

The ACA Decision: Watershed Moment for Federalism, or Much Ado About Nothing?

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- *Sebelius* offers holdings in at least five separate areas touching on federalism.
 - First, can Congress compel individuals to enter the market in order to regulate them? (Or, put another way, is “activity” required before Congress may regulate under the Commerce Clause?)
 - Second, what does it mean to say a congressional regulation is “necessary” under the Necessary and Proper Clause?
 - Third, what does it mean to say a congressional regulation is “proper” under the Necessary and Proper Clause?
 - Fourth, what is the reach of Congress’ tax power?
 - Fifth, what is the reach of Congress’ Spending Clause power?

- An awful lot of attention has been focused on holdings #1 and #5, but I doubt either one will have far-reaching effects on the jurisprudence.
 - Commerce Clause:
 - Chief Justice Roberts and the four-justice dissent agreed that Congress cannot compel individuals to enter the market in order to regulate them, and that Congress cannot use the Commerce Clause to regulate “inactivity.”
 - I doubt this will become an important feature of the Commerce Clause jurisprudence.
 - First, how often will it come up? By the *Sebelius* plaintiffs’ own admission, this was the first time Congress had ever attempted to compel individuals to buy a product.
 - Second, in my opinion the lines drawn by this part of the decision won’t withstand examination in future cases. It’s very difficult to determine, when you’re dealing with a massive, complex federal statute, whether Congress is “regulating inactivity” and/or “compelling” action. A wide swath of Congress’ long-standing regulations could be characterized that way by creative lawyers. I suspect future courts will punt on this determination and resolve cases on other grounds.

- (N.B.: To hold that Congress tried to “create the necessary predicate to the exercise of an enumerated power” and that the ACA regulated “inactivity,” the Court had to ignore the real thrust of the government argument: The “necessary predicate” already existed in spades because Congress was comprehensively regulating the massive, concededly interstate health market.)
- Spending Clause:
 - The Medicaid piece of the decision was hailed in some quarters as a watershed – a real limit on Congress’ spending power. Some have even suggested the decision makes it impossible for Congress to amend Medicaid going forward, because states can simply refuse to comply with any amendment and all Congress can do, in terms of punishment, is withhold any funding associated with the amendment.
 - Those are misreadings of *Sebelius*. Roberts’ opinion cleverly rests on the (to my mind, absurd) idea that the Medicaid expansion is a *new* federal program, not an amendment of the existing Medicaid program. The opinion says that that’s what makes Congress’ threat to withhold existing Medicaid funds from states that don’t comply so problematic; Congress, Roberts says, threatened to withhold “significant independent grants” if the states didn’t agree to the conditions Congress attached to its “new” program.
 - The opinion thus appears to limit Congress’ power to offer grants with regulatory strings attached only where (1) Congress threatens to terminate existing funding for a *separate* program if the state does not accept the new congressional conditions and (2) the threatened loss of existing funding is so massive that the State cannot realistically say no.
 - The opinion, in other words, is essentially limited to the facts of *Sebelius*. A typical, even substantial, Medicaid amendment would not trigger the *Sebelius* rule, even if Congress threatened to withhold all Medicaid funds from states the refuse to comply. That is so because it would be part of the *same* program, not a “new” program.
- Holding #4, on the meaning of “proper” in the Necessary and Proper Clause, is potentially a different story.
 - The Court, as Roberts recognized, has long read the Clause “to give Congress great latitude in exercising its powers.” E.g., *McCulloch*: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”

- But in the 1990s the Court's modern conservative wing began adding meat to the "proper" portion of the Clause, suggesting that it provides an independent limit on the Clause's reach. E.g., *Printz*: Laws which are not "consist[ent] with the letter and spirit of the constitution" are not "*proper* [means] for carrying into Execution" Congress's enumerated powers, but are instead "merely acts of usurpation which deserve to be treated as such."
- Roberts' opinion completes that transformation, essentially using the word "proper" as an independent basis to reject legislation on the ground that it affects state sovereignty or federal-state balance.
 - Roberts: "[L]aws that undermine the structure of government established by the Constitution" are not "proper" and thus are unconstitutional. The individual mandate meets that description because it "would work a substantial expansion of federal authority."
 - Wow. How is a court to determine whether a law "undermines the structure of government established by the Constitution" or "works a substantial expansion of federal authority"? These are, obviously, malleable concepts whose application depends on the judge's perspective.
 - This conception of "proper," if applied by its terms, gives federal judges substantial power to enforce their own generalized notions of the federalist balance. That flies in the face of the Court's decision in *Garcia* to "le[ave] primarily to the political process" the job of protecting states against "intrusive exercises" of Congress' powers.