

A Constitutional Moment?

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No review of the Supreme Court's October 2011 term would be complete without an extended discussion of the constitutional challenge to the president's health care law. The case dominated the term, and it captured the public's attention like few other Supreme Court cases. This essay traces the arc of the case and assesses what the Court ultimately did with it. While the public discussion has understandably focused on the Court's bottom-line decision to leave the law largely standing, the ruling is important for both its reasoning and its modifications to the legislation that Congress passed. In the long run, however, the decision may be as significant for what the Court did *not* decide. Despite many predictions to the contrary, the Court did not embrace the broad Commerce Clause defense of the individual mandate. As a consequence, the Court's long-running struggle to enforce meaningful outer limits on Congress's power under the Commerce Clause will continue.

The Arc of the Case

The arc of the health care case that took it to the Supreme Court was quite unusual. Many great constitutional cases involving congressional statutes present themselves as major constitutional cases from the very beginning. Take, for example, the constitutional challenge to the McCain-Feingold campaign finance statute, which culminated in the Supreme Court's decision in *McConnell v. FEC*.¹ In that case, the congressional debates were largely constitutional debates, with First Amendment issues front and center. Those First Amendment

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¹ *McConnell v. FEC*, 540 U.S. 93 (2003).

issues were taken very seriously from the outset. Indeed, the statute itself recognized the imminence of a First Amendment challenge with a provision for expedited review.

The trajectory of the health care cases was entirely different. While the health care legislation was hotly debated in Congress, it was a political and policy debate, not a constitutional one. Even though legislators challenged the wisdom of the individual mandate, constitutional concerns were not raised until the very end of the debate and were neither central to the debate nor taken particularly seriously.

Moreover, when a number of challengers filed suit, attacking the law as unconstitutional, the suits were nearly universally dismissed as frivolous. They were seen more as a continuation of the policy debate and treated more as political statements than serious constitutional cases with a realistic prospect of success. Even Orin Kerr of the *Volokh Conspiracy*, a relatively sympathetic commentator, gave the suits only a one percent chance of success.²

But all of that changed when Judge Henry Hudson issued an opinion striking down the individual mandate as unconstitutional.³ Then in relatively short order, Judge Roger Vinson did Judge Hudson one better when he struck down the health care law in its entirety.⁴ Other challenges were unsuccessful.⁵ But then something pernicious started happening: Commentators could not help but notice that the judges striking down the statute as unconstitutional were appointed by Republican presidents while those upholding the law were appointed by Democratic presidents. Much of the coverage of the decisions focused on that disparity, and with a seemingly unprecedented number of people paying attention, such reportage could not help but breed a certain cynicism and a belief that judging is simply politics by other means.

² Orin Kerr, What Are the Chances That the Courts Will Strike Down the Individual Mandate?, *Volokh Conspiracy*, Mar. 22, 2010, <http://www.volokh.com/2010/03/22/what-are-the-chances-that-the-courts-will-strike-down-the-individual-mandate>.

³ See *Virginia v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010).

⁴ *Florida v. U.S. Dep't. of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011).

⁵ See, e.g., *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010); *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010).

Fortunately, the next stage of the trajectory was at the courts of appeals, and the results necessitated a more nuanced narrative. A number of prominent appellate court judges appointed by Republican presidents, such as Laurence Silberman of the D.C. Circuit and Jeffrey Sutton of the Sixth Circuit, voted to uphold the statute. At roughly the same time, Judge Frank Hull, an appointee of President Clinton, was one of two Eleventh Circuit judges to strike down the law in the challenge brought by Florida and a growing number of states. Wholly apart from the merits of the various decisions, this more complicated pattern of judicial decisions had the happy by-product of forcing a more nuanced discussion of the relationship between judicial philosophy and the political party of an appointing president.

Then, something truly remarkable occurred. The Supreme Court decided to grant review of these cases. That much was expected. What was remarkable was not the bare fact that the Court granted review, but the nature and extent of that review. The Court granted the government's petition seeking review of the Eleventh Circuit's decision striking down the individual mandate as unconstitutional. That was all but a foregone conclusion. When a court of appeals invalidates an act of Congress and the solicitor general files a petition, the Supreme Court's review is essentially guaranteed. But the Supreme Court not only granted the government's petition, but also granted separate petitions filed by the states and the private plaintiffs (the National Federation of Independent Business and two individuals) seeking review of the severability question—the question of what would become of the remainder of the statute if the individual mandate were invalidated—and the states' request that the Court consider its challenge to the Medicaid expansion as exceeding the scope of Congress's spending power. The Court's interest in that last issue, in particular, caught commentators by surprise, as the lower courts had dismissed the spending power issue even as they had invalidated the individual mandate.

