

Testimony of Steven G. Bradbury

Before the

House Ways and Means Committee

Hearing on

**The Ramifications of the Supreme Court's Ruling
on the Affordable Care Act**

July 10, 2012

Chairman Camp, Ranking Member Levin, and distinguished Members of the Committee, it is an honor to appear before you today to discuss the implications of the Supreme Court's opinion addressing the constitutionality of the Affordable Care Act (the "ACA" or "Act").

Introduction

I participated in preparing three amicus briefs for the Supreme Court on behalf of a large number of economists, including two Nobel laureates, former senior government officials, and professors from major research universities, supporting the challengers to the ACA and addressing the economic realities behind the law. We filed briefs on the individual mandate, the severability issue, and the Medicaid expansion. Our brief on the mandate offered a counterpoint to the economic justifications cited by the Solicitor General in support of the Government's Commerce Clause arguments.

The positions we staked out on the Commerce Clause and Necessary and Proper Clause (along with the Medicaid expansion) ended up being embraced by a majority of the Members of the Court, and two of our briefs were cited in the joint opinion of the four dissenters.

I want to share with the Committee today some observations about the implications of the Court's rulings on the weighty constitutional issues it faced in this historic case. I believe the Court's conclusions on the Commerce Clause and Neces-

sary and Proper Clause will prove to be of great consequence in reestablishing the bedrock principle that under our Constitution, the federal government is a government of limited, enumerated powers. At the same time, however, I am concerned that the Court's decision to uphold the "minimum coverage provision" in the Act as a constitutional exercise of Congress's taxing power has the potential to unleash the coercive power of the federal government in a different guise.

The Original Purpose of the Individual Mandate

Congress plainly viewed the individual mandate as a central feature of the Affordable Care Act that was necessary to the operation and effectiveness of the entire statutory scheme. *See* 42 U.S.C. §§ 18091(2)(H) (express finding by Congress that the minimum coverage requirement "is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market").

The individual mandate was originally enacted to compel millions of Americans to pay more for health insurance than they receive in benefits as a means to subsidize the costs that the Act's guaranteed-issue and community-rating requirements will impose on private insurance companies. *See id.* §§ 18091(a)(2)(C), 18091(a)(2)(I) (congressional finding that the mandate was required to force "healthy individuals" into the market as "new consumers" to reduce insurers' costs).

The guaranteed-issue and community-rating requirements of the Act prevent health insurers from making the basic actuarial decisions made in every other insurance market. Insurers may no longer withhold health insurance from those with preexisting conditions or price insurance premiums to match customers' known actuarial risks. By requiring health insurers to cover the sick and set premiums based on average costs, these federal requirements would dramatically increase healthcare premiums for all insured Americans, unless Congress at the same time forces the young and healthy with relatively little need for comprehensive health insurance to enter the market on terms that are economically disadvantageous. And that is what the individual mandate was designed to do.

The mandate was also designed to counteract the moral hazard, or "adverse selection," that Congress recognized will be created by those same insurance requirements, which will inevitably give rise to a strong incentive for people to forgo buying insurance until they actually need it. *See id.* § 18091(a)(2)(A) (finding that absent the mandate, individuals "would make an economic and financial decision to

forego health insurance coverage”); *id.* § 18091(a)(2)(I) (“[I]f there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the [mandate], together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums.”).

Accordingly, in his brief defending the individual mandate before the Supreme Court, the Solicitor General represented that the mandate “is key to the viability of the Act’s guaranteed-issue and community-rating provisions.” S.G. Br. at 18. And in his guiding opinion for the Supreme Court, the Chief Justice emphasized that “Congress thought it could enact such a command under the Commerce Clause, and the Government primarily defended the law on that basis,” *National Federation of Independent Business v. Sebelius*, No. 11-393, slip op. at 32 (U.S. June 28, 2012) (Opinion of Roberts, C.J.) (hereinafter “Slip Op.”), since only the Commerce Clause argument could potentially support a direct legal mandate such as Congress originally intended to enact.

