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RSC Policy Brief:
The Supreme Court's Obamacare Decision

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After two years, three months, and four days since legal challenges were brought against the Patient Protection and Affordable Care Act[1], the Supreme Court decided in *National Federation of Independent Business (NFIB) v. Sebelius* the law to be constitutional in part and unconstitutional in part. The two challenged provisions the Supreme Court addressed are the law's requirements that nearly all American citizens purchase a federally-approved health insurance product, and that states expand their Medicaid-eligible beneficiaries to child-less adults whose income levels fall below 138% of the Federal Poverty Level (FPL) or risk losing federal funding for their existing Medicaid programs. Other federal legal challenges brought against Obamacare are pending in lower federal courts that address different potential constitutional violations than those argued in this case, and can be found here.

The decision reinforces the importance of a legislative repeal to this impractical, unworkable, expensive, and draconian federal takeover of our nation's health care system. Many legal, practical, and political questions remain as a result of this remarkable decision. This Policy Brief summarizes the decision and also examines some of these unresolved matters.

What Does the Ruling Actually Say?

Despite evidence to the contrary, explained in the joint dissent (pages 16-26), Chief Justice Roberts, along with Justices Breyer, Ginsberg, Kagan, and Sotomayor upheld Obamacare's penalty imposed upon individuals' failure to purchase federally-approved health insurance (the Individual Mandate) as within Congress' taxing power. A majority of the Court held that the Constitution's Commerce Clause did not grant Congress the power to institute an individual mandate. A significant portion of the law's Medicaid provision was partially overturned as an unconstitutional coercive federal spending condition imposed on the states. Instead of entirely striking down this provision, the Secretary of Health and Human Services is prevented from withholding current Medicaid federal spending to those states who decide not to participate in Obamacare's Medicaid expansion. The joint dissent explained that the entire law should have been struck down.

[1] P.L. 111-148 & the health care-related provisions, title I and subtitle B of title II, of P.L. 111-152

The Commerce Clause and Necessary and Proper Clause

There has long been a broad assumption that virtually no limits on congressional power to regulate under the Constitution's Commerce Clause authority (Article I, Section 8, Clause 3) will be enforced.[2] The most illustrative example of this expansive view is the 1942 Supreme Court decision in *Wickard v. Filburn*, which dramatically expanded the scope of Congress to regulate aspects of individual citizens' everyday life.[3] *Perez v. United States* is a "close second," in upholding a federal statute criminalizing the "eminently local activity" of loan sharking.[4] Most recently, the court found in *Gonzalez v. Raich* that Congress can prohibit the local cultivation and possession of medical marijuana.[5] As such, the President and his congressional supporters believed that the Commerce Clause would be further expanded to grant Congress the power to mandate action out of inaction. However, Chief Justice Roberts and the joint dissenters held that the Commerce Clause cannot be expanded in this way.

The Court's language on this point is strong in insisting this Commerce Clause power would be unprecedented. Chief Justice Robert explained, "…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…the Government's logic would justify a mandatory purchase to solve almost any problem." [6] He continued that "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."[7] The joint dissenters supported this point in stating that the government's view "threatens [our constitutional order] because it gives such an expansive meaning to the Commerce Clause that all private conduct (including the failure to act) becomes subject to federal control, effectively destroying the Constitution's division of governmental power." [8] Notably, the joint dissenters

[2] "Roberts' decision, page 19.
[3] The court upheld the power of the federal government to regulate a private farmer's wheat production for his own use with no intention of selling it on the commercial market. 317 U.S. 111 (1941).
[4] Joint dissent, page 12, 402 U.S. 146 (1971).
[5] Joint dissent, page 9, 545 U.S. 1 (2005).
[6] Roberts' decision, page 3,
[7] Roberts' decision, pages 21 and 22. Further supporting statements include: "Congress already enjoys vast power to regulate much of what we do. Accepting the Government's theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government (page 23)."; "The Framers gave Congress the power to regulate commerce, not to compel it, and for over 200 years both our decisions and Congress's actions have reflected this understanding. There is no reason to depart from that understanding now (page 24)."; "The Commerce Clause is not a general license to regulate an individual from cradle to grave in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the states (page 26)."; and "The proposition that Congress may dictate the conduct of an individual today because of prophesized future activity finds no support in our precedent (page 26)."
[8] Joint dissent, page 14. Also, see "…if every person comes within the Commerce Clause power of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end." Page 12 of joint dissent.

