

NFIB v. Sebelius and the Triumph of Fig-Leaf Federalism

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National Federation of Independent Business v. Sebelius was the most anticipated decision of the term. At stake was the Obama administration's "signature" achievement, the Patient Protection and Affordable Care Act of 2010.¹ The ACA, more colloquially known as Obamacare, represented an effort by President Barack Obama and his congressional allies to revolutionize the American health care system. Spread across more than 900 pages of statutory text, the law was and is so complex and wide-ranging that one of the bill's principal supporters, then-House Speaker Rep. Nancy Pelosi, famously suggested to her colleagues that "we have to pass the bill so that you can find out what is in it."

The case involved constitutional challenges to the law brought by 26 states, the NFIB, and several individuals. The plaintiffs argued that two of the ACA's key provisions, the requirement that nearly every American purchase a congressionally prescribed package of health care insurance benefits and mandatory expansion of the states' Medicaid programs, exceeded Congress's enumerated powers (particularly its authority to regulate interstate commerce) and impermissibly coerced the states in violation of the Constitution's federalist structure.

The Court ruled that the commerce power could not support the "individual mandate" to purchase health insurance but, by a separate

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¹ Pub. L. No. 111-148. All references to the ACA herein refer to the act as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152.

majority, also concluded that the mandate could be sustained as an exercise of Congress's power to lay and collect taxes. With regard to Medicaid, seven justices concluded that the expansion could be upheld only if it was not imposed on the states by threatening them with loss of all federal Medicaid funding.

In reaching those results, the justices produced four opinions: an opinion by Chief Justice John Roberts, portions of which speak for the Court (joined, in part, by Justices Stephen Breyer, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan); an opinion by Justice Ginsburg, who would have upheld the entire law as enacted (joined in part by Justices Breyer and Kagan and in full by Justice Sotomayor); an unusual "joint dissent" by Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito, who would have struck down the law in its entirety; and a brief separate dissent by Justice Thomas, restating his view that the Commerce Clause's original meaning would render the entire exercise laughably easy because the power to regulate interstate commerce obviously does not include the power to regulate intrastate, noncommercial matters such as the provision of health care.

NFIB's several holdings may ultimately matter less than its strong affirmation of what Prof. Nelson Lund has called "fig-leaf federalism," which is long on principles and platitudes but short on enforcement when the prize is anything more than symbolic. Despite its strongest statement yet on the limits of Congress's power to regulate interstate commerce, the Court ultimately proved unwilling to strike down the centerpiece of a statute that a majority of the justices agreed blatantly intruded on the authority reserved to the states and the people. Instead, the Court contrived a new rule, ready-made for this case, by which a penalty may be read as a tax in just these precise circumstances, notwithstanding the statutory language or the taxing power's own inherent limitations. And despite finding that the ACA's Medicaid expansion was "a gun to the head" of the states,² the Court salvaged it by rewriting a separate provision of law, thereby enacting a new incentive structure for federal-state cooperation in Medicaid that Congress neither considered nor passed.

With respect to the mandate, the plaintiffs asked the Court to uphold the principles of *United States v. Lopez* and *United States v.*

² Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2640 (Roberts, C.J.).

Morrison,³ without expanding them one inch. And with respect to Medicaid expansion, the state plaintiffs merely asked that the Court apply the limitation it recognized in *South Dakota v. Dole*.⁴ The Court did both those things, but then contrived a different basis on which to uphold Obamacare, for reasons known only to the justices themselves. The nation is thus left with a vigorous federalism and strong limitations on federal power, but they seem to apply only to temporary programs as in *Printz v. United States*,⁵ low-stakes disputes as in *New York v. United States*,⁶ and Congress's and the executive branch's most arbitrary and ill-considered overreaching as in *Lopez*, *Morrison*, and *Bond v. United States*.⁷

The ultimate meaning and impact of *NFIB* is therefore difficult to predict. In this article, all that we can do is consider the Court's holdings and stated reasoning, evaluate their merits, and observe how they affect the state of the law. And we can only guess whether the Court actually means what it says and whether *NFIB* will amount to more or less—perhaps far less—than the sum of its parts.

I. The Individual Mandate Fails as an Exercise of the Commerce Power

The Court held, by a 5-4 vote, that the individual mandate could not be sustained as an exercise of Congress's commerce power.⁸ Unusually, this holding is split across two separate opinions, the chief justice's and the joint dissenters', that proceed along similar, if not identical, lines. Both reject the government's contention that the mandate is a regulation of the means of payment for health care services and is therefore, in itself, a regulation of activities either comprising or substantially affecting interstate commerce. Both too reject the alternative argument that the Necessary and Proper Clause supports the mandate as incident to Congress's lawful regulation of the health insurance markets in the ACA. Justice Ginsburg, joined

³ *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

⁴ 483 U.S. 203, 211 (1987).

⁵ *Printz v. United States*, 521 U.S. 898 (1997).

⁶ *New York v. United States*, 505 U.S. 144 (1992).

⁷ *Bond v. United States*, 131 S. Ct. 2355 (2011).

⁸ 132 S. Ct. at 2599 (Roberts, C.J.).

by Justices Breyer, Sotomayor, and Kagan, dissented on both points, recognizing no judicially enforceable structural limitations on the Congress's power to regulate interstate commerce.

Although based on broad and fundamental principles—that the federal government's powers are enumerated and therefore limited, and that only the states may exercise a far-reaching police power—the Court's holding is narrow, rejecting the ACA's unprecedented regulation of the failure to engage in congressionally directed commerce. The Court thus reaffirms the basic holding of *Lopez* and *Morrison*: *Wickard v. Filburn*'s expansive view of the commerce power stands,⁹ in that Congress may regulate economic acts that in the aggregate have a substantial effect on interstate commerce, but it may go not an inch further. Even if *NFIB*, taken as a whole, does not advance the line on individual liberty, federalism, or original meaning, it at least holds this all-important line. But that conclusion may be short-changing a decision that breaks new ground—or, more accurately, rediscovers long-lost terrain—on the scope of the Necessary and Proper Clause.

A. The Court Affirms Original Meaning

The government proffered two arguments in support of the individual mandate, one relying on the bare Commerce Clause and the second depending, in addition, on the Necessary and Proper Clause. The first is that the mandate simply regulates “the way in which individuals finance their participation in the health-care market.”¹⁰

According to the government, that such individuals may not be active participants in the health insurance market at this time is irrelevant, because they do—or no doubt soon will—consume health care services and either pay for those services or shift their cost onto others. According to the government, the mandate requires only that individuals pay now, through comprehensive insurance plans, rather than later when the health care bill comes due.

That argument ran into a buzzsaw at the Supreme Court: The text of the Commerce Clause itself. As the joint dissenters explain, the

⁹ *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that Congress can regulate certain classes of local economic activity—such as growing wheat—when, in the aggregate, they may have a substantial effect on interstate commerce).

¹⁰ Brief for the Petitioner at 33, *U.S. Dep't of Health & Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398).

power to “regulate Commerce” presupposes by its terms that the object of such regulation already exists:

In *Gibbons v. Ogden*, Chief Justice Marshall wrote that the power to regulate commerce is the power “to prescribe the rule by which commerce is to be governed.” That understanding is consistent with the original meaning of “regulate” at the time of the Constitution’s ratification, when “to regulate” meant “[t]o adjust by rule, method or established mode” It can mean to direct the manner of something but not to direct that something come into being. There is no instance in which this Court or Congress (or anyone else, to our knowledge) has used “regulate” in that peculiar fashion. If the word bore that meaning, Congress’ authority “[t]o make Rules for the Government and Regulation of the land and naval Forces,” U. S. Const., Art. I, §8, cl. 14, would have made superfluous the later provision for authority “[t]o raise and support Armies,” *id.*, §8, cl. 12, and “[t]o provide and maintain a Navy,” *id.*, §8, cl. 13.¹¹

The chief justice also surveyed the evidence of original meaning, concluding that “the power to regulate assumes there is already something to be regulated.”¹² Reflecting that assumption, the Court’s commerce-power cases “uniformly describe the power as reaching ‘activity.’”¹³

But individuals who decline to purchase insurance and would thus run afoul of the mandate are not engaged in any commercial activity. That they may be, as the government argued, “active in the market” at some future date “cannot obscure the fact that most of those regulated by the individual mandate are not currently engaged in any commercial activity involving health care”¹⁴ And “that fact is fatal to the Government’s effort to ‘regulate the insured as a class.’”¹⁵

¹¹ 132 S. Ct. at 2644 (joint dissent) (citations omitted).