The Historic Importance of the Court’s Rulings on the Commerce Clause and the Necessary and Proper Clause

With regard to the central legal arguments made by the Solicitor General in defense of the mandate, I believe it is important to stress that the conclusions reached by five Members of the Court that the individual mandate exceeded Congress’s powers under the Commerce Clause and the Necessary and Proper Clause of the Constitution are of great historic significance. These conclusions are likely to be enormously consequential in the future jurisprudence of the Court and in the legislative business of Congress for generations to come.

The opinion of the Chief Justice provides the roadmap to understanding the Court’s rulings. It traces the conclusions and reasoning that commanded five or more votes from Members of the Court on each of the major constitutional issues raised by the ACA. On the most prominent and widely discussed constitutional issues—the Commerce Clause power, the Necessary and Proper Clause power, and the limits of Congress’s Spending Clause power over the States—the Chief Justice and a majority of the Court resoundingly accepted all of the principal substantive arguments of the challengers to the law.

In the end, because of the Court’s holding on the taxing power and because of the way the Court interpreted the statute, the practical impact of these rulings in this case is limited to (1) requiring a narrow reading of the individual mandate, or so-called “minimum coverage provision,” contained in 26 U.S.C. § 5000A(a) so that it does not have any substantive meaning separate from the tax penalty contained in subsection (b) of section 5000A, and (2) requiring a narrow reading of the Medicaid expansion provision to eliminate the federal government’s ability to deny the States the remainder of their Medicaid funding if they choose not to participate in the Medicaid expansion.

In rejecting the Solicitor General’s effort to justify the minimum coverage provision as an exercise of Congress’s power under the Commerce Clause, the Chief Justice made several critical points. Quoting the Chief Justice:

- “The power to regulate commerce presupposes the existence of commercial activity to be regulated. If the power to ‘regulate’ something included the power to create it, many of the provisions in the Constitution would be superfluous.” Slip Op. at 18 (Opinion of Roberts, C.J.).
- “The individual mandate . . . does not regulate existing commercial activity. It instead 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.” *Id.* at 20.
- “People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce. Under the Government’s logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act. That is not the country the Framers of our Constitution envisioned.” *Id.* at 23.
- “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.” *Id.* at 23-24.

- “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 to regulate individuals as such, as opposed to their activities, remains vested in the States.” *Id.* at 26.

Similarly, in rejecting the Solicitor General’s arguments under the Necessary and Proper Clause, the Chief Justice wrote:

- “[T]he individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms [*i.e.*, guaranteed issue and community rating requirements]. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. . . . The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.” *Id.* at 29.
- “[S]uch a conception of the Necessary and Proper Clause [as was advanced by the Government] would work a substantial expansion of federal authority. . . . Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it. Even 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.” *Id.* at 29-30.

On each of the points I have just recited, the four Justices in the joint dissent completely agreed with the Chief Justice. These five Members of the Court—the Chief and the four joint dissenters—shared the same reasoning and reached the same conclusions with respect to the Commerce and the Necessary and Proper Clauses of the Constitution. All five concluded that the individual mandate exceeded Congress’s powers under the Commerce Clause, whether considering the Clause alone or in combination with the Necessary and Proper Clause.

I believe that these conclusions are properly treated as holdings of the Court, for the following reasons.

First, they were adopted by five Justices, a majority of the Court.

Second, they were essential to the Court’s ultimate disposition upholding section 5000A under Congress’s taxing power. The Chief Justice, whose vote was decisive for the Court’s disposition, made it clear in his opinion that he could not have reached the taxing power issue at all and could not have given the mandate the narrowing construction that allowed the statute to survive as an exercise of the taxing power *without first addressing and rejecting the Government’s arguments under the Commerce Clause*:

“[T]he 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. *It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question.* And it is only because we have a duty to construe a statute to save it, if fairly possible, that §5000A can be interpreted as a tax. *Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction.*” Slip Op. at 44 (Opinion of Roberts, C.J.) (emphases added).

Finally, the Court itself, in its majority opinion, described the Commerce Clause conclusion reached by the Chief and the four joint dissenters as a holding of the Court: “The Court today *holds* that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity.” *Id.* at 41-42 (Opinion for the Court) (emphasis added).