remind readers that the Constitution enumerates "…not federally soluble problems, but federally available powers…Article I contains no whatever-it-takes-to-solve-a-national-problem-power."[9]

Chief Justice Roberts also did not accept the government's theory that the Constitution's Necessary and Proper Clause (Article I, Section 8, Clause 18) provided Congress the authority to enact the Individual Mandate despite the government's argument that "the mandate is an 'integral part of a comprehensive scheme of economic regulation—the guaranteed issue and community-rating insurance reforms." [10] Although Roberts recognized that the Court's jurisprudence under the Necessary and Proper Clause has been "very deferential to Congress's determination that a regulation is 'necessary,'" he explains that the Court has declared laws unconstitutional that undermine the structure of the Constitution. Applying these precedents, he concluded that the jurisprudence on this point upholds laws with authority derivative of, and in service to, a granted and enumerated power. Therefore, the Individual Mandate cannot be sustained under this authority because doing so would vest "…Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power."[11] According to the Chief Justice, it was not a "proper" means for making those reforms [guaranteed-issue and community-rating] effective.[12]

The Chief Justice's decision did not scale back the current scope of federal control under the interpretation of the Commerce Clause—it simply prevented its further expansion in this particular direction. Like previous Supreme Court decisions which struck down congressional attempts to stretch the Commerce Clause to the "outer edge,"[13] this ruling basically told Congress that it could not go this far in compelling individuals to buy a private product under an extension of the Commerce Clause. As some conservative legal commentators mentioned, this was a case for the line [on the Commerce Clause] to be held, and it was held, despite Obamacare being saved through the taxing power discussed below.

[9] Joint dissent, page 15.
[10] Roberts' decision, page 27 and 28. Guaranteed issue requires insurance companies to offer health insurance to all applicants, regardless of health status. Community Rating requires insurance companies to charge individuals the same premium price regardless of their health status except for age, family size (individual or family), smoking status, or geographic rating areas (Section 1201 of P.L. 111-148).
[11] *Ibid*, page 29.
[12] *Ibid*, page 30.
[13] The joint dissent on page 8 lists the following decisions on point: *New York v. United States, 505 U.S. 144 (1992)*—held that Congress could not, in an effort to regulate the disposal of radioactive waste produced in several different industries, order the States to take title to that waste; *Printz v. United States, 521 U.S. 898 (1997)*—held that Congress could not, in an effort to regulate the distribution of firearms in the interstate market, compel state law-enforcement officials to perform background checks; *United States v. Lopez, 514 U.S. 549 (1995)*—held that Congress could not, as a means of fostering an educated interstate labor market through the protection of schools, ban the possession of a firearm within a school zone; and *United States v. Morrison, 529 U.S. 598 (2000)*—held that Congress could not, in an effort to ensure the full participation of women in the interstate economy, subject private individuals and companies to lawsuits for gender-motivated violent crimes.

Obamacare's Medicaid Expansion and Congress' Spending Power

The court also considered whether Obamacare's conditions placed on the states' receipt of federal funds to implement their existing Medicaid programs were unconstitutionally coercive. Seven Justices agreed it did despite no lower federal court deciding the same.[14]

Obamacare vastly expanded the Medicaid program by requiring states, beginning in 2014, to expand coverage to all individuals below the age of 65 with incomes below 138% of the Federal Poverty Level (FPL), as well as to offer benefits to satisfy the minimum essential benefits required under the law. [15] If any state does not comply with this expansion, Obamacare threatens to withhold all of the state's Medicaid funding,[16] which typically amounts to more than 20% of that state's expenditures.