¹² *Id.* at 2586 (Roberts, C.J.).

¹³ *Id.* at 2587 (Roberts, C.J.).

¹⁴ *Id.* at 2590 (Roberts, C.J.).

¹⁵ *Id.* (quoting Pet. Br. at 42); accord *id.* at 2644 (joint dissent) (“[W]hen Congress provides that (nearly) all citizens must buy an insurance contract, it goes beyond” its commerce power).

Finally, Congress may not shrug off that basic limitation by recharacterizing inactivity as activity, because to do so would transform both the commerce power's and the federal government's reach. Chief Justice Roberts put this point most emphatically:

[The individual mandate] compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce 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.¹⁶

But "[t]hat is not the country the Framers of our Constitution envisioned."¹⁷ Exceeding *Wickard*, the high-water mark of commerce-power jurisprudence, would "fundamentally chang[e] the relation between the citizen and the Federal Government."¹⁸ The joint dissenters concurred precisely on this point: "To go beyond [*Wickard*], and to say that the failure to grow wheat . . . affects commerce, so that growing . . . can be federally compelled, is to extend federal power to virtually everything."¹⁹ And that is impermissible.

B. The Government's Failure To Articulate Any Limiting Principle

The government's loss on this issue did not come as a surprise to those who take the Court at its word. Though often more honored in the breach than the observance, the Court has consistently reaffirmed the principle that Congress's legislative powers are circumscribed by the text of the Constitution's Article I, Section 8. And despite any slipping with respect to particular powers, it has never

¹⁶ *Id.* at 2587 (Roberts, C.J.).

¹⁷ *Id.* at 2589 (Roberts, C.J.).

¹⁸ *Id.*

¹⁹ *Id.* at 2648 (joint dissent).

repudiated Chief Justice John Marshall's reasoning that the federal government "is acknowledged by all to be one of enumerated powers"²⁰ and that this enumeration "presupposes something not enumerated."²¹ (Indeed, Chief Justice Roberts's opinion begins with that point, in those words.²²) In this way, federal power is subject to structural limitations, precluding any interpretation of the Commerce Clause that would render federal power plenary.

Yet throughout the course of this litigation, the government was unwilling or unable to identify any coherent limiting principle that would cabin its assertion of the commerce power. This failure conspicuously extended to oral argument before the Court:

The Government was invited, at oral argument, to suggest what federal controls over private conduct (other than those explicitly prohibited by the Bill of Rights or other constitutional controls) could not be justified as necessary and proper for the carrying out of a general regulatory scheme. It was unable to name any.²³

That is a charitable characterization. At oral argument, in response to Justice Alito's request that he "express [his] limiting principle as succinctly as you can," the solicitor general actually proffered two.²⁴ The first was a simple tautology: "When Congress is . . . enacting a comprehensive scheme that it has the authority to enact[,] the Necessary and Proper Clause gives it the authority to include regulation, including a regulation of this kind, if it is necessary to counteract risks attributable to the scheme itself that people engage in economic activity that would undercut the scheme."²⁵ In other words, where Congress has the authority to regulate, it may do so, without limitation. This response was a dodge, not an answer.

The second bordered on the incomprehensible:

Congress can regulate the method of payment by imposing an insurance requirement in advance of the time in which

²⁰ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

²¹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

²² 132 S. Ct. at 2577 (Roberts, C.J.).

²³ *Id.* at 2647 (joint dissent) (citation omitted).

²⁴ Transcript of Oral Arg. at 43, U.S. Dep't of Health & Human Servs. v. Florida, 132 S. Ct. 2566 (2012) (No. 11-398).

²⁵ *Id.* at 44.

the service is consumed when the class to which that requirement applies either is or virtually most certain to be in that market when the timing of one's entry into that market and what you will need when you enter that market is uncertain and when you will get the care in that market, whether you can afford to pay for it or not and shift costs to other market participants.²⁶

The solicitor general's point seems to be one elaborated in the government's briefs, that the intertwined markets for health care and health insurance are somehow unique and that their unique features in and of themselves amount to a limiting principle.²⁷

The government never attempted to explain, however, how or why these features (ubiquitous participation, uncertainty, cost-shifting) have any constitutional significance. Nor, even more basically, was it able to demonstrate that the market for health insurance is unique in any relevant respect. "Government regulation typically imposes costs on the regulated industry," to the point that "many industries so regulated face the reality that, without an artificial increase in demand, they cannot continue on."²⁸ So may the government mandate the purchase of American-made automobiles (to avoid the economic consequences that would attend the collapse of any of the "Big Three" automakers) or broccoli (to promote health and reduce health-care spending)? The government's response to that question was that "[h]ealth insurance is not purchased for its own sake like a car or broccoli; it is a means of financing health-care consumption and covering universal risks."²⁹ But cars and vegetables also are not purchased for their own sakes, but to satisfy basic human needs, transportation and nourishment.³⁰ There is no difference.

In the end, Congress's assertion of what would amount to plenary power was met and checked by the Court's affirmation of the *status quo ante*, prior to the mandate bubble:

The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power

²⁶ *Id.* at 44–45.

²⁷ Reply Brief for Petitioner at 19, *HHS v. Florida*, 132 S. Ct. 2566 (No. 11-398).

²⁸ 132 S. Ct. at 2645 (joint dissent).

²⁹ Reply Brief at 19.

³⁰ 132 S. Ct. at 2591 (Roberts, C.J.); *id.* at 2650 (joint dissent).

to regulate individuals as such, as opposed to their activities, remains vested in the States.³¹

Far from radical, the Court's decision leaves Congress with the same degree of power that the Court previously had said it possessed in case after case—no more, no less.

More surprising than that unexceptional result is that four justices—Ginsburg, joined by Breyer, Sotomayor, and Kagan—reject even this modest limitation on federal power, even where it is necessary to deny the federal government the plenary power reserved to the states. To Justice Ginsburg, “it is Congress’ role, not the Court’s, to delineate the boundaries of the market the Legislature seeks to regulate.”³² Thus, Congress may define a market by reference to activity or inactivity that bears on economic transactions, and Congress is then due deference in its choice of how to regulate that market, whether by mandate, prohibition, or some intermediate step.³³ As for the distinction between activity and inactivity, Justice Ginsburg insists that it is unadministrable by the courts.³⁴ In response to the chief justice’s protests, Justice Ginsburg asserted that this view of the commerce power is not entirely without limit: “A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause.”³⁵ And then there is that “formidable check on congressional power: the democratic process”³⁶—which is apparently not quite formidable enough to protect those rights Justice Ginsburg believes the courts should enforce.³⁷

³¹ *Id.* at 2591 (Roberts, C.J.).

³² *Id.* at 2619 (Ginsburg, J.).

³³ *Id.* at 2622–23 (Ginsburg, J.).

³⁴ *Id.*

³⁵ *Id.* at 2624 (Ginsburg, J.).

³⁶ *Id.*

³⁷ Justice Ginsburg’s dissent stands in marked contrast to Justice Breyer’s dissent in *Lopez*, which attempted, with debatable success, to explain that the Gun Free School-Zone Act could have been sustained without abandoning judicially enforceable structural limitations on federal powers. 514 U.S. at 617 (Breyer, J., dissenting).

Of course, this articulation is a recipe for judicial disengagement, or passivism, an outright refusal to enforce the Constitution's terms where inconsistent with the judge's view of the proper scope of federal power. It would leave federal power without structural limitation. Yet "[h]indering" congressional power, Justice Ginsburg asserts, "is shortsighted; if history is any guide, today's constriction of the Commerce Clause will not endure."³⁸ Not only does Justice Ginsburg overstate the effect of *NFIB*'s commerce-power decision, she is also wrong as to history and precedent. She would effectively excise from the casebooks the Court's "new federalism" decisions of the past 25 years. And she would actually, in one important respect, abrogate *Wickard*, which, although rejecting categorical exclusions from regulable "commerce," did concede judicially enforceable limitations on the commerce power.³⁹ Indeed, the *Wickard* Court considered and rejected an approach that would have jettisoned all structural limitations on federal power, opting instead for a more modest retrenchment of judicial enforcement of the Constitution's structural features.⁴⁰ Disdainful of what narrow limitations *Wickard* preserved, the commerce-power dissenters seek to revisit that choice. This, and not the opinions of the chief justice and joint dissenters, is truly radical.