The Court did not stop there, however. It also accepted the parties' invitation to consider the jurisdictional issue—the federal tax Anti-Injunction Act⁶—that the Fourth Circuit had relied on when it vacated Judge Hudson's decision and dismissed that constitutional

⁶ 26 U.S.C. § 7421(a).

challenge as unripe.⁷ The Court appointed two amici—one to argue for a lack of jurisdiction (essentially to defend the Fourth Circuit’s reasoning) and another to defend the Eleventh Circuit’s specific severability holding (namely, that if the individual mandate is unconstitutional, the remainder of the statute can remain fully operative). And, most dramatically of all, the Court on its own motion divided the case into four separate arguments—jurisdiction, the mandate, severability, and the Medicaid expansion—and allocated an entire week of argument to the case. The Court initially granted five-and-a-half hours of argument time, which was later expanded to six, to be spread over three days in the second week of its March sitting.

Granting this amount of argument time was unprecedented in the modern era. To put this in perspective, when *McConnell v. FEC* came to the Court, I was involved in the process of formulating the request for argument time. *McConnell* was a sprawling case, involving almost a dozen consolidated challenges, more than a dozen separate constitutional issues, and a lower court opinion that spanned more than a thousand pages. The parties consulted and came up with what they collectively reasoned was the maximum amount of argument time that they could possibly request from the Court: a relatively paltry four hours on a single day. Although one or two commentators still refused to take the constitutional challenge to the health care law seriously, it was crystal clear that the Supreme Court itself was taking the case very seriously indeed.

My personal involvement in the case had a trajectory of its own. I was not present at the creation of these challenges and had no direct role in the district court proceedings. I certainly paid attention when the suit was filed, but was busy with other matters. Thus, when asked about the cases during a National Public Radio program focused on a different topic, my response was tentative. My co-panelist, Walter Dellinger, had studied the cases more closely and had already filed an amicus brief, so he was in a position to predict victory with confidence, suggesting that only Justice Clarence Thomas would accept the challengers’ Commerce Clause arguments. Since I had not studied the materials closely, I could only offer a lesson I had learned while defending statutes against constitutional attack during my time in the solicitor general’s office: the importance of

⁷ *Virginia v. Sebelius*, 656 F.3d 253 (4th Cir. 2011).

a limiting principle. All nine justices agree that Congress's power under the Commerce Clause is not plenary; thus, if the government asserts a broad conception of Congress's commerce power, it must articulate a clear limiting principle. If Congress can do this, what can it not do?

I became directly involved in the challenge brought by Florida and ultimately 25 other states when the case reached the court of appeals.⁸ Even though they were successful in the trial court, the steering committee directing the litigation viewed Supreme Court review as inevitable and so wanted to bring a Supreme Court litigator on board for the appellate briefing and argument. I was less sure that the Eleventh Circuit case was destined for the Supreme Court; there were at least three other circuit court cases that were potential vehicles for Supreme Court review, and some of them were further along in the process of briefing and argument. Still, I was honored to have the chance to represent more than half the states in a case of this magnitude. I argued the case in the Eleventh Circuit. When that Court struck down the individual mandate and then the solicitor general decided to seek Supreme Court, rather than en banc, review of that decision, I knew Supreme Court review was all but guaranteed. Nonetheless, I marveled, along with everyone else, when the Court dedicated a full week to the argument.

The Challengers' Daunting Task

Although the Supreme Court divided the case into four separate arguments, that actually understates the number of issues. In reality, this one case involved six separate issues of surpassing importance. The first day's argument focused on the single issue of jurisdiction concerning the Anti-Injunction Act, a relatively obscure federal statute dating back to the Reconstruction era, which provides that most constitutional challenges to federal taxes must wait until the taxpayer has paid the tax and sought a refund. Fortunately, the Supreme Court unanimously rejected any jurisdictional concerns because Congress had not denominated the mandate as a tax.

