

CHAPTER ONE

Postmortem on *NFIB v. Sebelius*

Early Reflections on the Decision That Kept the ACA Alive

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Introduction

But for one vote by one Justice of the Supreme Court, there would be no reason for any discussion of healthcare under the Affordable Care Act (ACA). Chief Justice Roberts's surprising opinion not only gives life to this symposium, but along with the other opinions by the various Justices serves as a useful context for beginning the process of looking to the future. This essay thus discusses the U.S. Supreme Court's decision in *National Federation of Independent Business v. Sebelius*¹ and its implications going forward.

That the Supreme Court's decision upholding the ACA bears on "The Future of Health Care Reform in the United States" is beyond doubt. Less clear at this time, however, are the precise form and contours of this impact—both in the particular space of healthcare reform and in the broader realm of Supreme Court jurisprudence addressing the scope of congressional power. But being lawyers, a lack of clarity begins our discussion rather than ends it.

Indeed, this discussion was originally pitched to us as a "postmortem," which is a somewhat strange way to think about an opinion that as of the date of this conference (October 12, 2012) had been public for less than four months, and as such was decidedly not dead. Even as of this

writing, the yet-recent decision is very much alive. And thanks to it, so is the ACA. Thus, this essay is more a general analysis of the decision than a postmortem in the literal sense.

We begin with an overview of the decision, featuring three main opinions with a host of unexpected and in many ways remarkable elements. We then discuss the three primary doctrinal areas of the Court's decision: (1) its analysis of ACA's "individual mandate" under the Commerce Clause, (2) its approval of the "individual mandate" under Congress's taxing authority, and (3) its ruling on ACA's Medicaid expansion provisions. Although a relatively short period of time has passed since the decision was announced, it paved the way for continued ACA implementation, which has proceeded along aggressive timelines (particularly following the reelection of President Obama in November). Thus, while appreciating that these implementation efforts are ongoing and in flux, and that additional challenges to the ACA continue to wind their way through the courts, we discuss not only what the Court held and our thoughts on why it did so, but also a few observations on how the Court's decision appears to be affecting (or not) ACA implementation to date.

The decision's impact beyond the realm of healthcare reform likewise remains to be seen. Throughout the decision, the Court draws a number of distinctions that we imagine only lawyers can love, many of which center on—but do not clearly define the boundaries of—the concept of "coercion": At what point does an act of Congress become too coercive, either with respect to individuals or to the states, to withstand constitutional scrutiny? In many ways, the Justices' opinions in *NFIB v. Sebelius* raise far more questions on this issue than they answer, planting seeds for continued constitutional litigation over where to draw lines.

Did Anyone Predict This?

Many people expected that the ACA would survive the Court's review (although we suspect that just as many felt certain it would not after the oral argument). But did anyone predict the constellation of elements in the decision that culminated in that result? Probably not.

First, the Justices split into three main opinions, including an opinion written by Chief Justice Roberts only for himself.

Second, the Chief Justice's opinion was joined in certain places by the four liberals, in the opinion authored by Justice Ginsburg,² and not at all

by the four dissenting conservatives;³ although they clearly agreed with some portions of the Chief Justice's analysis, remarkably, the four conservatives never even mentioned his opinion in their dissent.

Third, the dissent coauthored by the four conservatives has no individually named author. This is an extraordinary step that is exceedingly rare. Perhaps even more provocatively, and as noted, this dissent with no individually named author never mentions, let alone addresses, the analysis in the Chief Justice's opinion. Even Justice Ginsburg, at various times—both when she joined with it and when she did not—at least acknowledged and did business with aspects of the Chief Justice's opinion, as is customary in separate opinions written by individual members of the Court on their own behalf or for one or more other Justices. She also dealt with the four conservatives' dissenting analysis (and notably, they dealt in some places with hers).

Fourth, the Chief Justice was a “swing vote,” and further, was the *lone* swing vote; Justice Kennedy, the usual swing-vote suspect, obviously chose not to join the Chief on any point.

Fifth, the individual mandate was upheld—but *not* on Commerce Clause grounds.

Sixth, the Chief Justice included an in-depth opinion analyzing the individual mandate under the Commerce Clause, even though that issue was upheld under Congress's taxing power, which made it completely unnecessary to address the Commerce Clause issue.

Seventh, the Court held both that the individual mandate “penalty” is not a tax (jurisdictionally speaking) and is a tax (constitutionally speaking). This, of course, is a distinction only a lawyer can love.

Eighth, the Medicaid expansion ruling was in many ways a “sleeper” issue that few people paid much attention to prior to the Court's ruling; yet it produced an unprecedented result, in that the Court found (7 to 2, no less) unconstitutional “coercion” by Congress in connection with financial incentives provided to states under Spending Clause legislation designed to encourage the states to adopt certain programs. Although precious few people predicted this result, and perhaps no one predicted the nuanced outcome of rendering the Medicaid expansion “optional” for states while not striking down those provisions altogether—and, further, preserving every other aspect of the ACA—this ruling could have significant implications for cooperative federalism moving forward, both within and outside of the healthcare industry. Then again, perhaps it will not, as discussed further below. Time alone will tell.