C. New Punch for "Necessary and Proper"?

The government also argued that the mandate is "integral to the Affordable Care Act's insurance reforms" and "necessary to make effective the Act's core reforms."⁴¹ As explained by Chief Justice Roberts, to "address[] the problem of those who cannot obtain insurance coverage because of preexisting conditions or other health issues," the ACA provided for "guaranteed issue" of insurance policies and their "community rating."⁴² Respectively, these provisions "prohibit insurance companies from denying coverage to those with

³⁸ *NFIB*, 132 S. Ct. at 2625 (Ginsburg, J.).

³⁹ 317 U.S. 111, 125 (1942) ("But even if appellee's activity be local . . . , it may still . . . be reached by Congress if it exerts a substantial economic effect on interstate commerce . . .").

⁴⁰ Barry Cushman, *Rethinking the New Deal Court* 212–19 (1998).

⁴¹ Brief for Petitioners at 24.

⁴² 132 S. Ct. at 2585 (Roberts, C.J.).

such conditions or charging unhealthy individuals higher premiums than healthy individuals.”⁴³ The problem is that providing price-controlled access to insurance for the unhealthy would cause many to delay buying insurance until after becoming sick. The cost of covering pre-existing conditions would then be borne either by the insurance companies, whose viability might be threatened, or by healthy consumers, who would face higher premiums. One result, Congress feared, could be a premium “death spiral,” in which increasing premiums drive healthier individuals out of the insurance market, causing further increases and then further defections.⁴⁴ Preventing such a result was the individual mandate’s stated justification.⁴⁵

But as the chief justice also explained, Congress had a second motive in enacting the mandate, quite apart from avoiding premium spirals: Corraling the young and healthy into expansive and expensive health insurance plans that they did not want or need so as to subsidize the premiums of older and less healthy individuals.⁴⁶ In this way, Congress could push down premiums among politically active constituencies (the elderly, families, etc.) without bearing the political cost of imposing a substantial new tax on younger workers. And because insurance companies would benefit from an expanded customer base, they too could be neutralized as potential opponents of Obamacare, even though they would be required to cover preexisting conditions.

By emphasizing the complexity of its overall regulatory scheme, and the mandate’s integral place in that scheme, the government sought to rely on the Court’s decision in *Gonzales v. Raich*, which upheld the constitutionality of “individual applications of a concededly valid statutory scheme” to comprehensively regulate drugs including marijuana.⁴⁷

The chief justice and joint dissenters treat this argument very differently. To the joint dissenters, the Necessary and Proper Clause

⁴³ *Id.* (Roberts, C.J.).

⁴⁴ See generally Jonathan Gruber, Health Care Reform Is a “Three-Legged Stool,” Aug. 5, 2010, http://www.americanprogress.org/issues/2010/08/three_legged_stool.html.

⁴⁵ 132 S. Ct. at 2585 (Roberts, C.J.).

⁴⁶ *Id.*

⁴⁷ 545 U.S. 1, 23 (2005).

provides Congress with no freestanding power, but is simply incident to the power the exercise of which it facilitates. This understanding follows the reasoning set forth in Justice Scalia's *Raich* concurrence, which recognized that "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause."⁴⁸ The mandate therefore fails for much the same reason that the chief justice found it unsupported by the Commerce Clause alone:

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."⁴⁹

Moreover, the joint dissenters observe, the Necessary and Proper Clause itself requires a specific showing of necessity, and the Court's scrutiny is heightened where challenged "regulations that do not act directly on an interstate market or its participants" are at issue.⁵⁰ In *Raich*, this burden was met by the government's demonstration that "the growing and possession prohibitions were the only practicable way of enabling the prohibition of interstate traffic in marijuana to be effectively enforced," because intrastate marijuana could not be distinguished from interstate marijuana.⁵¹ But with the ACA, "there are many ways other than this unprecedented Individual Mandate by which the regulatory scheme's goals of reducing insurance premiums and ensuring the profitability of insurers could be achieved"—including taxes, tax credits, or surcharges on those consuming health services.⁵²

To the chief justice, the Necessary and Proper Clause authorizes regulations that are "an integral part of a comprehensive scheme"

⁴⁸ 545 U.S. at 34.

⁴⁹ 132 S. Ct. at 2646 (joint dissent) (quoting *The Federalist* No. 33, at 202 (C. Rossiter ed. 1961)).

⁵⁰ *Id.*

⁵¹ *Id.* at 2647 (joint dissent).

⁵² *Id.*

of regulation.⁵³ This view reflects some of the less-restrained language in Justice John Paul Stevens's majority opinion in *Raich*, as well as the approach taken in Justice Breyer's majority opinion in *United States v. Comstock*,⁵⁴ which the chief justice joined in full, without separate opinion.

But even John Roberts has his limits. "[T]he individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms," simply because it "vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power."⁵⁵ That logic would "work a substantial expansion of federal authority"—the opposite of an authority that is "narrow in scope or 'incidental.'"⁵⁶ Accordingly, "[e]ven if 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."⁵⁷ The chief justice's reasoning builds more on the Court's decision in *Printz v. United States*,⁵⁸ which rejected federal commandeering of state officials based on federalism principles inherent in the constitutional design, than on its other modern Necessary and Proper Clause cases, which have typically given short shrift to the "proper" prong.

D. The Court's Holding . . . and There Was One

In the wake of *NFIB*, some have argued that the Court failed to reach any holding on Congress's asserted exercise of its commerce power, leaving the door open to future, Commerce Clause-based mandates on the American people. This misapprehension, although perhaps understandable in the confusion of the first few hours after the decision was handed down, was plainly rejected by the majority of the Court.

In the usual case, the legal holding of a fractured decision, as may be applied by lower courts, is determined by the "Marks rule": "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of

⁵³ *Id.* at 2591–92 (Roberts, C.J.).

⁵⁴ 130 S. Ct. 1949 (2010).

⁵⁵ 132 S. Ct. at 2592 (Roberts, C.J.).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ 521 U.S. 898, 923–25 (1997).

the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”⁵⁹ But *NFIB* is not the usual case, in two respects. First, the chief justice, though rejecting the government’s commerce-power arguments, nonetheless voted to uphold the mandate on other grounds, arguably rendering his discussion of the commerce-power issue dicta, without legal force. Second, the four joint dissenters, being dissenters, did not concur in the result of the case, and they declined to join the chief justice’s opinion regarding the commerce power—giving their reasoning and votes uncertain weight in the *Marks* calculus. Accordingly, any future case applying *NFIB*’s commerce-power holding would face a difficult question at the outset: was there any holding at all?⁶⁰

Evidently anticipating this question, however, Chief Justice John Roberts—joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan—conclusively put it to rest. The Court’s opinion clearly states that “[t]he Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity.”⁶¹ This is surely a novelty: A majority of the Court announcing the holding of a separate majority of the Court in the very same case. But it nevertheless serves the purpose of providing clarity to an aspect of the Court’s decision that otherwise would have sown unnecessary confusion and disagreement in the lower courts.

Fortunately, the *Marks* rule is also unnecessary to determine the substance of the Court’s holding, due to the close congruence of the chief justice’s opinion with that of the joint dissenters’. Taken narrowly, *NFIB* holds that the commerce power does not empower Congress to mandate that individuals purchase a product or service from other private entities. Taken broadly, *NFIB* reaffirms that *Wickard* defines the outer bounds of Congress’s commerce power and, while still good law, will not be extended beyond its holding in any respect. As a corollary, the case also stands for the proposition that

⁵⁹ *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotation marks and citation omitted).

⁶⁰ Cf. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (describing how the *Marks* rule “is more easily stated than applied”).

⁶¹ 132 S. Ct. at 2599 (Roberts, C.J.).

the police power is reserved to the states and must be denied to the federal government, and that the courts are charged with policing that boundary. Of course, given the four votes Justice Ginsburg's dissenting opinion commanded, that fundamental proposition survives by only a single vote.

Although taking slightly different approaches, the chief justice's opinion and the joint dissent apply more careful scrutiny to exercises of the Necessary and Proper Clause than have some of the Court's other precedents—particularly 2010's decision in *Comstock*. To the joint dissenters, the government must do more than make a perfunctory showing of necessity, instead demonstrating (in a manner much like narrow tailoring) that other, less questionable options are infeasible. Chief Justice Roberts, though not focusing on this point, seems to concur.⁶² And Roberts's opinion gives new bite to the "proper" inquiry, a position with which the joint dissenters plainly concur.⁶³ Taken together, these holdings may signal a return to the more limited conception of the Necessary and Proper Clause that prevailed in Chief Justice Marshall's decision in *McCullough v. Maryland*.⁶⁴

In the end, *NFIB*'s commerce-power decision holds the line established in *Lopez* and *Morrison*, affirming that there are enforceable structural limits on federal power. Had the Court decided otherwise, that would have spelled the end of the federalism revolution begun during Chief Justice William Rehnquist's tenure. As it is, the revolution continues, slowed in recent years but not broken down.