The Court dedicated the second day's arguments to what we took to be the heart of the matter, the constitutionality of the individual mandate. But this issue was really three issues in one since

⁸ Another two states, Virginia and Oklahoma, pursued their own separate challenges.

the government had three independent arguments for the mandate's constitutionality. The government's principal defense—and the issue that dominated discussion of the case both inside and outside the courtroom—depended on the Commerce Clause. But the government also defended the mandate as valid legislation under the Necessary and Proper Clause and as a valid exercise of Congress's taxing power.

Each of these three constitutional arguments provided an independent basis for upholding the statute. Thus, the challengers' task was daunting: they needed to prevail on all three issues. Worse still, past decisions gave strong indications that four justices—Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan—would not be receptive to arguments that the mandate was unconstitutional. Thus, the challenge facing the states and the private plaintiffs was to convince the five other justices who might be amenable to a constitutional challenge on all three issues. In short, the challengers had to run the table and get 15 of a possible 15 votes to prevail.

The good news from the perspective of my clients is that we received 14 out of a possible 15 votes. The bad news is that we needed that 15th vote. Despite repeated suggestions that the challengers' commerce power arguments would appeal only to Justice Thomas, five justices concluded that the mandate was not valid Commerce Clause legislation. The same five justices concluded that the Necessary and Proper Clause did not save the mandate. Nonetheless, the challengers lacked the fifth vote when it came to the taxing power.

The Individual Mandate Was Held Unconstitutional

Although the challengers fell short of a fifth vote on the taxing power question, that does not mean that the constitutionality of the individual mandate was upheld. To the contrary, despite what people read the next day in the newspapers, the Supreme Court found the individual mandate to purchase insurance or pay a penalty unconstitutional. Five justices upheld the statute only by construing the mandate as a tax and upholding it as a valid exercise of the taxing power. But five justices also held that the individual mandate that Congress actually passed could be sustained only under the Commerce Clause or Necessary and Proper Clause. And yet those congressional powers were insufficient, they held, to justify the unprecedented individual mandate. For those skeptical of this reading

of the Court's opinion, do not take my word for it. The chief justice's opinion makes this distinction quite clear.

Chief Justice John Roberts emphasized that the government's taxing power argument required the Court to read the statute in a fundamentally different way from its Commerce and Necessary and Proper Clause arguments.

The Government's tax power argument asks us to view the statute differently than we did in considering its commerce power theory. In making its Commerce Clause argument, the Government defended the mandate as a regulation requiring individuals to purchase health care insurance. The government does not claim that the taxing power allows Congress to issue such a command. Instead, the Government asks us to read the mandate not as ordering individuals to buy insurance, but rather as imposing a tax on those who do not buy the product.⁹

The chief justice then reiterated the point that the taxing power was not just an alternative ground for defending the mandate as written, but rather required a fundamentally different conception and construction of the statute. "Under [the tax] theory, the mandate is not a legal command to buy insurance."¹⁰ Rather, it is "just a tax hike on certain taxpayers who do not have health insurance."¹¹

The chief justice also readily admitted that construing the mandate as a tax on the uninsured was not the most straightforward reading of the statute. Instead, "[t]he most straightforward reading of the mandate is that it commands individuals to purchase insurance."¹² Indeed, the belief that the mandate was *not* most naturally read as a tax on the uninsured—as opposed to a mandate to purchase insurance—was integral to the chief justice's opinion in general and to his willingness to address the Commerce Clause and Necessary and Proper Clause in particular. This key point is seen most clearly in his response to Justice Ginsburg's separate opinion. Justice Ginsburg pointedly criticized the chief justice for addressing the Commerce Clause and Necessary and Proper Clause argu-

⁹ NFIB v. Sebelius, 132 S. Ct. 2566, 2593 (2012) (opinion of Roberts, C.J.).

¹⁰ *Id.* at 2594.

¹¹ *Id.*

¹² *Id.* at 2573.

ments at all. She essentially told the chief justice—and here I am only paraphrasing—you like to talk about judicial restraint, but the judicially restrained approach is not to unnecessarily address constitutional issues, so if the mandate is valid under the taxing power, you have no business addressing the other two issues. The chief justice responded directly to this criticism by saying that “the statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it.”¹³ In other words, the chief justice viewed his first responsibility as addressing the constitutionality of the statute that Congress actually passed, and only upon finding it impossible to sustain the mandate qua mandate did he find it appropriate to consider whether the statute could be construed in an alternative matter such that it could be sustained under the taxing power.