The balance of this essay addresses, briefly, the elements of the decision, how it came out, and the impact it may have moving forward for healthcare policy and in other contexts. Particularly for conversations about structural healthcare reform going forward, it is important to understand the metes and bounds of the Court's decision, and in some ways to try to figure out how it will play out in practice and how long it will survive. To be sure, challenges to the ACA remain ongoing,⁴ but as its implementation plunges forward in the meantime, with *NFIB v. Sebelius* in place as the law of the land, the decision is a crucial one for policymakers and constitutional advocates to assess and understand.

The Commerce Clause: Constitutional Avoidance of “the Broccoli Horrible”

A. Context for the Individual Mandate

A central feature of the ACA, and certainly the headlining issue in *NFIB v. Sebelius*, is the individual mandate (or as the statute calls it, the “individual responsibility” requirement “to maintain minimum essential coverage”⁵). This provision requires that everyone—with certain exceptions,⁶ but virtually everyone—must buy healthcare insurance, or else pay what is called a “penalty,” although the assessment is codified in the Internal Revenue Code. The question is: can Congress impose that requirement in the context of an economy that is about one-fifth driven by healthcare costs⁷ and under circumstances in which we think everybody would concede that the system, if not broken, is certainly not functioning as efficiently as we might hope that it could?

Faced with those circumstances, Congress took what many view as the extraordinary action to impose the individual mandate as part of a complex and intricate legislative package designed to fix—or at least begin to address—an extremely inefficient and, many would argue, dysfunctional healthcare system. To be sure, the individual mandate is just one component of the ACA, a statute that consists of two public laws⁸ consuming more than 950 pages in addition to subsequent amendments that have enacted further technical and substantive changes to its provisions. Congress, in other words, was attempting in the ACA to deal with countless parts of the healthcare system, and the result is a complicated, intertwined web of provisions addressing more issues than most can imagine. To name only a small sample, the ACA includes provisions increasing

reimbursement for primary care providers in Medicaid; addressing fraud and abuse in government healthcare programs; creating and funding preventative healthcare services and programs; closing the Medicare Part D “donut hole” to increase seniors’ access to affordable prescription drugs; providing grants for minority health workers; amending the Fair Labor Standards Act to require a reasonable break time for nursing mothers; establishing new annual fees and excise taxes for health insurers, pharmaceutical manufacturers, and medical device manufacturers; and authorizing dozens of demonstration projects and other initiatives pertaining to healthcare payment and delivery reforms.

Within this context of trying to fix countless different moving parts, Congress also addressed (again through many provisions, including but certainly not limited to the individual mandate) the current functioning of the health insurance market, which renders coverage unattainable for a substantial proportion of the population due to financial constraints, preexisting conditions, or both. Congress did not seek a “single payer” solution, as some countries have implemented; instead, it sought to preserve the private market to the extent possible, including its feature that most Americans rely on employer-sponsored health insurance, particularly those under age sixty-five (i.e., those who do not qualify for Medicare, the country’s very popular single-payer healthcare system for the elderly and individuals with certain disabilities). In doing so, Congress considered the context and essentially said, “Look, we need to have people in the health insurance market in order to make the system work; health insurance is meaningless if those who are sick are shut out of the market; further, the market cannot be sustained if those who are not sick choose to ‘opt out’ of the market until the point at which they do get sick.” This was not a new idea, and indeed its origins came ideologically from the right, not the left.⁹

Congress clearly understood that its mandate decision would draw scrutiny, as it included comprehensive findings within the legislation as to this issue’s effect on the national economy and interstate commerce.¹⁰ In these findings, Congress stated that “[t]he individual responsibility requirement provided for in [the ACA] is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2)”; paragraph (2) then sets forth, in eight subparagraphs, Congress’s explanation for why the individual mandate substantially affects interstate commerce.¹¹ As a further point, the legislation adds that “[i]n *United States v. South-Eastern Underwriters Association* (322 U.S.

533 (1944)), the Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation.”¹²

These provisions plainly are designed to justify the individual mandate as a valid exercise of the Commerce Clause under existing Supreme Court precedent.¹³ And, Congress added, the mandate would be enforced through what the legislation calls a penalty. In describing the consequence of noncompliance as a penalty and not a tax, Congress apparently was not anticipating the argument upon which the Court ultimately would uphold the individual mandate—Congress’s taxing authority. We address the tax issue further below. To stay with the Commerce Clause for the moment, however, the key question is: can Congress impose the individual mandate as a valid regulation of commercial and economic activity under Article I, Section 8, Clause 3 of the Constitution?