II. The Individual Mandate Is Sustained as a "Tax"

The Court ultimately upheld, by a 5–4 vote, the individual mandate and its associated penalty as a "tax." There is little doubt, however, that this required a judicial edit of the statute's plain language, which in separate provisions imposes a mandate to obtain health care insurance and a penalty for failing to comply.⁶⁵ As the joint dissenters

⁶² *Id.* at 2593 (Roberts, C.J.) (stating that the individual mandate is not "an essential component of the insurance reforms" or "incidental" to them).

⁶³ *Id.* at 2646 (joint dissent).

⁶⁴ 17 U.S. (4 Wheat.) 159 (1819).

⁶⁵ See 26 U.S.C. §5000A(a) (2006 ed., Supp. IV) ("applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage."); See 26 U.S.C. §5000A(b) (2006 ed., Supp. IV) ("[i]f . . . an applicable individual . . . fails to meet the requirements of subsection (a) . . . there is hereby imposed . . . a

pointed out: “to say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it.”⁶⁶ In addition to a blue pencil, the Court also required Olympian intellectual gymnastics, and a conveniently blind eye directed at its own precedent, in order to transform the individual mandate’s penalty into a “tax,” thereby saving the ACA from constitutional oblivion.

A. The Mandate Is Not a “Tax” for Purposes of the Anti-Injunction Act

The Justice Department raised Congress’s taxing power in two separate contexts during the ACA litigation. First, the government argued that the individual mandate’s penalty was a tax and that constitutional challenges brought before it takes effect in 2014 were barred by the Anti-Injunction Act, a law that dates back to 1867. The AIA establishes a “pay and sue” rule, providing that “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.”⁶⁷

Second, the government argued that even if the individual mandate was not supported by the commerce power, it was nevertheless within Congress’s power to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”⁶⁸ To uphold the statute, the Supreme Court was forced to rule that the mandate’s penalty was *not* a tax for purposes of the AIA, but that it *was* a tax under Article I, Section 8, Clause 1.

The government had very little luck with its AIA arguments in the lower courts, and ultimately abandoned the argument altogether.⁶⁹ It was not argued before the court of appeals in the *NFIB* cases,⁷⁰ and the Supreme Court appointed *amici* to brief and argue the point. All nine justices agreed that the AIA did not bar the constitutional challenge to the individual mandate. The joint dissenters simply concluded, like most of the lower courts to consider the issue, that

penalty.”).

⁶⁶ 132 S. Ct. at 2655 (joint dissent).

⁶⁷ 26 U.S.C. § 7421(a).

⁶⁸ U.S. Const. art. I, § 8, cl. 1.

⁶⁹ See, e.g., *Sevensky v. Holder*, 661 F.3d 1, 13 n.25 (D.C. Cir. 2011).

⁷⁰ See *Florida v. HHS*, 648 F.3d 1235 (11th Cir. 2011), *aff’d* in part and *rev’d* in part,

the AIA did not apply because neither the mandate nor its associated penalty were taxes. The majority had a tougher row to hoe.

The Court ruled that the mandate and penalty were not taxes subject to the AIA because Congress had chosen to “label this exaction a ‘penalty’ rather than a ‘tax,’” which was significant “because the Affordable Care Act describes many other exactions it creates as ‘taxes.’”⁷¹ In addition, the Court noted, “although the penalty was located within the tax code, Congress had required only that it be “‘assessed and collected in the same manner as taxes.’”⁷² In light of this, and the Internal Revenue Code’s “consistent distinction between the terms ‘tax’ and ‘assessable penalty,’” the Court concluded that the mandate’s penalty need not and should not be construed as a tax for AIA purposes.⁷³ It was able, therefore, to proceed to the merits.

B. Upholding the Individual Mandate under the Taxing Power

Upon reaching the merits, of course, the Court reconsidered the mandate’s potential as a tax. In this connection, the majority reasoned that “[t]he exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects,” and identified a number of these similarities: (1) the payment is made on an affected taxpayer’s income tax returns; (2) taxpayers whose income falls below the established income tax filing threshold are exempt; (3) the amount of the payment is calculated based on income factors; (4) the payment provision is located in the Internal Revenue Code; and (5) the payment is to be assessed and collected “‘in the same manner as taxes.’”⁷⁴ In addition, the penalty “yields the essential feature of any tax: it produces at least some revenue for the Government.”⁷⁵

Of course, none of these factors swayed the Court with regard to the AIA. It explained this evident paradox by suggesting that, although Congress’s identification of the payment required for failing to comply with the individual mandate as a “penalty” was dispositive for purposes of the AIA (a statute entirely within congressional

NFIB v. Sebelius, 132 S. Ct. 2566 (2012).

⁷¹ 132 S. Ct. at 2583 (Roberts, C.J.).

⁷² *Id.* at 2584 (Roberts, C.J.) (quoting ACA § 6671(a)).

⁷³ *Id.*

⁷⁴ *Id.* at 2594 (Roberts, C.J.).

control), constitutionally this appellation was a mere label that the Court could ignore: “[I]t is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress’s choice of label on that question. That choice does not, however, control whether an exaction is within Congress’s constitutional power to tax.”⁷⁶ The Court had, it noted, ignored such congressional labels in the past when trying to determine whether a particular exaction was a “tax” or a “penalty,” citing in particular its decisions in the *Child Labor Tax Case*,⁷⁷ the *License Tax Cases*,⁷⁸ and *New York v. United States*,⁷⁹ as “confirm[ing] this functional approach.”⁸⁰ It concluded:

The same analysis here suggests that the shared responsibility payment may for constitutional purposes be considered a tax, not a penalty: First, for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more. It may often be a reasonable financial decision to make the payment rather than purchase insurance, unlike the “prohibitory” financial punishment in *Drexel Furniture*. Second, the individual mandate contains no scienter requirement. Third, the payment is collected solely by the IRS through the normal means of taxation— except that the Service is *not* allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution. The reasons the Court in *Drexel Furniture* held that what was called a “tax” there was a penalty support the conclusion that what is called a “penalty” here may be viewed as a tax.⁸¹

Although it certainly is true that Congress can neither expand nor contract its constitutional power to tax based on the “labels” it uses, more than branding was at work in this case. The Court focused its analysis on the question whether Congress had the power to tax the failure to have health insurance and entirely failed to address the question whether Congress actually had chosen to exercise its taxing

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ 259 U.S. 20, 38 (1922).

⁷⁸ 72 U.S. (5 Wall.) 462, 471 (1866).

⁷⁹ 505 U.S. 171 (1992).

⁸⁰ 132 S. Ct. 2595 (Roberts, C.J.).

⁸¹ *Id.* at 2595–96 (footnotes and citations omitted).

power in enacting the ACA. As the joint dissent correctly noted: "The issue is not whether Congress had the *power* to frame the minimum-coverage provision as a tax, but whether it *did so*."⁸²

And the simple text of the statute indicates that it did not. Instead, that text establishes a freestanding mandate: "An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month."⁸³ Subsequent provisions then establish a penalty for a subset of individuals who violate this mandate. The chief justice, who ultimately concluded that the mandate was sustainable as a "tax," himself admitted that "[t]he most straightforward reading of the mandate is that it commands individuals to purchase insurance."⁸⁴ He invoked the doctrine of constitutional avoidance to justify reading the text otherwise. But even if the statute must, "if 'fairly possible,'" be construed as "a tax rather than a mandate-with-penalty, since this would render it constitutional rather than unconstitutional," the joint dissent explained, "[w]e cannot rewrite the statute to be what it is not."⁸⁵

Of course, Congress made very clear that it relied on its commerce power in enacting the individual mandate. At the time the ACA was debated and enacted, numerous of its sponsors and supporters, including the president, stated that the mandate was not a tax.⁸⁶ Similarly, neither the mandate nor its penalty was scored as a tax by the Joint Committee on Taxation, which scored numerous other ACA provisions, and the "Technical Explanation of the Revenue Provisions" of the ACA⁸⁷ did not identify the penalty as a tax, except in a heading indicating its placement in Subtitle D of the Internal Revenue Code.⁸⁸ More importantly, however, Congress enacted a

⁸² *Id.* at 2651 (joint dissent) (emphasis in original).

⁸³ ACA § 1501 (creating 42 U.S.C. s. 5000A(a)).

⁸⁴ 132 S. Ct. at 2593 (Roberts, C.J.).