In the end, the chief justice left little doubt about the difference between the unconstitutional mandate Congress actually enacted and the tax that he sustained. “The federal government does not have the power to order people to buy health insurance.”¹⁴ By contrast, “[t]he federal government does have the power to impose a tax on those without health insurance.”¹⁵

The Spending Power Holding: A Sleeper within the Blockbuster

I promised six issues, and the fifth and sixth issues were debated on the third day of arguments. The fifth issue discussed on the morning of the third day was severability, or the consequences for the balance of the statute if the individual mandate were struck down. Although the matter was hotly contested at argument, a majority of the Court never reached the issue because the mandate was recharacterized as a tax, rather than struck *in toto*. Nonetheless, the remarkable fact about the severability issue was that, in the end, four justices were willing to invalidate the statute in its entirety. The argument for total invalidation always seemed to me to be the most difficult aspect of the challengers’ argument; thus, the fact that the argument for total invalidation came within a vote of total success is a testament to the centrality of the mandate to the act as a whole.

¹³ *Id.* at 2600.

¹⁴ *Id.* at 2601.

¹⁵ *Id.*

The sixth issue—whether the Medicaid expansion was a valid exercise of Congress’s spending power—was argued on the afternoon of the third day of argument. Although the Court granted a remarkable six hours of argument for the health care case, even that proved insufficient, as the Court kept both advocates at the podium longer than scheduled. The result of that argument was a holding that may prove more important in future cases than anything the Court said about the mandate. In the end, seven justices ruled that Congress exceeded its spending power by conditioning the states continued participation in the entirety of the Medicaid program, including pre-existing aspects of the program, on a state’s willingness to expand the program to cover substantially larger numbers of the uninsured. The significance of this holding lies largely in the fact that it stands as the first case in which the Court has actually applied the “coercion limit” on the spending power that it had suggested in dicta in earlier cases.

The chief justice’s reasoning on the spending power emphasized a key component of the Court’s federalism jurisprudence—namely, accountability. “Permitting the Federal Government to force states to implement a federal program would threaten the political accountability key to our federal system.”¹⁶ If states are implementing federal programs not based on a voluntary choice for which state citizens can justly hold them accountable, but through the compulsion of the federal government, then state citizens may improperly blame the states for policies that are really the exclusive responsibility of the national government.

The key defect in the Medicaid expansion was Congress’s decision to leverage funds for the existing Medicaid program (and states’ dependency on those funds) to coerce the states’ acceptance of the new funds with the new conditions. “When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the states to accept policy changes.”¹⁷ Congress would have been free to create a separate program that gave states a choice to accept the new funds and the new conditions, but it could not hold the existing program—which Congress itself treated as separate for other

¹⁶ *Id.* at 2602.

¹⁷ *Id.* at 2604.

purposes, such as the degree of federal funding—hostage to this new program such that the consequence of refusing to participate in the new program was the inability to continue to participate in the old one. “What Congress is not free to do is to penalize states that chose not to participate in that new program by taking away their existing Medicaid funding.”¹⁸

In light of the Court’s reasoning, the consequence of this spending power defect was to decouple the new and old funding streams and to make clear that states would not forfeit their ability to participate in Medicaid if they refused to expand their programs along the lines envisioned by the new law. The undramatic remedial consequences of the Court’s determination have obscured some of the ruling’s significance. But there is no mistaking the fact that the Court held this aspect of the law unconstitutional. “We determine . . . that § 1396c is unconstitutional when applied to withdraw existing Medicaid funds from States that decline to comply with the expansion.”¹⁹

Practical Consequences of Court’s Partial Invalidation

In the wake of the oral argument, a number of commentators concluded that the entirety of the health care law was in peril. Not only did the Court appear to take the argument about the individual mandate and spending power quite seriously, but the severability argument did not have the feel of an academic debate. Thus, when a majority of the Court upheld the vast majority of the statute, much of the reaction understandably focused on what the Court did not do and did not invalidate. But there is certainly the potential for there to be significant practical consequences of what the Court did do and did invalidate.