B. A Brief Overview of Commerce Clause History

As two students of constitutional law (or so we thought), we both learned from the Chief Justice’s decision that what we thought we knew about constitutional law perhaps is not as obvious as we had come to believe. In particular, we would have thought that under the Court’s decision in *Wickard v. Filburn*,¹⁴ decided more than sixty-five years before *NFIB v. Sebelius* and still on the books, there was no question that Congress had the authority to impose the individual mandate as codified—because, frankly, there are effectively no limits on what Congress can do so long as it is regulating economic activity.

In *Wickard*, a farmer, Roscoe Filburn, was growing wheat on his farm for his own family’s consumption. The U.S. government had established limits on wheat production as part of a scheme for controlling wheat supply and therefore prices during the Great Depression. Filburn was growing more wheat than the laws permitted and was ordered to destroy his crops and pay a fine, even though he was growing the excess wheat for his own consumption and had no intention of selling it. In other words, Filburn argued, his activity was neither “interstate” nor “commerce.” (He was “inactive” in the commercial wheat market.) The Court did not agree, finding instead that Filburn’s wheat-growing activities affected the amount of wheat he otherwise would buy on the open market, and thus were affecting interstate commerce. The issue, the Court held, was not whether the activity was “local” but rather whether the activity “exerts a substantial economic effect on interstate commerce.”

As an interesting sidelight to this, a scholar on Justice Robert H. Jackson—who wrote the opinion in *Wickard* for a unanimous Court—found a letter exchange between Justice Jackson and a Seventh Circuit judge.¹⁵ The judge had criticized Justice Jackson for his opinion in *Wickard*, stating that the decision provided no meaningful guidance to the lower courts or to litigants about how to proceed under the Commerce Clause. Justice Jackson reportedly wrote back and essentially said, “Well, that is because I can’t conceive of any way to articulate any limits, and so I leave it basically to the good judgment of Congress to decide ultimately.” And that is effectively what the *Wickard* opinion reflects—which at least through about the 1990s was the way that nearly everybody thought about Congress’s authority. You could (as many do) question the wisdom of what Congress had done, but so long as the action related to regulating economic activity in some way, it was not for the courts to decide whether it was constitutional or not, at least under the Commerce Clause.

Now, there were exceptions to that general rule, most notably articulated in *United States v. Lopez* (1995) and *United States v. Morrison* (2000).¹⁶ In *Lopez*, Congress was told that there are limits to what it can do—and, for the first time since the New Deal, a provision was struck down as exceeding those limits.¹⁷ In the context of that case, the Court held that Congress could not, under the Commerce Clause, prohibit a person from possessing a gun within a certain distance of a school. The theory was that no form of economic activity was involved, and that the relationship between the conduct and interstate commerce was so attenuated as to be insufficient; to reach the necessary link would require “pil[ing] inference upon inference in a manner that would . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”¹⁸ Therefore, the Court held (in a 5 to 4 decision authored by then-Chief Justice Rehnquist) that this was too far to go and struck down the relevant statute.¹⁹ Even in doing so, however, the Court upheld the general framework of *Wickard*—namely, that there are three broad categories of activity that Congress may regulate under the Commerce Clause: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that substantially affect or substantially relate to interstate commerce.²⁰

Five years later, the Court struck down parts of the Violence Against Women Act of 1994—in particular, the law’s provision for a federal civil remedy to victims of gender-based violence, again on the basic theory

that this was a noneconomic activity with at best an attenuated and indirect effect on interstate commerce, and therefore that was too far for Congress to go under the Commerce Clause.

In the wake of *Lopez* and *Morrison*, the framework of *Wickard* and decades of its progeny remained in place, including the “substantial effect on commerce” standard. Even so, everyone began to accept the idea that “noneconomic” activity that is too attenuated to affect interstate commerce is outside the bounds of Congress’s authority (i.e., not “substantial” enough). That meant, however, that virtually everything else must be *inside* the bounds of that authority.

The Court reinforced this idea in its recent decision dealing with marijuana, *Gonzales v. Raich* (2005).²¹ In *Raich*, the Court relied on *Wickard* in upholding the federal government’s power to prosecute individuals who grow their own medical marijuana pursuant to state law, without selling or distributing it in any way or placing it at any point in the channels of interstate commerce. The Court stated that *Wickard* “establishes that Congress can regulate purely intrastate activity that is not itself ‘commercial’, in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.” [545 U.S. at 18.] In a concurring opinion in *Raich*, Justice Scalia stated his agreement that Congress could prohibit intrastate growing and use of marijuana, because Congress “could reasonably conclude that its objective of prohibiting marijuana from the interstate market ‘could be undercut’ if those activities were excepted from its general scheme of regulation.”²² Because the home-grown marijuana was usable in interstate commerce (even if not in fact used), Congress’s regulation of it was necessary and proper as an incident of its federal regulatory scheme under the Controlled Substances Act.