⁸⁵ *Id.* at 2651 (joint dissent).

⁸⁶ See, e.g., Obama: Requiring Health Insurance Is Not a Tax Increase, CNN (Sept. 29, 2009), <http://edition.cnn.com/2009/POLITICS/09/20/obama.health.care/index.html>; Obama's Nontax Tax, Wall St. J. (Sept. 21, 2009) at A18.

⁸⁷ Staff of the Joint Comm. 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 (Mar. 21, 2010).

series of findings as part of the ACA's statutory text, specifically with reference to the individual mandate and its penalty, all of which attempted to justify the provision under the commerce power.⁸⁹ The majority never grappled with these facts or this aspect of the law.

For their part, the joint dissenters concluded that the payment required of those who fail to comply with the mandate's health insurance requirements was, indeed, a "penalty" based on the statute's plain language and operation. It was, they explained, an exaction "imposed for violation of the law,"⁹⁰ and further noted:

We never have classified as a tax an exaction imposed for violation of the law, and so too, we never have classified as a tax an exaction described in the legislation itself as a penalty. To be sure, we have sometimes treated as a tax a statutory exaction (imposed for something other than a violation of law) which bore an agnostic label that does not entail the significant constitutional consequences of a penalty—such as "license" or "surcharge." But we have never—*never*—treated as a tax an exaction which faces up to the critical difference between a tax and a penalty, and explicitly denominates the exaction a "penalty." Eighteen times in §5000A itself and elsewhere throughout the Act, Congress called the exaction in §5000A(b) a "penalty."⁹¹

The "nail in the coffin," the joint dissenters concluded, "is that the mandate and penalty are located in Title I of the Act, its operative core, rather than where a tax would be found—in Title IX, containing the Act's 'Revenue Provisions.'"⁹² The Court rewrote the statute in order to avoid holding it unconstitutional.

To justify its holding in the face of the statute's plain meaning, and the equally clear evidence of congressional intent, the majority

⁸⁸ Only later, after constitutional challenges to the mandate were filed, did the Joint Committee on Taxation amend the March 21 Technical Explanation, in "Errata" JCX-27-10 (May 4, 2010), referring to the penalty as a "new excise tax" and stating that the "penalty is an excise tax."

⁸⁹ See Pub. L. No. 111-148, 124 Stat. 242–44.

⁹⁰ 132 S. Ct. at 2651 (joint dissent).

⁹¹ *Id.* at 2653 (joint dissent) (emphasis in original).

⁹² *Id.* at 2655 (joint dissent).

claimed that it did not matter how Congress “framed” the statute, as a tax or as a penalty:

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. The “question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.” *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948).⁹³

This is a truly breathtaking assertion of judicial power, holding that Congress *cannot* itself decide which of its enumerated powers to invoke in passing legislation, even when it plainly structures the legislative text to preclude reliance on those powers that it has not chosen to exercise. In other words, it is the Court and not Congress that will decide when a particular statute is functionally a revenue measure and when it is not. Significantly, the Court’s claim that the “question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise” is supported by citation to a single precedent, *Woods v. Cloyd W. Miller, Co.*,⁹⁴ and that case is inapposite.⁹⁵

Woods involved a challenge to Title II of the Housing and Rent Act of 1947. This law continued certain rent controls originally imposed by Congress during World War II. The statute was challenged as beyond Congress’s war powers because it was enacted after hostilities had ended (although before a peace treaty was ratified). The lower court agreed, and also concluded that “even if the war power continues, Congress did not act under it because it did not say so, and only if Congress says so, or enacts provisions so implying, can it be held that Congress intended to exercise such power.”⁹⁶

The Supreme Court reversed, concluding that the war power did indeed support the challenged legislation, and also stating that “[t]he question of the constitutionality of action taken by Congress

⁹³ *Id.* at 2598 (Roberts, C.J.).

⁹⁴ 333 U.S. 138, 144 (1948).

⁹⁵ 132 S. Ct. at 2598 (Roberts, C.J.).

⁹⁶ *Woods*, 333 U.S. at 140.

does not depend on recitals of the power which it undertakes to exercise.”⁹⁷ The *Woods* Court did not mean to suggest by this, however, that Congress cannot choose the power under which it acts, or that the judiciary is not bound by that decision once made and clearly expressed. Indeed, in *Woods*, the Court went on to examine the statute’s legislative history to determine Congress’s intent in this regard, concluding that “it is plain from the legislative history that Congress was invoking its war power to cope with a current condition of which the war was a direct and immediate cause.”⁹⁸ The same, of course, was true with regard to the individual mandate; Congress was clearly invoking its commerce power, not its taxing power.⁹⁹

C. Direct Taxes

In upholding the mandate as a tax, the *NFIB* Court also gave very short shrift to the constitutional requirement that “direct” taxes be apportioned among the states.¹⁰⁰ Apportionment means that direct taxes are paid in proportion to each state’s population. It is a cumbersome process that may result in the residents of some states paying more than the residents of others. Not surprisingly, direct taxation has been a rare phenomenon throughout our history. Nevertheless, this requirement is a basic limit on Congress’s otherwise broad power to tax.

The Court avoided holding the individual mandate unconstitutional as an unapportioned direct tax by narrowing the meaning of “direct” taxes to capitation or “head” taxes and taxes on real property—although both the constitutional text and the history of the Sixteenth Amendment, which was adopted specifically to give Congress the “power to lay and collect taxes on income, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration,” are inconsistent with this conclusion.

⁹⁷ *Id.* at 144.

⁹⁸ *Id.* (emphasis added).

⁹⁹ The Court’s opinion suggests some concern for legislative intent, but only in an indirect way: In explaining why it believed the penalty for failure to comply with the individual mandate operated like a tax, positing that individuals could simply choose to pay and still be in compliance with the law, the Court noted that “Congress did not think it was creating four million outlaws.” 132 S. Ct. at 2497 (Roberts, C.J.).

¹⁰⁰ U.S. Const. art. I, § 9, cl. 4 (“No capitation, or other direct, Tax shall be laid unless in Proportion to the Census or Enumeration herein before directed to be taken.”).

What is a “direct” tax is actually a complex question, best approached through a process of elimination. For constitutional purposes, the Supreme Court has recognized only three species of tax: excise taxes, income taxes, and direct taxes. “Together, these classes include every form of tax appropriate to sovereignty.”¹⁰¹ The minimum coverage provision is not an income tax, as it does not tax “gains, profits, and income derived.”¹⁰²

Nor are the mandate and penalty excise taxes, which are exactions imposed on a transaction or some other type of activity.¹⁰³ The Court itself acknowledged that the mandate and penalty are “a burden that the Federal Government imposes for an omission, not an act.”¹⁰⁴

That leaves, of course, direct taxes. As noted above, however, the Court concluded that the mandate and its penalty were not “direct” taxes because they are neither land taxes nor “capitation” taxes, defined as “taxes paid by every person ‘without regard to property, profession, or any other circumstance.’”¹⁰⁵ It reasoned that failing to have health insurance was a sufficient “circumstance” to avoid classification as a capitation tax.¹⁰⁶ But the Court did not further address its own jurisprudence, holding that the Constitution recognized only excise, income, and direct taxes, and failed to identify in which category—income or excise tax—the mandate belonged as a

¹⁰¹ *Steward Mach. Co. v. Davis*, 301 U.S. 548, 581 (1937); see also *Thomas v. United States*, 192 U.S. 363, 370 (1904) (these “apparently embrace all forms of taxation contemplated by the Constitution”).

¹⁰² *Comm’r of Internal Revenue v. Glenshaw Glass Co.*, 348 U.S. 426, 429 (1955) (internal citation omitted).

¹⁰³ See *Steward Mach. Co.*, 301 U.S. at 582 (“the words ‘duties, imposts, and excises’ . . . ‘were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture, and sale of certain commodities, privileges, particular business transactions, vocations, occupations, and the like.’”) (quoting *Thomas*, 192 U.S. at 370)). See also *Fernandez v. Wiener*, 326 U.S. 340, 352 (1945) (excise taxes are laid “upon a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property”); *In re DeRoche*, 287 F.3d 751, 756 (9th Cir. 2002) (“a fundamental characteristic of a typical excise tax is that it is a discrete, one-time tax based on a single act by the person or entity taxed”).

¹⁰⁴ 132 S. Ct. at 2599 (Roberts, C.J.).

¹⁰⁵ *Id.* (Roberts, C.J.) (quoting *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796)).