The simple fact is that the statute that emerged from the Supreme Court is not the statute that Congress actually passed. Not only has the mandate been converted into a tax, but states now have a choice about whether to participate in the Medicaid expansion. Indeed, both rulings allow choice where Congress imposed a mandate. And choices have consequences. Although it is too early to tell how many individuals will opt to pay a weakly enforced tax rather than purchase health care insurance and how many states will choose not to expand Medicaid, these choices operate in only one direction,

¹⁸ *Id.* at 2607.

¹⁹ *Id.*

namely, in the direction of leaving fewer individuals with health insurance than Congress envisioned when it enacted the statute. Indeed, the chief justice for his part affirmatively recognized that some individuals would not buy health insurance as a result of his decision. “It may often be a reasonable financial decision to make the payment rather than purchase insurance.”²⁰ And a majority of the states have since indicated that they will not participate in the Medicaid expansion.

Thus, there is no doubting that, relative to what Congress envisioned, millions fewer individuals will be insured in light of the Court’s decision, and the statute will not operate as Congress intended. That, in turn, may well cause Congress to reopen the debate over health care, and if the statute is reopened, it is anyone’s guess as to what will ensue. In sum, the practical consequences of the Court’s decision should not be underestimated.

Jurisprudential Consequences: A Constitutional Moment That Wasn’t

Whatever the practical consequences of the Court’s decision, the jurisprudential consequences are even more significant. Although the focus has been on the significance of the Court’s decision to substantially uphold the statute, the jurisprudential consequences of the Court’s refusal to endorse Congress’s power to enact the statute as written are at least as significant. If the Court had endorsed the statute as passed, it would have largely signaled the end of the Court’s federalism jurisprudence—one of the signal doctrinal achievements of the Rehnquist Court. Thus, in many respects, the significance of the Court’s decision lies in the constitutional moment that wasn’t and the fact that the Court’s federalism jurisprudence remains alive and well.

As Justice Anthony Kennedy has observed, “federalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.”²¹ The Court’s decisions in

²⁰ *Id.* at 2595.

²¹ *United States v. Lopez*, 514 U.S. 549, 575–76 (1995) (Kennedy, J., concurring) (citations omitted).

Lopez and *United States v. Morrison*,²² invalidating acts of Congress as exceeding Congress's commerce power, and other decisions invoking the Eleventh Amendment to preclude damage actions against the states, were signal achievements of the Rehnquist Court. Yet in the last years of Chief Justice William Rehnquist's tenure, the so-called federalism revolution appeared to be running out of steam, with the late chief justice in dissent in cases upholding congressional power like *Gonzales v. Raich* and *Tennessee v. Lane*.²³

Nor was it foreordained that the new appointees of President George W. Bush would have the same enthusiasm for federalism as the justices they replaced. While Chief Justice Rehnquist and especially Justice Sandra Day O'Connor cut their teeth in the state courts and in state politics, both Chief Justice Roberts and Justice Samuel Alito had their formative experiences in the executive branch of the federal government. Thus, there was a palpable sense in some circles that the health care case could be the swan song for the federalism revival.

Such considerations certainly produced bold predictions of 8–1 victories for the federal government across the board, particularly when it came to the Commerce Clause challenge. While commentators were willing to concede that Justice Thomas would endorse the challenge, even Justice Antonin Scalia's vote was widely perceived to be "in play." Well after the Supreme Court signaled its own view of the seriousness of the issues by granting unprecedented argument time, commentators were still dismissive of the constitutional case against the statute. Linda Greenhouse's *New York Times* pre-argument commentary provides an example:

Free of convention, and fresh from reading the main briefs in the case to be argued before the Supreme Court next week, I'm here to tell you: that belief [that both sides have weighty views to present to the Court] is simply wrong. The constitutional challenge to the law's requirement for people to buy health insurance—specifically, the argument that the mandate exceeds Congress's power under the Commerce Clause—is rhetorically powerful but analytically so weak that it dissolves on close inspection. There's just no there there.²⁴

²² *United States v. Morrison*, 529 U.S. 598 (2000).

²³ *Gonzales v. Raich*, 545 U.S. 1 (2005); *Tennessee v. Lane*, 541 U.S. 509 (2004).

²⁴ Linda Greenhouse, *Never Before*, *N.Y. Times Opinionator Blog*, Mar. 21, 2012, <http://opinionator.blogs.nytimes.com/2012/03/21/never-before>.