In the past when the Court has analyzed cases with multiple, fragmented opinions from different Justices and no single rationale explaining the result, it has typically identified the “holding” of the case as the “position taken by those Members who concurred in the judgments on the narrowest grounds.” *Marks v. United States*, 430 U.S. 188, 193 (1977). Here, the Chief Justice’s opinion identifies the narrowest ground for the Court’s disposition, and his controlling opinion held that the Act was constitutional only because of the conclusions he reached on the Commerce Clause and Necessary and Proper Clause questions, in which the four joint dissenters joined. Further, the Court’s disposition of the Medicaid expansion issue clearly relied upon the four joint dissenters to render the Court’s 7-2 holding on that point. For these reasons, I believe the Court, at least in this case, would count the views of the four joint dissenters on the Commerce Clause and Necessary and Proper Clause issues in identifying the holding of the Court under the *Marks* rule.

Henceforth, I predict, the lower courts will view the Chief Justice’s and four dissenters’ conclusions about the Commerce Clause and Necessary and Proper Clause as binding law that they must follow. And Congress will recognize that any legislation it might consider in the future that would purport to require individuals to enter into commercial transactions through a direct mandate would likely be struck down in the courts.

Implications of the Court’s Ruling on the Taxing Power

Now, let me turn to the implications of the Court’s ruling on the taxing power. The Court upheld the so-called “shared responsibility payment” (that is, the tax penalty found in subsection (b) of section 5000A) as a constitutional tax assessment under Congress’s Article I taxing power. In an important respect, what the Court gave us with its Commerce Clause ruling (protection from a coercive legal mandate requiring individuals to purchase products that they do not want), it took back with this tax ruling, which has the potential to permit Congress to impose coercion financially through its taxing power.

One thing that the Court’s tax ruling means is that there really is no individual insurance mandate in the ACA—at least, the minimum coverage provision does not exist as a direct legal mandate to purchase insurance. As the Chief Justice clearly explained in his opinion, in order for the Court to reach the taxing power question, it was necessary to read the mandate language of subsection (a) out of the statute. Instead of saying that all individual Americans “shall” maintain health insurance coverage, subsection (a) has now been reinterpreted, in effect, to say only that it is a goal of the Act that all individuals *should* maintain insurance coverage.

The Chief Justice acknowledged that this interpretation is not the “most straightforward reading” of the statute. Slip Op. at 31 (Opinion of Roberts, C.J.). Nevertheless, now that the Court has spoken, what remains of section 5000A is a tax assessment: The statute imposes a tax on those who could afford to purchase health insurance but who choose to go without it; it is a tax hike designed to push people into buying insurance, rather than a direct legal mandate. *See id.* at 32 (“Under [the Government’s alternative taxing power] theory, 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.”).

It is fair to ask how this ruling may affect the law that Congress enacted, and, just as important, how Congress might try to toughen the tax provision in the

future to preserve the original purposes of the mandate. Now that the statute is devoid of any “legal command to buy insurance,” will section 5000A fulfill the function it was intended to perform? I believe there is significant reason to think it will not.

The Supreme Court was careful to make clear that reliance on the taxing power fundamentally changes the nature of the regulatory compulsion that Congress can bring to bear in section 5000A:

“[A]lthough the breadth of Congress’s 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. Once we recognize that Congress may regulate a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear. Congress may simply command individuals to do as it directs. An individual who disobeys may be subjected to criminal sanctions. Those sanctions can include not only fines and imprisonment, but all the attendant consequences of being branded a criminal: deprivation of otherwise protected civil rights, such as the right to bear arms or vote in elections; loss of employment opportunities; social stigma; and severe disabilities in other controversies, such as custody or immigration disputes.

“By contrast, Congress’s authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. If a tax is properly paid, the Government has no power to compel or punish individuals subject to it. We do not make light of the severe burden that taxation—especially taxation motivated by a regulatory purpose—can impose. But imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice.” Slip Op. at 43-44 (Opinion for the Court).