The Chief Justice's opinion recognized the long-standing history of Congress attaching conditions upon states in exchange for receiving federal funding under Congress' Article I, Section 8, Clause 1 spending power.[17] The legitimacy of this power "…rests on whether the State voluntarily and knowingly accepts the terms of the contract," since the "Constitution has never been understood to confer upon Congress the ability to require States to govern according to Congress's instructions."[18] When "pressure turns into compulsion, the legislation runs contrary to our system of federalism," the opinion explains. Roberts bluntly determined that Obamacare's financial inducement is a "gun to head" to states by threatening the loss of significant federal funds while leaving states with no real option "but to acquiesce in this Medicaid expansion."[19] By striking down this coercive spending condition, the Court reigned in the spending power for the first time since the New Deal era. Although the court had previously recognized that limits to Congress' spending powers exist, it had never until this case decided that a federal law actually breached these limits.

The remedy it fashioned, though, has generated a lot of controversy. First, there are complaints that the Roberts decision rewrote the statute, i.e., legislated from the bench, by not simply striking down the Medicaid expansion. Despite Roberts' claim[20] that Congress would have wanted to preserve the Medicaid expansion had Obamacare given states a genuine choice

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[14] Justices Breyer and Kagan joined in the Chief Justice's opinion on this point. Additionally, the four joint dissenters explained their belief that the withholding of federal funds to procure compliance with Obamacare's mandated Medicaid expansion is unconstitutional.

[15] 42 U.S.C. Section 1396a(a)(10). The current Medicaid program requires States to cover only certain categories of needy individuals including pregnant women, children, needy families, and the blind. See Roberts' opinion, page 45.

[16] 42 U.S.C. Section 1396c.

[17] "We have long recognized that Congress may use this power to grant federal funds to the states and may condition such a grant upon the states taking certain actions that Congress could not require them to take…Such measures encourage a State to regulate in a particular way [and] influence a State's policy choices." Roberts' opinion, page 46.

[18] Roberts' opinion, page 47.

[19] *Ibid*, page 51 and 52. Also, see "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.'" Page 55. "Courts should not conclude that legislation is unconstitutional on the grounds of being coercive unless it is unmistakably clear—in this case, however, there can be no doubt. If the anticoercion rule does not apply in this case, then there is no such rule," Joint dissent, page 38.

[20] Roberts' opinion, page 57.

whether to participate in the Medicaid expansion, many beg to differ. The joint dissent points out that "The reality that States were given no real choice but to expand Medicaid was not an accident…[Obamacare] depends on States' having no choice, because its Mandate requires low-income individuals to obtain insurance many of them can afford only through the Medicaid Expansion."[21] Ignoring this true congressional intent "would be to make a new law, not to enforce an old one," which is not the role of the courts.[22] The remedy takes Obamacare and "the Nation in a new direction and charts a course for federalism that the Court, not the Congress, has chosen; but under the Constitution, that power and authority do not rest with this Court."[23]

As a practical matter, States are now forced to decide between electing to expand Medicaid or having their citizens pay "huge sums" in federal tax dollars to subsidize the expansion of Medicaid in other states. Many states are loathe to expand at this time or ever. Reports explain that Governors in Florida, Louisiana, Mississippi, South Carolina, and Texas have definitively stated their states will not expand Medicaid. Five others are leaning toward not participating, while twenty-seven remain undecided. Despite the fact that Obamacare provides 100% federal funding for newly-eligible Medicaid beneficiaries for the first three years (tapering down to 90% in 2020 and beyond) , many states question the fiscal impact of increased administrative costs as well as the "woodworking effect" that come with such an expansion. Whether the federal government will actually continue to deliver this increased federal matching rate for those newly eligible is also a big concern given the $16 trillion national debt. Many states are waiting to see if the results from this November's election will bring a renewed energy for a legislative repeal of Obamacare, and in effect, have this decision made for them. For them, this can't come soon enough since Medicaid spending is already the largest portion of state budgets and is growing faster than state budget revenue.