In *NFIB v. Sebelius*, however, several Justices again demonstrated a desire to find a “limiting principle” for the Commerce Clause—apparently to ensure that Americans are not someday compelled to buy (or, even worse, to eat) broccoli.

C. The Commerce Clause in *NFIB v. Sebelius*

In analyzing the ACA’s individual mandate, the Chief Justice did not follow the framework of prior precedents and their repeated reliance on the “substantial effects” analysis. Instead, he reasoned that there is a fundamental difference between “activity” and “inactivity.” His basic analysis

is that in order for Congress to regulate, there must be an *activity* that is ongoing. Through that lens, he focused on the issue of a specific individual being asked to buy health insurance and decided that there was no “activity” being regulated. Justice Ginsburg’s dissent, in contrast, would have analyzed the question through the lens of the entire market—as was done, for example, in *Wickard* and in *Raich*.

The fear that the Chief Justice and the dissenters embraced in their opinions is the notion that without imposing this type of limiting principle on the Commerce Clause, there are essentially no limits on what Congress can do. That fear, in turn, gives rise to one of our favorite exchanges in the Court, both at the oral argument and otherwise, which is, of course, “the broccoli horrible” (to use Justice Ginsburg’s description of it). This is the notion that Congress will suddenly insist that everyone start buying broccoli and then, having done so, will probably go the extra mile and insist that we actually eat the broccoli that we are required to buy—and we all know that, once that happens, everything we hold dear in life is jeopardized.

So that is the fear, and because of it the Justices must avoid the broccoli horrible. In order to do that, they must devise a limiting principle; here, they identify “inactivity” as that limiting principle.

Justice Ginsburg, we think rightly, takes the Chief Justice and four dissenters to task on this on two counts. First, as noted, she takes an “entire market” perspective, as reflected in prior Court precedents, and sees no dearth at all of “substantial effects” on interstate commerce when individuals elect not to purchase insurance yet do, inevitably, wind up needing healthcare services down the road—which they often cannot afford in their uninsured state. In other words, she believes the Chief Justice and the other dissenters have chosen an odd way to look at the issue by focusing on particular individuals and not on the actual problem that Congress was regulating; and as a result of framing the issue in this odd way, they reach an odd answer. Second, she said, even following the notion of “activity” or “inactivity” as a framework, why isn’t the relevant “activity” the active use of self-insurance?

Particularly striking was the dissenters’ attack on that argument, as their rebuttal is essentially to say that if “active in the self-insurance market” constitutes an activity, then that is mere “word play.” In all seriousness, that is what lawyers live for. On some level, all we do is wordplay, so that is hardly a criticism of any sort. At any rate, Justice Ginsburg’s view seems far more aligned with Supreme Court precedent, including

Wickard and its holding that the farmer growing wheat for his own family instead of purchasing it from the commercial market (i.e., his activity of “self-feeding”) affected the entire market because of the market conditions at the time; in the same way the individual who does not purchase health insurance (i.e., who engages in “self-insuring”) affects the entire health insurance market because of how that market operates. (There are, in fact, a number of ways in which the health insurance market is nothing like, for example, the broccoli market.)

In any event, it is rather stunning, given the history of Commerce Clause jurisprudence—including the long-standing *Wickard*, the more recent *Raich*, and a host of other cases—that the Court would have struck down the individual mandate on Commerce Clause grounds. Even more surprising in some ways is that the Chief Justice felt the need to write an opinion on the Commerce Clause even though he—and a majority of the Court—upheld the individual mandate based on the taxing authority of Congress. Essentially, the Chief Justice’s articulated position is that he had to decide the Commerce Clause issue, because if he had not, his reading of the statute would have been that the mandate “penalty” was not really a tax; thus, it was only in order to “save” the law under the Constitution that he was required to read the provision in a way that he would not otherwise have read it. Therefore, he had to decide the Commerce Clause issue.

Any student of the Court, and likely many casual followers, knows that by and large the Court does not reach out to decide a difficult constitutional issue when there is an easier way to get to the result. Chief Justice Roberts’s detailed Commerce Clause opinion, therefore, strikes us as at least unpersuasive—as does his reasoning on why he had to engage in that analysis in this particular instance.

D. Potential Implications

With the decision on the books, including the Chief Justice’s Commerce Clause analysis, the question then is: What will the impact of the Commerce Clause be in the future? Will the Court continue to draw this particular line of “activity” vs. “inactivity”—and, if so, how much influence will it have on future reform?

