CASE 5.1

National Federation of Independent Business v Sebelius
132 S.Ct. 2566 (2012)

Mandating Health Insurance under the Commerce Clause

FACTS

Congress passed the Patient Protection and Affordable Care Act (also known as Obama Care) in order to increase the number of Americans covered by health insurance and decrease the cost of health care. One key provision in the law is the individual mandate, which requires most Americans to maintain "minimum essential" health insurance coverage. Attorneys general from several states, along with businesses, challenged this requirement (and other provisions of the law) as being unconstitutional under the Commerce Clause. From a series of federal court decisions below, some finding the law constitutional and others not, the affected parties appealed and the Supreme Court granted *certiorari*. Their cases were consolidated for the court's review.

JUDICIAL OPINION

ROBERTS, Chief Justice

The Constitution grants Congress the power to "*regulate* Commerce." (Art. I, § 8, cl. 3.) 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. For example, the Constitution gives Congress the power to "coin Money," in addition to the power to "regulate the Value thereof." And it gives Congress the power to "raise and support Armies" and to "provide and maintain a Navy," in addition to the power to "make Rules for the Government and Regulation of the land and naval Forces." If the power to regulate the armed forces or the value of money included the power to bring the subject of the regulation into existence, the specific grant of such powers would have been unnecessary. The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated.

Our precedent also reflects this understanding. As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching "activity." It is nearly impossible to avoid the word when quoting them.

The individual mandate, however, 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. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and—under the Government's theory—empower Congress to make those decisions for him.

Indeed, the Government's logic would justify a mandatory purchase to solve almost any problem. To consider a different example in the health care market, many Americans do not eat a balanced diet. That group makes up a larger percentage of the total population than those without health insurance. The failure of that group to eat a healthy diet increases health care costs more than the failure of the uninsured to purchase insurance. Those increased costs are borne in part by failure of that group to have a healthy diet increases health care costs, to a greater extent than other Americans who must pay more, just as the uninsured shift costs to the insured. Congress addressed the insurance problem by ordering everyone to buy insurance. Under the Government's theory, Congress could address the diet problem by ordering everyone to buy vegetables.

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. James Madison explained that the Commerce Clause was "an addition which few oppose and from which no apprehensions are entertained."

CONTINUED

The Federalist No. 45, at 293. While Congress's authority under the Commerce Clause has of course expanded with the growth of the national economy, our cases have "always recognized that the power to regulate commerce, though broad indeed, has limits." The Government's theory would erode those limits, permitting Congress to reach beyond the natural extent of its authority, "everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." The Federalist No. 48, at 309 (J. Madison). 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.

[There were other issues covered in the 106-page opinion. The complicated decision resulted in the lower court decisions being both affirmed and reversed, but the individual mandate was declared unconstitutional under the Commerce Clause but constitutional as a tax.]

CASE QUESTIONS

1. What was missing that the Court indicated was needed in order to find that the mandate was constitutional?
2. What was the purpose of the court's discussion of a healthy diet?
3. What sources does the court rely on for constitutional interpretation?

Consider . . . 5.2

Ollie's Barbecue is a family-owned restaurant in Birmingham, Alabama, specializing in barbecued meats and homemade pies, with a seating capacity of 220 customers. It is located on a state highway 11 blocks from an interstate highway and a somewhat greater distance from railroad and bus stations. The restaurant caters to a family and white-collar trade, with a takeout service for "Negroes." (*Note:* The court uses this term in the opinion on the case.)

In the 12 months preceding the passage of the Civil Rights Act, the restaurant purchased locally approximately $150,000 worth of food, $69,683 or 46% of which was meat that it bought from a local supplier who had procured it from outside the state.

Ollie's has refused to serve Negroes in its dining accommodations since its original opening in 1927, and since July 2, 1964, it has been operating in violation of the Civil Rights Act. A lower court concluded that if it were required to serve Negroes, it would lose a substantial amount of business.

The lower court found that the Civil Rights Act did not apply because Ollie's was not involved in "interstate commerce." Will the Commerce Clause permit application of the Civil Rights Act to Ollie's?

THINK: What did the *Sebelius* case require for the Commerce Clause to allow Congressional action on intrastate activities? If Congress was to have the authority to regulate seemingly intrastate activities, there had to be some underlying economic activity, and, whatever that economic activity was, it had to have some relation to or an impact on interstate activity.

APPLY: What is different about Ollie's Barbecue's activities and the federal health care law?

Ollie's Barbecue is a commercial enterprise involved in producing and selling food. This is economic activity, and the *Sebelius* case discussed that Congress was not authorized to regulate inactivity, which is what the mandate did.

Ollie's has an impact on interstate commerce because it orders goods in interstate commerce, and it serves travelers who are moving from state to state. The Civil Rights Act prohibited discrimination in public places, and Congress was regulating economic activity. The activity involved interstate shipment of goods.

ANSWER: Congress had the authority under the Commerce Clause to pass the Civil Rights Act and have it apply to intrastate businesses such as Ollie's Barbecue.

[Katzenbach v McClung, 379 U.S. 294 (1964)]