How states ultimately respond to the Court's Medicaid ruling will impact the health insurance coverage assumptions and fiscal projections Congress relied upon in passing the bill. The Congressional Budget Office (CBO) originally estimated before final passage that up to 16 million uninsured individuals would gain coverage through this expansion. If a large number of states do not expand their Medicaid programs (as anticipated), these assumptions could dramatically miss the mark. In addition, Obamacare's interplay between its Medicaid expansion and its federal premium exchange subsidies and cost sharing for individuals earning between 100%-400% of FPL for those not-eligible for Medicaid have major implications for its costs and coverage. As such, CBO explained in its recent updated estimate for the coverage provisions of the law, Medicaid and the Children's Health Insurance Program will cover six million fewer people, while leaving three million additional people uninsured.

Congress' Taxing Power & the Individual Mandate

Despite no lower federal court deciding the penalty to enforce the Individual Mandate to be a tax, five justices upheld it as such.[24] In effect, this remarkable ruling upheld Obamacare. For

[21] Joint dissent, page 47.
[22] *Ibid*.
[23] *Ibid*, page 48.
[24] Joining the Chief Justice in this opinion were Justices Ginsburg, Sotomayor, Breyer, and Kagan. Also, the Fourth Circuit Court of Appeals did state in dicta (non-binding legal commentary) that it would have determined it to be a

most of the nation, whether Obamacare was upheld as a proper exercise of Congress' taxing power or through the commerce power is simply a distinction without a difference. The law as it was before the Supreme Court decision is virtually the same as it was afterward. But, as a matter of legal precedent and technical legislating, such a determination is monumentally important in terms of how future cases of congressional power will be decided, as well as how bills are crafted for consideration.

The Majority's Rationale

The majority opinion leaves many perplexed as to how one of the most controversial provisions in Obamacare, whose supporters publicly and repeatedly denied to the contrary, could be determined to be a tax. Chief Justice Roberts argues that the Court does not need to see the mandate as a tax to uphold it, but says that if the Court can construe it as one, it must uphold the law.[25] It cites the ruling to be a "fairly possible" interpretation of the mandate, explaining the government's position (whose side the Court ultimately takes) that "…the only consequence [of not complying with the Individual Mandate] is that he must pay an additional payment to the IRS when he pays his taxes…the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the Government taxes, like buying gasoline or earning income." However, these comparisons are not similar at all in an important way. The two taxes cited are taxes on actual actions. In the first case, the action is buying the gasoline, and in the second, the action is working and receiving income. Instead, such a "tax" would be a tax on *inaction*. A reasonable comparison would be the federal government taxing somebody for *not* purchasing gasoline. This undermines the claim that the mandate can be fairly construed as a constitutional tax under the taxing powers. The dissent points out, even if it could be fairly construed as a tax, the type of tax matters determining its constitutionality.

Chief Justice Roberts goes further along these lines by stating that Congress can tax inactivity. He stated, "[first} and most importantly, it is abundantly clear the Constitution does not guarantee that individuals may avoid taxation through inactivity." It should not be troubling to tax inactivity because "Congress' ability to use its taxing power to influence conduct is not without limits." These limits, according to the opinion, have been defined by the Court before as "punitive exactions obviously designed to regulate behavior otherwise regarded at the time as beyond federal authority." It suggests that there are limits, but that these limits remained undefined—and therefore thus far, they might as well not exist at all. This logic runs contrary to the idea of enumerated powers which the opinion itself cited in the introduction to the decision as limiting federal powers. That the Constitution does not actively prevent this type of tax is only valid if one believes that there is an essentially unlimited taxing power enumerated to the Congress.