Potentially, this decision might not change much as a legal matter, because *Wickard* and *Raich* remain on the books. Moreover, as the different opinions in *NFIB v. Sebelius* show, the difference between “inac-

tivity” and “activity” can be a matter of description in many ways. As a practical matter, too, this decision potentially might not change much, because it appears, as discussed below, that Congress can do this type of legislating whenever it wants, as long as it uses its taxing authority instead of the Commerce Clause.

Ultimately, our guess is that the Commerce Clause aspect of this decision likely will have more impact outside the healthcare area than inside it, because other issues will raise Commerce Clause questions, and there is now more vitality to the Commerce Clause challenges, or so it seems.

The Taxing Authority: Distinctions That Only Lawyers Can Love

While the Court’s decision in *NFIB v. Sebelius* seeks to impose a limiting principle on the Commerce Clause, it simultaneously affirms Congress’s taxing authority rather strongly. The decision contains a clear 5 to 4 ruling that the individual mandate resides within the scope of Congress’s taxing authority and therefore is constitutional. Indeed, even the four dissenters never argue that the mandate would fall outside of Congress’s taxing power; instead, they argue that Congress did not, in this case, make it a tax (because Congress consciously called it a “penalty” instead).

Congress did, after all, describe the consequences of noncompliance with the mandate in numerous places throughout the ACA—and every one of them describes it as a “penalty”; even so, the “penalty” is codified in the Internal Revenue Code and enforced by the Internal Revenue Service. Further, individuals with income below the federal income tax filing threshold are exempt from the penalty, and the mechanism for reporting compliance with the mandate (or for paying in the case of noncompliance) is, in fact, a person’s tax returns. In that sense, the “penalty” has, as Chief Justice Roberts reasoned, at least some indicia of a tax.

The other twist, of course, is that Chief Justice Roberts decided that this is both a tax and not a tax. This conundrum arises because of the tax Anti-Injunction Act (AIA) issue raised in this case. Under the AIA,²³ it is not within a federal court’s authority to enjoin taxes before they are collected. As the ACA cases wound their way through the courts of appeals, the Fourth Circuit ruled that the individual mandate “penalty” was actually a tax, and further that the AIA was a jurisdictional provision

that deprived courts of subject-matter jurisdiction to consider the constitutionality of the mandate until *after* the penalty had actually been assessed against a party.²⁴ In granting certiorari in *NFIB v. Sebelius*, the Court added a Question Presented specifically to address this AIA argument. Several amici supported the analysis of the Fourth Circuit, arguing to the Court that the AIA is jurisdictional and therefore would bar the Court from considering any challenge to the individual mandate until after collection of a penalty—which, these amici argued, would necessarily be a “tax.” Others contended either that the penalty was not a tax (such that the AIA did not apply at all) or that even if the penalty were a tax, the AIA is not jurisdictional (meaning that the Court could choose to address the constitutionality of the penalty even if the AIA applied to it).

The Court, for its part, held that the penalty is a tax but that this was not a problem for AIA purposes, because although the “label” of a penalty cannot control whether the payment at issue is a tax for purposes of *the Constitution*, it can—and, the Court held, does—control the determination of whether the AIA applies. In other words, the Court reasoned that Congress did not want this payment to be a tax for purposes of the AIA’s statutory bar on courts’ consideration of lawsuits seeking to enjoin taxes, but it would be perfectly happy to have this payment be a tax in order to have its statute (i.e., the ACA and its individual mandate provision) upheld. One could argue in criticism, of course, that this is just mere wordplay again. We might respond here, though, that this is not much of a criticism, because so much of what lawyers do could be characterized, at the end of the day, as mere wordplay. We concede, though, that this likely is a distinction that only a lawyer can love. So for the doctors, nurses, teachers, and all other nonlawyers out there, we apologize for the legal profession’s overreaching in this context (although not for our loving it).

In any event, the main point is that the Court seems convinced that the taxing authority under the Constitution extends well beyond the Commerce Clause authority, and further that the individual mandate “penalty” falls squarely within it. Going forward, then, it does seem that, to the extent that Congress wants to continue to be active in this area, it has a fairly easy pathway to get where it wants to go. There is one caveat, though; the Chief Justice did state that at some point taxing can become “coercive,” and in that context will be regarded again as a penalty. How far does that go? Well, that takes us back again to the wordplay and line drawing that lawyers embrace. We all know that the task of answering

“How much coercion is too much coercion?” creates litigation, so we warmly thank the Court for that as they and we go forward from here.