My point is not to call out anyone who incorrectly predicted the outcome. After all, literally no one predicted the actual outcome, including the chief justice's taxing power ruling and the 7-2 vote on the spending power. My point rather is to emphasize that there was a substantial body of very reputable opinion that believed that the commerce and spending power challenges were not just narrowly wrong, but entirely frivolous. As the ever-quotable Walter Dellinger told *Politico* on the eve of argument: "You know how they say, 'People were saying it's frivolous, and they're not saying that anymore'? Well, I'm still saying it's frivolous."²⁵

Thus, my point is that if that view had prevailed, then we would really have had a constitutional moment on our hands. The long struggle to enforce judicial limits on the Commerce Clause would largely have ended. Five justices declined to let that happen. As Justice Kennedy wrote in his *Lopez* concurrence, "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far."²⁶

An Objection and a Conclusion

Allow me to consider an obvious objection to my emphasis on the importance of five justices upholding judicially enforceable limits on the Commerce and Necessary and Proper Clauses. What about the taxing power? Why do limitations on the commerce power matter if Congress can simply turn around and accomplish the same or similar thing via the taxing power? Whatever the merits of the chief justice's taxing power opinion, his decision to embrace the Commerce Clause challenge and uphold the statute only as construed as a tax differs from a straight-up endorsement of the mandate in at least three ways.

First, the difference between the two sources of power matters practically. As noted, the inevitable result of the chief justice's reliance on the tax power, as his opinion expressly recognized, is that some individuals will choose to pay a tax rather than obtain

²⁵ Josh Gerstein, *How the Legal Assault on Obama's Health Law Went Mainstream*, *Politico*, Mar. 25, 2012, available at <http://www.politico.com/news/stories/0312/74429.html>.

²⁶ *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring).

qualifying health insurance.²⁷ As a result, more individuals will remain uninsured than under the law Congress envisioned. The exact magnitude of this practical difference will become clear only over time, but there will clearly be some practical difference.

Second, there is an important theoretical difference. The taxing power is a less complete and less sweeping power than a comparable ability to impose purchase mandates under the Commerce Clause. If the government's theory of the commerce power—that a purchase mandate has the requisite effect on interstate commerce through the aggregation of the mandated purchases—had prevailed, there would be no logical constraint on Congress's power to enforce the purchase mandate. As the chief justice recognized, even criminal penalties for failing to purchase health insurance would appear to be valid under the government's theory.²⁸ The taxing power, by contrast, would allow the government to impose tax consequences only for the failure to purchase health insurance.

Third, and perhaps most important, there is a critical structural difference between the two outcomes. Now that five justices have determined that a true individual mandate is not valid under either the Commerce Clause or the Necessary and Proper Clause, and that a mandate can be sustained only as a tax, all of the political checks that make enacting a "tax hike" or imposing a "new tax" difficult should be fully operable in the face of any future effort to enact another individual mandate. The consistent efforts of the president, even after the decision came down, to deny that the mandate was, in fact, a tax underscore the political difficulty and unpopularity of new taxes. To the extent the *raison d'être* of the mandate was to accomplish certain goals without explicitly raising taxes, a Supreme Court decision holding that a mandate can be upheld only as a tax may create an important political obstacle to future mandates.

In all events, my point in underscoring the differences between the chief justice's taxing power rationale and the government's principal theories for defending the legislation is not to defend the chief justice's rationale or to enter into the debate over whether his opinion should be viewed as a glass half-full or half-empty. Rather, my point is to emphasize that a decision that fully embraced the federal

²⁷ NFIB, 132 S. Ct. at 2601.

²⁸ See *id.* at 2600.

government's view of Congress's power under the Commerce Clause and the Necessary and Proper Clause would have been a truly significant constitutional moment. It would have signaled an end to one of the principal projects of the Rehnquist Court: reasserting a judicial role in enforcing limits on Congress's commerce power. The fact that five justices rejected the government's effectively plenary view of Congress's power and that seven justices asserted judicially enforceable limits on Congress's spending power means that the long struggle to define the proper balance of power between the federal and state governments—and the judiciary's role in enforcing that balance—will continue. Indeed, with cases concerning the Voting Rights Act, same-sex marriage, and the treaty power before the Court, federalism may take on, if anything, a more significant role in the immediate future.