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tax in *Liberty University v. Geithner*, 2011 WL3962915 (CA4 2011). The majority opinion held that that the mandate is a tax for purposes of the Anti-Injunction Act, and therefore, prevented the court challenge to proceed to a decision on the constitutional merits. An Obama-appointed Judge, James Wynn, wrote that he would have upheld the Mandate as a tax for constitutional purposes.

[25] "As we have explained [in previous cases], 'every reasonable construction must be resorted to' in order to save a statute from unconstitutionality." Roberts' opinion, page 32.

The opinion further suggests that the power to tax inactivity is not troubling because "although the breadth of Congress' power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior." In other words, the power to tax inactivity is not as dangerous as the ability to regulate inactivity through the commerce clause.

Problems with the Majority Opinion's Rationale

Is there a difference between a tax and a penalty?

Taxes and penalties are not synonymous. "A tax is an enforced contribution to provide for the support of government."[26] In other words, a tax seeks to raise revenue for the government by enforcing contributions. On the other hand, a penalty "is an exaction imposed by statute as punishment for an unlawful act."[27] The ultimate result of these two can be similar: both can result in the choice of avoid/perform this action, or you will have a net loss of money. However the method and purpose of such a choice legally and logically matter, and make taxes and penalties distinct actions requiring distinct constitutional authority.

It had been clear to every lower federal court that ruled on the matter that the enforcement of the Individual Mandate is a penalty[28] rather than a tax. The purpose of the mandate was to lower health insurance rates by pushing others into the market for health insurance, and imposing a financial penalty for those who did not. Both in intent and in practice, it is a penalty rather than a tax. In fact, while this language did not appear in her written opinion, even Justice Ginsburg explained during oral argument why the provision is a penalty:

> "A tax is to raise revenue, tax is a revenue-raising device, and the purpose of this exaction is to get people into the health care risk pool before they need medical care. And so it will be successful, if it doesn't raise any revenue, if it gets people to buy the insurance, that's -- that's what this penalty is -- this penalty is designed to affect conduct. The conduct is buy health protection, buy health insurance before you have a need for medical care. That's what the penalty is designed to do, not to raise revenue."

The joint dissent points out that deciding the Individual Mandate's penalty as both a tax *and* a penalty would create "a creature never hitherto seen in the United States Reports: A penalty for constitutional purposes that is also a tax for constitutional purposes. In all our cases the two are mutually exclusive. The provision challenged under the Constitution is either a penalty or else a tax." It continues, "…we have never held—*never*—that a penalty imposed for violation of the law was so trivial as to be in effect a tax. We have never held that *any* exaction imposed for violation of the law is an exercise of Congress' taxing power—even when the statute *calls* it a tax, much less when (as here) the statute repeatedly calls it a penalty."[29] Again, it laments,

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[26] Joint dissent, page 18.

[27] *Ibid.*

[28] The Joint dissent notes that Congress described the exaction for failing to comply with the Individual Mandate a "penalty" in the statute. Page 21.

[29] Joint dissent, page 18. Also, see, "We have never 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 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.'"[30] The enforcement mechanism of the individual mandate is either a tax or a penalty—by definition, it cannot be both.

Even penalties collected by the Internal Revenue Service (IRS) are just that –penalties, not taxes. The joint dissent explains such is not a rare practice. It cites examples where the IRS collects penalties for failure to make campaign-finance disclosures, domestic sales of tobacco products labeled for export, and failing to make required health-insurance premium payments on behalf of mining employees.[31] The Court even previously held that an exaction "…not only *enforced* by the Commissioner of Internal Revenue but even *called* a "tax" was in fact a penalty.[32]

Is there a constitutional difference between what Congress could have done and what it did?