The Medicaid Ruling: Knowing “Coercion” When We See It

The Court’s “coercion” line-drawing exercise becomes even more interesting in the context of ACA’s Medicaid expansion provisions and, indeed, in the context of “cooperative federalism” more generally. This ruling was, to be frank, astonishing to us, all the more so given that seven Justices signed onto it. Never before had any majority of the Court, let alone a 7-to-2 majority, held that a statute enacted by Congress under the taxing and spending authority was unconstitutional because it was an overly “coercive” financial inducement vis-à-vis the states. The Court has, of course, held that Congress has impermissibly “‘commandeered’ a state’s legislative or administrative apparatus for federal purposes,”²⁵ but those rulings were distinct from a holding under the Spending Clause that Congress has used federal “financial inducements to exert a ‘power akin to undue influence.’”²⁶ In other words, while the Court has long recognized that federal Spending Clause legislation potentially *could* offer incentives so coercive that “pressure turns to compulsion,”²⁷ the Court had never, prior to *NFIB v. Sebelius*, held that this actually had happened.

To take a step back, Medicaid is a program jointly administered by the federal government and the states, which provides healthcare coverage to certain low-income individuals. The federal government sets certain rules that apply to all Medicaid programs nationally, and the states can receive federal matching funds if they agree to abide by those federally established rules in setting up their own state Medicaid programs. These rules include certain eligibility criteria—i.e., standards for which individuals qualify for Medicaid coverage. Since its initial enactment in the mid-1960s (through the same legislation that created the Medicare program), Congress has from time to time amended the federal rules that apply to Medicaid, including those concerning eligibility.²⁸ The Medicaid statute itself states that Congress has reserved the “right to alter, amend, or repeal” any provision of it.²⁹ Further, state participation in Medicaid is voluntary; a state can either accept the federal rules for the program, agree to follow them, and take the federal funding associated with such acceptance, or reject the Medicaid rules and in so doing reject the associated federal funding. Since 1982, when Arizona became the last state to

sign up for this offer from the federal government, all states have participated in Medicaid.

ACA's Medicaid expansion provisions once again updated the federal eligibility standards applicable to the program, requiring that each state Medicaid program must, beginning in 2014, extend Medicaid eligibility to all individuals up to 133 percent of the Federal Poverty Level (FPL). To encourage states to accept this eligibility expansion, the law provides that the federal government will pay for 100 percent of the expansion costs through 2016, with that federal share then decreasing gradually yet slightly, ultimately to cover no less than 90 percent of those costs in 2019 and thereafter. The ACA further provides that if a state chooses *not* to get onboard with this expansion, then the law permits—although, notably, does not require—the Secretary of Health and Human Services to deprive that state of *all* Medicaid funding in the future (not just the “expansion” funding). So the question was, once again, is that unconstitutionally “coercive”?

Uses of Congress's taxing and spending authority occur regularly and frequently; the entire entitlement program concept is based on this idea, and all cooperative programs rest on the basic premise that “Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds.”³⁰ In a case decided about twenty-five years ago, *South Dakota v. Dole*,³¹ the Court considered a challenge to a provision in the Federal Highway Act in which Congress required states to increase their minimum drinking age limits as a condition of receiving some portion of federal highway funds. The Court upheld that provision as “encouragement” to states rather than “coercion,” stating in essence that while there may be some point at which a federal law's financial inducement under the Spending Clause becomes “coercive” beyond the bounds of constitutional permissibility, such was not the case there.

Many years passed, and the Court never held that financial conditions attached to Spending Clause legislation amounted to “coercion” of the states. Frankly, everybody seemed to assume that whatever meaning that dictum may have had, it had lost all practical meaning because there had been too many statutes in the past that seemed to cross the line into “coercion” but had never been subject to serious question. But here in *NFIB v. Sebelius*, the Court struck down the Medicaid expansion provisions of the ACA, 7 to 2, stating that this expansion “accomplishes a shift in kind, not merely degree”³² and that, even though the amount that the states are

being asked to contribute is quite small—i.e., nothing at all in the short term and no more than 10 percent in the long term—the Chief Justice wrote a fairly colorful line equating the expansion provisions with “a gun to the head”³³ and stated that “‘Your money or your life’ is a coercive proposition, whether you have a single dollar in your pocket or \$500.”³⁴ In other words, even if it’s only a dollar in your wallet, “your money or your life” is still your life, and so that command is coercive.

That metaphor may prove too much, however. While many states did not like the idea of expanding their Medicaid rolls to this degree (or kind, in the Chief Justice’s view), we do not think that any state really felt as though there was a gun put to its head as a consequence of these provisions, particularly because the statute did not even *require* that states passing on the expansion funds would necessarily be in a position where they actually would lose all existing Medicaid funding—the law merely gave the Secretary *discretion* to terminate funding. Nonetheless, with Justices Breyer and Kagan joining the four conservatives and the Chief Justice, the Court struck down the expansion provisions on the ground of excessive coercion. On the other hand, with that decision made, a different majority of five Justices—the four liberals and the Chief Justice—agreed that the *remedy* for this violation would be a narrow one. Rather than striking down the entire statute on the ground of the constitutional infirmity, they held that the expansion effectively would be “optional” for states. Each state could decide whether to expand its eligibility rules up to the ACA’s requirements; those that did so could receive the increased federal funding provided for under the law, whereas those that did not would lose out on that slab of new money, although the rest of their existing Medicaid entitlement would not be in jeopardy as a consequence.³⁵