¹⁰⁶ Of course, under this logic, Congress may enact an unapportioned capitation tax in piecemeal fashion—for example, by reaching men first, and then women.

“burden” imposed for an “omission.”¹⁰⁷ Perhaps the Court, contra its previous teaching in *Steward Machine Company*,¹⁰⁸ has recognized a *sui generis*, new form of constitutional taxation.¹⁰⁹

D. “Limitations” on the Power to Tax

Finally, the Court considered the obvious objection that, if the regulation of inactivity is problematic under the Commerce Clause, then “perhaps it should be similarly troubling to permit Congress to impose a tax for not doing something.”¹¹⁰ The majority answered “no” to this question for a number of reasons. First, it noted that “the Constitution does not guarantee that individuals may avoid taxation through inactivity.”¹¹¹ Second, there remain limits on Congress’s power to “use its taxing power to influence conduct,” even if “we have declined to closely examine the regulatory motive or effect of revenue-raising measures” in recent years.¹¹² Taxes can

¹⁰⁷ 132 S. Ct. at 2599 (Roberts, C.J.).

¹⁰⁸ 301 U.S. at 581.

¹⁰⁹ This confusion is hardly surprising. Although the question of direct taxation was raised by the plaintiffs in the lower courts, it dropped out of the case when the government’s claim that the mandate and penalty were “taxes” was rejected. See *Florida v. HHS*, 716 F. Supp. 2d at 1160. The issue was not properly briefed and argued before the Supreme Court. As the joint dissenters aptly wrote:

The meaning of the Direct Tax Clause is famously unclear, and its application here is a question of first impression that deserves more thoughtful consideration than the lick-and-a-promise accorded by the Government and its supporters. The Government’s opening brief did not even address the question—perhaps because, until today, no federal court has accepted the implausible argument that §5000A is an exercise of the taxing power. And once respondents raised the issue, the Government devoted a mere 21 lines of its reply brief to the issue. At oral argument, the most prolonged statement about the issue was just over 50 words. One would expect this Court to demand more than fly-by-night briefing and argument before deciding a difficult constitutional question of first impression.

132 S. Ct. at 2655 (joint dissent).

¹¹⁰ *Id.* at 2599 (Roberts, C.J.).

¹¹¹ *Id.*

¹¹² *Id.*

still, for example, become so punitive that they are impermissible penalties, and remain subject to constitutional challenge on that ground. Third, the Court noted that the taxing power was at best a blunt instrument of regulation, since it permits only a requirement that funds be paid into the Treasury. For this reason, “the taxing power does not give Congress the same degree of control over individual behavior” as does the Commerce Clause.¹¹³

All of this may be true, but the Court failed to wrestle with the real reason that permitting federal taxation of inactivity is constitutionally suspect. The problem is not only that such impositions violate individual liberty rights, on which the majority’s analysis focuses, but that admitting of such an authority would permit Congress to exercise—through the taxing power—the very same general federal police power the Court has always rejected.¹¹⁴ The Commerce Clause and all other enumerated powers, including the power to tax, must be interpreted consistently with this basic rule. As Chief Justice Roberts noted in his separate opinion, “This case concerns two powers [the commerce and taxing 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.”¹¹⁵

Although the taxing power is not as flexible as the power to regulate commerce, if deftly wielded the ability specifically to tax an individual’s failure to take some form of favored action—rather than simply granting relief from taxes otherwise applicable¹¹⁶—can achieve exactly the same type of health and welfare regulation that the *NFIB* Court rejected under the commerce power.¹¹⁷ Taxes on inactivity also lack any neutral, judicially enforceable limiting principle that might keep this power from serving as the basis of a general federal police power. Significantly, as is the case with respect to Congress’s exercise

¹¹³ *Id.* at 2600 (Roberts, C.J.).

¹¹⁴ See, e.g., *United States v. Comstock*, 130 S. Ct. 1949, 1964 (2010); *United States v. Lopez*, 514 U.S. 549, 567 (1995); *United States v. Morrison*, 529 U.S. 598, 618 (2000).

¹¹⁵ 132 S. Ct. at 2478 (Roberts, C.J.).

¹¹⁶ An example here might be a tax imposed on the purchase of health care services, with credits or deductions available for those who pay for these services through an approved health care insurance policy.

¹¹⁷ Indeed, when narrower constructions of the Commerce Clause prevailed, Congress employed the taxing power to circumvent the limitations on its power to regulate directly. See, e.g., *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

of its commerce power, it is difficult to identify any precedent where Congress has imposed a tax on the simple *failure* to buy some good or service. And, as was the case under the commerce power, if Congress ever thought that it could regulate conduct through the simple expedient of taxing the failure to make such purchases, this extraordinary power would surely have been used before now.

The Court's failure to address, or even acknowledge, these issues (raised by its own precedents) has clouded rather than clarified the law in this area. It may well be, of course, that in less politically sensitive cases the Court will continue to uphold the Constitution's structural limitations on federal power, even in the face of congressional efforts to achieve police power results through taxation. If it does, however, the Court will have some explaining to do in reconciling its decision in *NFIB v. Sebelius* with its other precedents.

III. The Medicaid Expansion Unlawfully Coerces the States

The Court held, by a 7–2 vote, that the ACA's requirement that states significantly expand their Medicaid programs, or face loss of all federal Medicaid funding, was unduly coercive and therefore not a proper exercise of the spending power. Again, this holding was split across two opinions: The chief justice's opinion was joined by Justices Breyer and Kagan, and the joint dissent commanded four votes. Neither opinion sets forth a test for coercion; both simply conclude that, wherever the line between permissible and impermissible conditions on federal grants to the states may lie, the Medicaid expansion plainly exceeds it. The two opinions clash, however, on the proper remedy. While the joint dissenters would strike down the expansion in its entirety, the chief justice's less-straightforward approach—rewriting a preexisting provision of law to preclude the secretary of health and human services (HHS) from cutting off existing funding to a state that declines to expand its program—prevailed, backed (however grudgingly) by the votes of Justices Ginsburg and Sotomayor, who would have upheld the expansion in its entirety.

The Court's spending-power decision is something new under the sun. It is the first time, seven decades after the possibility was first broached, that the Court has found a federal grant program to “cross[] the line distinguishing encouragement from coercion,”¹¹⁸

¹¹⁸ *New York v. United States*, 505 U.S. 144, 175 (1992).

and thereby intrude on state sovereignty. The Court's holding may reflect an uneasiness with the equilibrium established in the years since it cut the reins tying the spending power to the exercise of enumerated powers in 1936's *United States v. Butler*,¹¹⁹ freeing the federal government to pursue nearly any end through conditional grants to the states. If so, *NFIB*'s Medicaid holding may be the most important and durable part of the decision, reestablishing a "cooperative federalism" premised on genuine cooperation and not bullying.

A. "A Gun to the Head": The Chief Justice's Opinion

Medicaid offers substantial federal funding to states that establish programs to provide health care coverage or services to certain categories of needy individuals. Prior to the ACA, state Medicaid programs were required to provide coverage to pregnant women, children, needy families, the blind, the elderly, and the disabled.¹²⁰ Beyond those categories, the states exercised substantial discretion in defining benefits packages and providing coverage to the poor, on average covering unemployed parents who make less than 37 percent of the federal poverty line and employed parents who make less than 63 percent of the federal poverty line.¹²¹

The ACA transforms Medicaid from a program targeted at the poor to an entitlement for the lower-middle class, while substantially curtailing state discretion. As the chief justice explains, the ACA "require[s] States to expand their Medicaid programs by 2014 to cover all individuals under the age of 65 with incomes below 133 percent of the federal poverty line."¹²² At the same time, it specifies a comprehensive "essential health benefits" package designed to satisfy the individual mandate. While the ACA provides that the federal government will largely pay for the costs of this expansion—providing 100 percent funding for newly eligible individuals through 2016, and 90 percent funding for several years thereafter¹²³—it provides zero funding for new enrollment among previously eligible individuals expected to enroll due to the ACA and, in any case, its funding levels are subject to revision by subsequent acts of Congress.

¹¹⁹ 297 U.S. 1 (1936).

¹²⁰ 42 U.S.C. §1396a(a)(10).

¹²¹ 132 S. Ct. at 2601 (Roberts, C.J.).