Upholding the Individual Mandate as a proper congressional exercise of its taxing power equates what Congress had the power to do and could have done with what Congress actually did. To say that Congress could have constitutionally achieved a similar or identical result by passing the legislation as a tax is not the same thing as saying that what Congress actually did was constitutional. The Supreme Court's duty in this instance is not to re-write Congress' legislation so as to make it constitutional. Instead, it is to judge whether the legislature's law as it was written can stand under the Constitution. This important distinction was not thoroughly fleshed out in the opinion, and the question of what Congress would have had the authority to do and the question of what Congress actually did were not treated as distinct questions. They are distinct, and the argument that Obamacare's mandate is similar to a tax and could have been passed as a tax is not synonymous with the statement that "the mandate *is* a tax" or "the mandate, as written, falls within the taxing powers of the Constitution."

The Anti-Injunction Act does not apply even though the Individual Mandate is a tax?

The Anti-Injunction Act (42 U.S.C. section 7421(a)) prevents federal courts from hearing legal challenges to the enforcement of tax laws until the challenged tax is actually collected. If the mandate had been ruled a tax for purposes of the Anti-Injunction Act, then the court would have been required to wait until this "tax" had been collected before deciding the law's constitutionality. The majority ruled that the "Anti-Injunction Act and the Affordable Care Act, however, are creatures of Congress' own creation. How they relate to each other is up to Congress, and the best evidence of Congress' intent is the statutory text."

In other words, the Mandate constitutes a tax in all ways which will uphold the law, but constitutes a penalty in all of the ways which allow the Court to consider the law immediately. As the joint dissent writes, the government and the majority "would have us believe in these

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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 a 'license' or 'surcharge'." Page 20/21.

[30] *Ibid*, page 21.

[31] *Ibid*, page 23.

[32] *Ibid*.

cases that the very same textual indications that show this is *not* a tax under the Anti-Injunction Act show that it *is* a tax under the Constitution. This carries verbal wizardry too far, deep into the forbidden land of the sophists."

What kind of tax is the Individual Mandate?

Congress' taxing powers under Article I, Section 8, Clause I are broad but not unlimited. The Constitution directly prohibits Capitations and other direct taxes (unless they are apportioned among the states by population, Article I, Section 2), and the Supreme Court has not formulated many clear lines on this issue. The type of tax the Individual Mandate might be, at the very least, is an open question.

The Court in this case does not adequately address this issue. Though it briefly states that the Individual Mandate is not a direct tax, it fails to provide an in-depth analysis of this important question. The joint dissent declares that the decision:

> "would force us to confront a difficult constitutional question: whether this is a direct tax that must be apportioned among the States according to their population...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 [the mandate] is an exercise of the tax 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."

Robert Levy of the Cato Institute wrote in 2011 the following:

> "Assume, however, the Supreme Court ultimately disagrees and finds that the penalty for not purchasing health insurance is indeed a tax. Nevertheless, say opponents of PPACA, the tax would be unconstitutional. They underscore that taxes are of three types—income, excise, or direct. Each type must meet specified constitutional constraints. Because the mandate penalty under PPACA does not satisfy any of the constraints, it is not a valid tax.
>
> Income taxes, authorized by the Sixteenth Amendment, must (by definition) be triggered by income. Yet the mandate penalty is triggered by the nonpurchase of insurance. Except for an exemption available to low-income families, the amount of the penalty depends on age, family size, geographic location, and smoking status. So the penalty is not an income tax.
>
> Excise taxes are assessed on selected transactions. Because the penalty arises from a nontransaction, perhaps it qualifies as a reverse excise tax. If so, it has to be

> uniform across the country (U.S. Const., Art. I, sec. 8). But the penalty varies by location, so it cannot be a constitutional excise tax.
>
> Direct taxes are assessed on persons or their property. Because the penalty is imposed on nonownership of property, perhaps it could be classified as a reverse direct tax. But direct taxes must be apportioned among the states by population (U.S. Const., Art. I, sec. 2). The mandate penalty is assessed on individuals without regard to any state's population. Hence, it is not a lawful direct tax."

