its staking out a third position — distinct from the polarized views of the advocates and the rest of the Court. She identifies disagreements dividing the eight other Justices over views of the judicial role, modes of constitutional interpretation, conceptions of time, interpretations of the Court's own history, attitudes toward economic analysis, and approaches to anything new. Dean Minow maintains that the Chief Justice's opinion, in contrast, proceeded with analysis converging with parts of the other opinions' competing views. His opinion overlapped with the others on particular points and issues, but did not surrender individual elements in favor of others. Thus, his opinion

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[91] *See, e.g.*, Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 1, 2012, 1:29 PM), http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law; Orin Kerr, *Did Chief Justice Roberts Change His Vote? Perhaps Not*, VOLOKH CONSPIRACY (June 29, 2012, 6:08 AM), http://www.volokh.com/2012/06/29/did-chief-justice-roberts-change-his-vote-perhaps-not.

[92] *See, e.g.*, Robert Alt, *Twisting a Statute Is Better Than Twisting the Constitution*, SCOTUSBLOG (June 28, 2012, 6:27 PM), http://www.scotusblog.com/2012/06/twisting-a-statute-is-better-than-twisting-the-constitution.

embraced and enacted commitments both to enforcing constitutional limits on government in pursuit of individual liberty and state prerogatives and to respecting Congress as empowered to address complex national issues. Operating in the distinctive manner of a Court mindful that its own exercise of power is necessary but — if used improperly — a potential threat to democratic accountability, the Chief Justice's approach in *NFIB* was a step toward reviving respect for the judiciary by resisting the predictions of pundits and the political calculations of those lacking faith in law as its own distinctive enterprise.