¹²² *Id.*

¹²³ *Id.*

The Medicaid expansion will therefore impose substantial, and perhaps enormous, costs on those states that implement it. According to the statute, states that decline to restructure their Medicaid programs to comply with the ACA, or any other Medicaid requirement, may be denied further federal funding, at the discretion of the HHS secretary.¹²⁴

Chief Justice Roberts characterizes exercises of “Congress’s power under the Spending Clause to secure state compliance with federal objectives” as “‘much in the nature of a contract.’”¹²⁵ “The legitimacy of Congress’s exercise of the spending power ‘thus rests on whether the State voluntarily and knowingly accepts the terms of the “contract.”’”¹²⁶ In *Steward Machine Company*,¹²⁷ the Court upheld “a federal tax on employers that was abated if the businesses paid into a state unemployment plan that met certain federally specified conditions”¹²⁸ against the claim that the federal scheme had coerced the state into action. “Nothing in the case,” concluded the Court, “suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation.”¹²⁹

Fifty years later, in *South Dakota v. Dole*,¹³⁰ the Court acknowledged what *Steward Machine Co.* had only hypothesized, that “in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”¹³¹ Nonetheless, the *Dole* Court held that the threatened loss of 5 percent of a state’s federal highway funding for its refusal to raise its drinking age to 21 was but “relatively mild encouragement” and that any “argument as to coercion is . . . more rhetoric than fact.”¹³²

¹²⁴ 42 U.S.C. § 1396c.

¹²⁵ 132 S. Ct. at 2602 (Roberts, C.J.) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

¹²⁶ *Id.*

¹²⁷ 301 U.S. 548, 589–90 (1937).

¹²⁸ 132 S. Ct. at 2603 (Roberts, C.J.).

¹²⁹ 301 U.S. at 590.

¹³⁰ 483 U.S. 203, 210–11 (1987).

¹³¹ 132 S. Ct. at 2604 (Roberts, C.J.) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

¹³² 483 U.S. at 211.

But in this case, the chief justice explains, “the financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement’—it is a gun to the head.”¹³³ A state that declines to comply with the expansion stands to lose the entirety of its Medicaid funding, amounting on average to 10 to 15 percent of its total budget.¹³⁴ This “economic dragooning” “leaves the States with no real option but to acquiesce in the Medicaid expansion.”¹³⁵

A second factor leads the chief justice to conclude that the Medicaid expansion amounts to undue coercion. The ACA, he writes, is “an attempt to foist an entirely new health care system upon the states,”¹³⁶ rather than a mere modification of an existing program, which might not be objectionable. “It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.”¹³⁷ Accordingly, “[a] State could hardly anticipate that Congress’s reservation of the right to ‘alter’ or ‘amend’ the Medicaid program included the power to transform it so dramatically.”¹³⁸

Beyond providing those two factors—lack of voluntariness and a new program—Chief Justice Roberts declines to put flesh on the coercion standard:

We have no need to fix a line It is enough for today that wherever that line may be, this statute is surely beyond it. Congress may not simply conscript state [agencies] into the national bureaucratic army, and that is what it is attempting to do with the Medicaid expansion.¹³⁹

Mirroring his approach to the mandate—the penalty is not a tax for AIA purposes, but it is one under the Constitution—the chief justice flips his position on whether the Medicaid expansion creates a “new program” when considering remedies. Drawing on a suggestion in the government’s brief, he focuses on an “old Medicaid”

¹³³ 132 S. Ct. at 2604 (Roberts, C.J.).

¹³⁴ *Id.* at 2604–05.

¹³⁵ *Id.* at 2605.

¹³⁶ *Id.* at 2605 n.13.

¹³⁷ *Id.* at 2606.

¹³⁸ *Id.*

¹³⁹ *Id.* at 2606–07 (internal quotation marks and citation omitted).

provision, not contained in the ACA, that authorizes the HHS secretary to withhold Medicaid funding from states that fail to comply with the program's requirements.¹⁴⁰ He proceeds to amend it, again wielding his blue pencil:¹⁴¹ "In 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."¹⁴²

This narrow fix is compelled, he argues, by a separate "old Medicaid" provision providing for full severability of all provisions within that chapter of the U.S. Code.¹⁴³ Its applicability is, at the very least debatable; Chief Justice Roberts's approach does not actually invalidate any provision.¹⁴⁴ Moreover, Roberts is "confident that Congress would have wanted to preserve the rest of the Act," rather than strike down the Medicaid expansion as a whole.¹⁴⁵ And he is "[c]onfident that Congress would not have intended anything different . . ."¹⁴⁶ Unfortunately, the chief justice does not disclose the basis of this confidence.

B. Restoring Balance after Butler: The Joint Dissent

Although also concluding that the Medicaid expansion exceeds Congress's spending power, the joint dissenters take a somewhat different approach, addressing how the Court's precedents have upset federalism's careful balance between the states and the national government.

They start at the beginning, with the Court's 1936 decision in *United States v. Butler*.¹⁴⁷ As they describe it, the scope of the federal government's power to spend money had been uncertain, from the Framing Era well into the 20th century. The Constitution provides that Congress may "collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States."¹⁴⁸

¹⁴⁰ See 42 U.S.C. § 1396c.

¹⁴¹ See *Free Ent. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3162 (2010).

¹⁴² 132 S. Ct. at 2607 (Roberts, C.J.).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 2667 (joint dissent).

¹⁴⁵ *Id.* at 2608 (Roberts, C.J.).

¹⁴⁶ *Id.*

¹⁴⁷ 297 U.S. 1 (1936).

¹⁴⁸ Art. I, § 8, cl. 1.

James Madison's view was that "general welfare" was a reference to Congress's enumerated powers—that is, Congress may only spend in service of the exercise of its enumerated powers.¹⁴⁹ Hamilton, however, viewed the spending power as not so limited, but broad enough to reach any purposes general, and not local, in nature.¹⁵⁰ In *Butler*, nearly 150 years after the framing of the Constitution, the Supreme Court overturned over a century of precedent and practice to endorse Hamilton's view.¹⁵¹ Since then, grants to the states have grown from a pittance to, as of 2010, "over \$608 billion or 37.5% of state and local government expenditures."¹⁵²

The federal government, of course, imposes conditions on grants and, in that manner, aggrandizes its own power, reaching ends that would otherwise be denied to it.¹⁵³ "This formidable power, if not checked in any way, would present a grave threat to the system of federalism created by our Constitution."¹⁵⁴ Its abuse "'has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach.'"¹⁵⁵ For that reason, the Court has been vigilant in policing the conditions attached to grants, so as to preserve the balance between the federal government and the states.¹⁵⁶ Part of that broader project, the coercion doctrine is but an application of the Constitution's protection of dual sovereignty recognized in *New York and Printz*.¹⁵⁷

The joint dissenters' coercion test contains only a single element: "[I]f States really have no choice other than to accept the package [of grants and conditions], the offer is coercive, and the conditions cannot be sustained under the spending power."¹⁵⁸ In this case, it

¹⁴⁹ *Butler*, 287 U.S. at 65.

¹⁵⁰ *Id.* at 65–67.

¹⁵¹ *Id.*

¹⁵² 132 S. Ct. at 2658 (joint dissent).

¹⁵³ See *Dole*, 483 U.S. at 212.

¹⁵⁴ 132 S. Ct. at 2659 (joint dissent).

¹⁵⁵ *Id.* (quoting *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 654–55 (1999) (Kennedy, J., dissenting)).

¹⁵⁶ *Id.* (joint dissent).

¹⁵⁷ *Id.* at 2659–60 (joint dissent).

¹⁵⁸ *Id.* at 2661.

was apparent that “no State could possibly refuse the offer that the ACA extends.”¹⁵⁹ In particular, “the sheer size of this federal spending program in relation to state expenditures means that a State would be very hard pressed to compensate for the loss of federal funds by cutting other spending or raising additional revenue.”¹⁶⁰ Thus, “the offer that the ACA makes to the States—go along with a dramatic expansion of Medicaid or potentially lose all federal Medicaid funding—is quite unlike anything that we have seen in a prior spending power case.”¹⁶¹ Indeed, “Congress well understood that refusal was not a practical option.”¹⁶² In its comprehensive scheme to cover all Americans, the decision of even a single state not to participate would leave “a gaping hole in the ACA’s coverage.”¹⁶³

The joint dissenters break with the chief justice, however, over the proper remedy for this violation. “The most natural remedy,” they say, “would be to invalidate the Medicaid Expansion.”¹⁶⁴ This result would defuse the unconstitutional coercion, while freeing the states (and their citizens) from the burden of paying for the expansion. For its failure to achieve that second result, the joint dissenters have harsh words for Chief Justice Roberts’s approach:

[His] remedy introduces a new dynamic: States must choose between expanding Medicaid or paying huge tax sums to the federal fisc for the sole benefit of expanding Medicaid in other States. If this divisive dynamic between and among States can be introduced at all, it should be by conscious congressional choice, not by Court-invented interpretation. We do not doubt that States are capable of making decisions when put in a tight spot. We do doubt the authority of this Court to put them there.¹⁶⁵

They also criticize the chief justice’s novel approach to severability, which severs nothing and rewrites a portion of a statute. “The Court today opts for permitting the cut-off of only incremental Medicaid

¹⁵⁹ *Id.* at 2664.