Hence, the Court's ruling raised serious confusion on what kind of tax is the Individual Mandate. Perhaps just as important is how the Court has forced Congress' hand on a matter that the Constitution exclusively gives Congress the responsibility to define. In response to the ruling, the House Ways and Means Committee convened a hearing on July 10, 2012, to discuss its implications and whether Congress has the broad power to levy taxes far beyond the historic scope of raising revenue.

The Origination Clause

Questions of whether Obamacare legislatively originated in the House of Representatives, as opposed to the Senate, are being raised. The Constitution states that "all bills for raising revenue shall originate in the House of Representatives" (Article 1, Section 7, Clause 1). Considering that the Court declared the Individual Mandate appropriate under Congress' taxing power for constitutional purposes, by definition this bill must raise revenue. CBO's original projections estimated it would yield the Treasury some revenue (approximately $4 billion). As a technical matter, the bill that became law did "originate" and pass the House as the Service Members Home Ownership Tax Act of 2009 (H.R. 3590). This bill waived the recapture requirement of a federal first-time homebuyer tax credit for members of the armed forces. On Christmas Eve 2009, the Senate amended H.R. 3590 and passed what is now Obamacare. Ultimately, H.R. 3590 again passed the House, and the President signed it into law on March 23, 2010, along with the Health Care and Education Affordability Reconciliation Act of 2010 (H.R. 4872).

Amending House-passed revenue bills that strip the entire original language and replace it with Senate crafted revenue language is not a rare occurrence. However, some conservatives believe that in this case, the Article I, Section 7, Clause 1 Origination Clause had been breached because the Senate language did not comply with the constitutional precedent governing germaneness. In other words, Obamacare had nothing to do with homebuyer tax credits for members of the armed forces. Representative Louie Gohmert (R-TX) introduced H.Res. 735, which declares that "the Patient Protection and Affordable Care Act of 2009 was a Bill for raising Revenue…" and "…did not originate in the House of Representatives."

Does the mandate offer a 'choice'?

The majority opinion holds that the Mandate is not in fact a requirement, and that instead it is a tax which does not penalize the refusal to purchase health insurance. It states that "[t]he shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of

buying health insurance."[33] In other words, this suggests that the government's mandate does not really require the action, "merely" making those who refuse to pay a "tax," and therefore this action does not constitute a penalty.

However, whether or not one refers to the Mandate as a requirement, it certainly has the coercive effects of one. The argument that the taxpayer has a lawful choice in this instance is technically true, but in application, is an absurd claim because the 'choice' is dramatically coerced by the 'tax' attached to the refusal to purchase health insurance. Similarly the proposition of "your wallet or your life" is, technically speaking, a choice; however, it is difficult to argue in this case that the transfer of the wallet would constitute a legitimate expression of free will. Similarly, the attempt to belittle the importance of the Mandate because it does not require action but rather "merely imposes a tax" is a difficult argument to make in a society which values private property rights and the freedom of association. Some taxes are constitutional, as are some penalties, but the argument that this particular "tax" for refusing to act is legitimized because it offers a 'choice' is simply not a legitimate choice.

Ramifications of the Decision

The majority opinion cites the dangers of expanding Congress' Commerce Clause powers and then determines that the Individual Mandate is an appropriate exercise of Congress' taxing power.[34] Unfortunately, the point missed by the majority opinion in raising these concerns is that its holding the line of the commerce power seems to not apply to the taxing power. Through a different method than expected, Congress has now been given Supreme Court assurance that it has the power to tax inactivity and thereby mandate activity.

The Court has allowed what is, in effect, a mandate to participate in a particular market through a penalty which acts as a tax. The precedent now indicates that mandates to buy certain products, or to participate in certain activity where there was none before, are legitimate under the Constitution. There seems to be no limitation for the possibilities implied by this power. Take, for example, the gasoline tax mentioned earlier. By the logic of this ruling, might the federal government now be able to tax citizens for *not* purchasing gasoline to ensure that everybody is

[33] Roberts' opinion, page 38.