Again, you have to love the Court. (Or at least we do.) “Coercion” is not a concept that is self-defining. So for people who make a living in this context, where wordplay really does count, this is a great decision. For purposes of healthcare policy moving forward, however, and how to reform Medicaid and virtually every other entitlement program, this could be a bit of a nightmare, even if only because the contours of the consequences remain uncertain. This is true not just for Medicaid and other healthcare programs, but also for any program based on cooperative federalism. In each context you will have the whole analysis of what the next steps will be and the question, at what stage do those steps become too coercive to pass constitutional muster? Policymakers and also Congress will have to be aware of that going forward.

As a practical matter, the Department of Health and Human Services has strongly encouraged states to accept the ACA Medicaid expansion provisions and funding, and has told the states that there is no “deadline” by which they must declare whether they will do so or not. Thus, their status remains uncertain and in flux. Even so, several states have announced decisions or declared their intent regarding the expansion (and a number of Washington-based think tanks have compiled charts and interactive websites detailing the status of such decisions and declarations).³⁶ As of April 1, 2013, more than half of the fifty states and the District of Columbia have announced that they are expanding or leaning toward doing so; notably, a number of these are states with Republican governors or states that vocally opposed the Medicaid expansion, including some that joined the multistate lawsuit against it. Perhaps the Court was right then, that this financial inducement is “coercive”—if, that is, “coercive” means the offer is simply too good to refuse, even when it is optional.

* * *

The Court’s analysis in *NFIB v. Sebelius* has already inspired countless pages of commentary on its meaning both now and moving forward—for the ACA, for healthcare reform more generally, and for Supreme Court jurisprudence and even judicial behavior more broadly. The case and decision have been compared to *Bush v. Gore*, for example, in terms of a highly publicized case involving a high-profile issue affecting the president, the Congress, the states, and the public at large. Many commentators have focused on Chief Justice Roberts: Did he view this decision as definitional to his legacy as Chief Justice? Did he switch his vote at the last minute? Was he strategic in setting out his constellation of views in this case, rather than sincere in his argument?

For our part, we have difficulty psychoanalyzing the Chief Justice in terms of how he came out in this particular case. Part of the problem likely is as much a function of timing as anything else. This case was argued at the end of March, and the Court has an unbending rule that all cases for each Term conclude by the end of June. That rule compressed the decision-making process extraordinarily. To suggest a sort of stealth strategic approach on the Chief Justice’s part, an almost Machiavellian approach as some describe it, seems to require a lot of “plotting” in a fairly short period of time, as opposed to the Chief Justice’s simply

concluding at the end of the day that he thought the statute really was constitutional, and should be upheld, then trying to develop the best rationale that he could to justify it and from there (if you accept the insider reports) trying to convince at least Justice Kennedy to go along with it. That seems to be a perfectly plausible way of thinking about the situation and the ultimate disposition by the Court, although of course we have no way of knowing.

Ultimately, this case, like *Bush v. Gore*, focuses attention on the Court in a way that may be horribly misleading, because 99 percent of the Court's work deals with complex ERISA questions, environmental issues, or other problems that nobody sees or pays much attention to, let alone understands. Those issues are probably where the Court is at its best, although the high-profile cases, including this and, to take another example, the same-sex marriage cases argued nearly exactly one year after the oral arguments in *NFIB v. Sebelius*, shine a spotlight on the Court that inspires legalese-infused public debate and discussion. Whether this spotlight is healthy for the Court or for the public is itself subject to debate and differing views, which we will not attempt to address here. We will conclude only by saying that with its many remarkable elements and powerful impact on a landmark piece of healthcare reform legislation, *NFIB v. Sebelius* is a critical decision for health policy makers and for anyone concerned with or interested in the line-drawing exercises through which the Court continues to check and balance the contours of Congress's authority. These may be distinctions that only lawyers can love, but they nevertheless affect us all.

Notes

1. 567 U.S. ___, 132 S. Ct. 2566 (2012).
2. Joined by Justices Breyer, Kagan, and Sotomayor.
3. Justices Scalia, Kennedy, Thomas, and Alito.
4. Numerous challenges are active in the courts, including an Origination Clause challenge, attacks on the so-called contraception mandate that relates to the law's preventive care coverage provisions, and questions of whether the law's federal premium subsidies are available to individuals who enroll in federally facilitated exchanges as well as those who enroll in state-run exchanges. Parts of the ACA are at issue in Congress, too, with legislation introduced to repeal various provisions, including the Independent Payment Advisory Board and the excise tax on medical devices.

5. *See* Pub. L. No. 111-148 § 1501(b), 124 Stat. 119 (codified at Internal Revenue Code § 5000A).