Back when Congress first enacted the ACA, when the minimum coverage provision was understood by everyone to be a legal mandate requiring all Americans to purchase insurance or be in violation of federal law, the Congressional Budget Office projected that approximately 3.9 million Americans would opt to pay the penalty rather than complying with the minimum coverage requirement. *See* CBO, *Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act* (Apr. 22, 2010), available at http://www.cbo.gov/ftpdocs/113xx/doc11355/Individual_Mandate_Penalties-04-22.pdf.

It is logical to understand that this earlier CBO projection was based in part on the assumption that most Americans would naturally feel a strong moral imperative to comply with the sort of direct legal requirement that the minimum coverage provision was originally thought to be, even if that requirement was not initially enforced with criminal sanctions.

Now that the Supreme Court has announced to the whole world that the minimum coverage provision is, in fact, not a legal mandate, but is only a tax assessment, it is equally logical to assume that the actual number of individuals who will choose to pay the tax rather than purchase insurance will be considerably greater than originally projected.

That result is especially likely given that the amount of the tax assessment currently prescribed in the ACA will be less than the actual cost of an individual health insurance policy for most people subject to the tax, as the Supreme Court recognized. *See* Slip Op. at 35-36 (Opinion of the Court) (“[F]or 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”) (footnote omitted).

If, as I suggest, the number of individuals who choose to forgo insurance coverage turns out to be much larger than Congress originally thought was necessary to preserve the effectiveness of the ACA’s regulatory scheme, we can expect that a future Congress may well ratchet up the amount of the “shared responsibility” tax, in an effort to use the tax to compel more Americans into the insurance market.

The Supreme Court’s cases use a functional test to distinguish taxes from penalties, which are fines or other exactions intended as punishment for an unlawful act. Slip Op. at 34-37 (Opinion of the Court). *See, e.g., United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922). Although a tax may not be so harsh as to be punitive, the Constitution nevertheless grants Congress wide latitude in setting the amount of a tax, even where the tax is so high that it is obviously designed to coerce desired behavior for a regulatory purpose, or even to squelch certain commercial conduct altogether.

Thus, Congress in the past has enacted prohibitively high tax assessments on certain activities that Congress wished to eradicate. *See United States v. Sanchez*,

340 U.S. 42, 44-45 (1950) (upholding as a constitutional tax a prohibitively high (in 1940s dollars) tax assessment of \$100 per ounce on the sale of marijuana to unregistered persons, even though the “severe burden” imposed by the tax was obviously intended as a definite deterrent); *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937) (upholding a 1934 law that imposed, among other things, a prohibitively high tax of \$200 on each transfer of a sawed-off shotgun, clearly designed to stamp out all such transfers).

A future Congress might someday decide to do the same with the “shared responsibility” tax, and the constitutional limits of how high Congress could raise the tax before it would be treated as punishment are ill-defined. The result could be a tax so high that it effectively coerces all young, healthy individuals to enter the market and purchase health insurance against their own economic interests in order to subsidize the health insurance costs of others, which was Congress’s ultimate objective with the individual mandate as originally enacted.

Furthermore, in addition to raising the amount of the tax itself, Congress has a host of coercive tax enforcement mechanisms that it could also introduce to ensure greater compliance with the tax requirement. The introduction of these enforcement mechanisms would, in turn, render the “shared responsibility” tax a more draconian and thus much less attractive option for people than entering into the market and purchasing insurance. These enforcement mechanisms can include criminal prosecution for failing to pay the tax, invasive tax audits by the IRS, and other penalties often associated with tax avoidance.

The Supreme Court made it clear that such harsh enforcement measures would be consistent with the constitutional taxing power that the Court held supported the “shared responsibility payment”:

“Of course, individuals do not have a lawful choice not to pay a tax due, and may sometimes face prosecution for failing to do so But that does not show that the tax restricts the lawful choice whether to undertake or forgo the activity on which the tax is predicated [so as to convert the tax into an unconstitutional penalty]. Those subject to the [minimum coverage provision] may lawfully forgo health insurance and pay higher taxes, or buy health insurance and pay lower taxes. The only thing they may not lawfully do is not buy health insurance and not pay the resulting tax.” Slip Op. at 44 n.11 (Opinion of the Court).

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Thank you, Mr. Chairman. That concludes my testimony, and I would be happy to answer the Committee's questions.