[34] "The individual mandate…instead compels individuals to *become* active in commerce by purchasing a product…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." Roberts' opinion, page 20; "…the Government's logic would justify a mandatory purchase to solve almost any problem." Roberts' opinion, page 22; "Accepting the Government's theory would give Congress the same license to regulate what we do not do, fundamentally changing the relationship between the citizen and the Federal government…the distinction between doing something and doing nothing would not have been lost on the Framers, who were "practical statesmen," not metaphysical philosophers."Roberts' opinion, pages 23 & 24; "No longer would Congress be limited to regulating under the Commerce Clause those who by some preexisting activity bring themselves within the sphere of federal regulation. Instead, Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it." Roberts' opinion, pages 29& 30.

paying their fair share of road repairs, upkeep, etc. on interstate highways? After all, citizens have a choice to use these roads for any number of activities or simply pay a gas tax.

Many will remember that conservatives argued against the legal basis of this mandate by using the intentionally-absurd broccoli example ("can the government also make us buy broccoli?"). However, by the logic of this ruling, the answer appears that it would be yes, so long as the 'mandate' can be construed by a court as having the effect of a tax. The ruling either rubber-stamps a current power to mandate nearly any action through taxes, or alternatively dramatically expands the scope of federal control through the taxing power. It is difficult to ascertain a limiting principle to this power, and if no limiting power exists, then the system of checks and balances the Founders created no longer applies, and sadly is a fading relic of a past republic.

On the other hand some commentators argue that the Court did not actually expand Congress' taxing power. They argue that it simply misapplied what conventional wisdom knew to be penalty as an appropriate use of an existing power: the acknowledged broad power to tax.

Final Thoughts

Conservatives' characterization of this ruling as a tortured one is appropriate. The joint dissent's scathing admission that "The Court today decides to save a statute Congress did not pass," recognizes that judicial activism by life-tenured jurists is dangerous to our Republic's scheme of the division of governmental power between the Legislative, Executive, and Judicial branches of our federal government.

It may not be clear for many years the impact this ruling will have on future lawsuits that challenge Congress' taxing power. Some matters are clear, however, namely that future appointments to federal courts will be asked where they stand on this remarkable opinion: with Chief Justice Roberts or the joint dissent? Secondly, Chief Justice Roberts strained to emphasize that the ultimate decision on Obamacare's fate entails a legislative resolution. He referenced such three times:

> "We do not consider whether the Act embodies sound judgment. That judgment is entrusted to the Nation's elected leaders" [35]
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> "Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices."[36]
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> "…the court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is left to the people."[37]

[35] Roberts' opinion, page 2.
[36] *Ibid*, page 6
[37] *Ibid*, page 59.

Republican Members of Congress did not need this reminder. Long before the Court ruled, this House Resolution by Representative Phil Roe (TN) declared the sense of the House of Representatives that the bill in its entirety is unconstitutional. The House of Representatives passed a full repeal of Obamacare (H.R. 6079) the first legislative week after the June 28, 2012 decision. Seventy four Republican Members sent a letter to the National Governors Association requesting Governors to not implement the flawed law. One hundred twenty seven House Republicans urged House leaders to prevent any appropriations of federal funding to agencies that have responsibility for implementing Obamacare.

Alexander Hamilton wrote in *The Federalist No. 78* that the judicial branch will always be the "least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them." Conservatives dreamed Hamilton's words would prove true in this case, and that the judiciary would have eradicated Obamacare from the U.S. Code. Instead, they are "injured" by a complicated ruling that cabins the Constitution's Commerce and Spending Clauses in the distant future somehow while causing many to wonder just what the taxing power involves. The Founding Fathers had envisioned a limited federal government. It is now incumbent upon the Legislative branch to ensure that this vision is realized.

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