6. *See* Pub. L. No. 111-148 §§ 1411 § 1501, 124 Stat. 119, (2010). For example, the law provides for exceptions to the individual mandate for religious objectors, individuals not lawfully present in the United States, and incarcerated individuals. It also provides for exemptions from the penalty for those who cannot afford coverage, taxpayers with income below the filing threshold, members of Indian tribes, those who have received a hardship waiver, and those who were not covered for a period of less than three months during the year.

7. *See* “Health Care Costs To Reach Nearly One-Fifth of GDP By 2021,” Kaiser Health News, last modified June 13, 2012, <http://www.kaiserhealthnews.org/Daily-Reports/2012/June/13/health-care-costs.aspx>. Healthcare costs consumed 17.9 percent of GDP in 2011. *Id.*

8. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

9. *See* Stuart M. Butler, “Assuring Affordable Health Care for All Americans” (lecture, Heritage Foundation, October 1, 1989) (including a provision to “mandate all households to obtain adequate insurance”). Multiple sources have reported on these conservative origins of the individual mandate, including Fox News. *See* “Individual Health Care Insurance Mandate Has Roots Two Decades Long,” Fox News Politics, last modified June 28, 2012, <http://www.foxnews.com/politics/2012/06/28/individual-health-care-insurance-mandate-has-long-checkered-past/>.

10. Pub. L. No. 111-148 § 1501(a).

11. *Id.* § 1501(a)(1)–(2).

12. *Id.* § 1501(a)(3).

13. *See* *United States v. Lopez*, 514 U.S. 549 (1995) (specifically examining, as a key factor in Commerce Clause analysis, whether there had been congressional findings of an economic link supporting the authority of Congress to enact the law at issue); *United States v. Morrison*, 529 U.S. 598 (2000) (same).

14. 317 U.S. 111 (1942).

15. The judge was Sherman Minton, who later went on to become a Supreme Court Justice himself.

16. 514 U.S. 549 (1995); 529 U.S. 598 (2000).

17. In full disclosure, Carter Phillips represented *Lopez* in that case.

18. 514 U.S. at 567.

19. The statute was 18 U.S.C. § 922(q), part of the Gun-Free School Zones Act of 1990.

20. *See also* *Perez v. United States*, 402 U.S. 146 (1971).

21. 545 U.S. 1 (2005).

22. 545 U.S. at 24 (quoting *United States v. Lopez*, 514 U.S. at 561).

23. 26 U.S.C. § 7421(a).

24. *Liberty Univ. v. Geithner*, 671 F.3d 391 (4th Cir. 2011), *remanded*, 568 U.S. ___, 133 S. Ct. 679 (2012), on remand sub nom. *Liberty Univ. v. Lew*, 733 F.3d 73 (2013).

25. *NFIB v. Sebelius*, slip op. at 47 (citing *Printz v. United States*, 521 U.S. 898 (1997) and *New York v. United States*, 505 U.S. 144 (1992)).

26. *Id.* (citing *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

27. *Id.* (citing *Steward Machine*, *supra* note 26).

28. *See NFIB v. Sebelius*, slip op. at 41–45 (Opinion of Ginsburg, J.).

29. 42 U.S.C. § 1304 (cited in *NFIB v. Sebelius*, slip op. at 39, 55) (Opinion of Ginsburg, J.).

30. *NFIB v. Sebelius*, slip op. at 49.

31. 483 U.S. 203 (1987).

32. Slip op. at 53.

33. *Id.* at 51 (“In this case, the financial ‘inducement’ Congress has chosen is much more than relatively mild encouragement—it is a gun to the head.” (internal quotation marks omitted)).

34. *Id.* at 52 n.12.

35. You might wonder why the Court would reach out to decide this issue in this particular case, rather than waiting to see if any state actually would make a decision to take a pass on the expansion funding, and if so whether it would, in fact, be punished by the Secretary with a full withdrawal of all existing Medicaid funding. In other words, was this constitutional issue even ripe to decide in this case, absent a true concrete dispute? The Court did not deal with that issue, so we do not know the answer.

36. *See, e.g.*, “Where Each State Stands on ACA’s Medicaid Expansion,” The Advisory Board Company, <http://www.advisory.com/Daily-Briefing/2012/11/09/MedicaidMap>, last modified Mar. 4, 2013 (reporting where each state currently stands on the expansion “[b]ased on lawmakers’ statements, press releases, and media coverage”); “Status of the ACA Medicaid Expansion after Supreme Court Ruling,” Center on Budget and Policy Priorities, <http://www.cbpp.org/files/status-of-the-ACA-medicaid-expansion-after-supreme-court-ruling.pdf>, last modified March 13, 2013 (“Each state is categorized based on statements and other indications from key policy makers—including governors, Medicaid directors, or legislative leadership.”).