¹⁶⁰ *Id.* at 2663.

¹⁶¹ *Id.* at 2664.

¹⁶² *Id.* at 2665.

¹⁶³ *Id.* at 2657.

¹⁶⁴ *Id.* at 2667.

¹⁶⁵ *Id.*

funding, but it might just as well have permitted, say, the cut-off of funds that represent no more than x percent of the State's budget."¹⁶⁶

C. *Uncertainty Reigns*

The Court's disposition of the plaintiff states' Medicaid claim leaves much unresolved. Most immediately, it provides no guidance as to what provisions of the ACA, other than the new coverage requirements, are a part of the "new" Medicaid program that states may decline to adopt without putting federal funding at risk. For example, the ACA contains a "maintenance of effort" provision, which requires each state to maintain the same eligibility standards, methodologies, and procedures—even those adopted under the state's discretion that, prior to the ACA, could have been freely revised—until the state has an operational insurance exchange.¹⁶⁷ Another provision requires that eligibility be determined based on "modified adjusted gross income."¹⁶⁸ These are just two of many ACA provisions that may or may not apply to states that choose to opt out of the expansion. The status of each will have to be resolved through administrative action or, more likely, litigation. Unfortunately, the Court provides no clue as to how the lower courts might sort the new from the old, unless mere presence in the ACA is the deciding factor.

And then there is the question of timing. Must a state choose to opt out before January 1, 2014, or may it opt in and then, some years later, reverse course?

The decision also leaves considerable uncertainty as to health policy. Despite Chief Justice Roberts's apparent confidence that few if any states would choose to opt out of the Medicaid expansion,¹⁶⁹ six have already announced their intention to do so, and another seven have announced that they may follow.¹⁷⁰ This development leaves, as the joint dissenters noted, a gaping hole in Congress's universal coverage scheme, particularly because health exchange

¹⁶⁶ *Id.*

¹⁶⁷ ACA § 2001(b).

¹⁶⁸ ACA § 2002.

¹⁶⁹ 132 S. Ct. at 2608 (Roberts, C.J.).

¹⁷⁰ Sarah Kliff, *The State of the Medicaid Expansion in One Map*, July 9, 2012, at <http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/07/09/the-state-of-the-medicaid-expansion-in-one-map/>.

subsidies are not available to individuals making less than the federal poverty line. Thus, there will be Medicaid coverage for the destitute and exchange subsidies for the middle class, but nothing for a broad swath of the working poor. This is not, presumably, what Congress intended.¹⁷¹

States' opting out may also affect the federal budget. When a state opts out of the Medicaid expansion, many of the individuals who would have been swept up in the expanded program will become eligible for insurance exchange subsidies, which are substantially more costly to the federal government than covering an additional individual under Medicaid. If just six states opt out, the additional cost to the federal government would be, according to a report by a former director of the Congressional Budget Office, \$72 billion to \$80 billion through 2021.¹⁷² Again, this substantial increase in cost is probably not something that Congress intended.¹⁷³

Finally, there is uncertainty as to the future of the anti-coercion doctrine. Neither opinion approving the doctrine did much to sketch out its particulars, only reasoning that the Medicaid expansion was beyond any doubt coercive and unlawful. The chief justice's approach appears to be the narrower, requiring not only that a state have no choice in acceding to federal conditions but also that the federal conditions be new or in some sense transformative of a preexisting program. Thus, states' reliance interests are protected, but only to a point. So long as the federal government moves incrementally, it need not fear the courts. By contrast, the joint dissenters' approach focuses on coercion alone, and could well reach any marginal burden backed by a serious enough sanction. A new reporting requirement for welfare programs, for example, could be called into question if the penalty for failure to implement it were complete loss of welfare funding. Although the joint dissenters' view

¹⁷¹ See ACA § 2001 (entitled "Medicaid Coverage for the Lowest Income Populations"); ACA § 1501(a)(2)(D) (purpose was to attain "near-universal coverage").

¹⁷² Douglas Holtz-Eakin, et al., Congressional Budget Office Revision to the Affordable Act Baseline, July 24, 2012, available at http://americanactionforum.org/sites/default/files/AAF%20Memo_CBO%20Score%20of%20SCOTUS%20Decision_7-24-12.pdf.

¹⁷³ ACA § 1563(a)(1) (stating that the ACA "will reduce the Federal deficit between 2010 and 2019").

commands more votes, it is the chief justice's that, being narrower, is binding on the lower courts.¹⁷⁴

If the Medicaid expansion is "surely beyond" the line that separates encouragement from coercion,¹⁷⁵ then there is space for other, marginally less egregious exercises in "cooperative federalism." The Clean Air Act may be among the most vulnerable. The CAA conditions receipt of all federal highway funding on compliance with federal air pollution control requirements.¹⁷⁶ Professor Jonathan Adler is right to suggest that "[t]his may be problematic because a majority of the Court thought Congress was trying to leverage state reliance on funding for one program (traditional Medicaid) to induce participation in another program (the Medicaid expansion)."¹⁷⁷ Adler also suggests another infirmity: constantly shifting Clean Air Act requirements that alter states' responsibilities. As he explains, "the recent inclusion of greenhouse gases as pollutants subject to regulation under the Act has radically altered states' obligations, such that states will now have to do many things they could not have anticipated when the Clean Air Act was last revised in 1990."¹⁷⁸ If states' participation in federal environmental programs is "much in the nature of a contract,"¹⁷⁹ then the federal government may be in breach. The remedy? Uncertain.

No more than predictions are possible today, and a single data-point rarely yields strong predictions. That seven justices found the ACA's Medicaid expansion to be constitutionally infirm at least suggests that a narrower majority may be willing to apply the coercion doctrine to lesser instances of abuse. That possibility, alone, should prompt Congress and the executive branch to provide the states more breathing room, even without the Court's intervention.

¹⁷⁴ Marks v. United States, 430 U.S. 188, 193 (1977).

¹⁷⁵ 132 S. Ct. at 2606 (Roberts, C.J.).

¹⁷⁶ 42 U.S.C. §§ 7410(m), 7509(b).

¹⁷⁷ Jonathan Adler, Could the Health Care Decision Hobble the Clean Air Act?, Percolator Blog, July 23, 2012, <http://percolatorblog.org/2012/07/23/could-the-health-care-decision-hobble-the-clean-air-act/>.

¹⁷⁸ *Id.*

¹⁷⁹ 132 S. Ct. at 2602 (Roberts, C.J.).

IV. Conclusion: The Triumph of Fig-Leaf Federalism

Just as *District of Columbia v. Heller* demonstrated that “we are all originalists now,”¹⁸⁰ *NFIB* may demonstrate that we are all now federalists. Five justices concluded that the commerce power (either taken alone or supplemented by the Necessary and Proper Clause) does not support forcing individuals to purchase health insurance; seven held that the spending power does not support coercing states to expand their Medicaid programs to cover middle-class families; and even the two justices who dissented on both points at least felt compelled to acknowledge some limitation on federal power.¹⁸¹

And just as an avowed originalist may do violence to the constitutional text and its original meaning,¹⁸² so may a judge who espouses the principles of federalism fall short, or balk, at putting them into practice. *NFIB* appears to follow this approach, engaging in magnificent contortions of text and precedent to rescue a statute whose framers cheerfully disparaged any suggestion that the Constitution might pose an obstacle to their goals.

This is fig-leaf federalism, and it suggests that the lawyers plotting the next big federalism case would do well to choose some inconsequential program as the subject of their suit. For all the build-up, that may be *NFIB*’s most enduring result.

¹⁸⁰ See Jamal Greene, *Heller* High Water? The Future of Originalism, 3 Harv. J.L. & Pub. Pol’y 325, 325 n.3 (2009) (discussing *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (finding an individual right to keep and bear arms under the Second Amendment)).

¹⁸¹ See, e.g., *NFIB*, 132 S. Ct. at 2623–24 (Ginsburg, J.)

¹⁸² See, e.g., *Heller*, 128 S. Ct. at 2822–46 (Stevens, J., dissenting); Jack Balkin, *Abortion and Original Meaning*, 24 Const. Commentary 291 (2007).