



The Dissent in National Federation of Independent Business v. Sebelius

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THE DISSENT IN *NATIONAL FEDERATION OF
INDEPENDENT BUSINESS V. SEBELIUS*

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Justice Ginsburg's dissent in *NFIB v. Sebelius* gave the Chief Justice a gentle lesson in legal analysis and in the politics of enacting statutes. She gave a more pointed lesson in economics to the colleagues who found the Affordable Care Act an unconstitutional exercise of Congress's power to regulate commerce among the several states.

The Chief Justice's opinion made much of the fact that Congress had never previously imposed affirmative obligations on Americans under the Commerce Clause. Justice Ginsburg observed that Congress had imposed similar obligations under other clauses—a duty to report for jury duty, to register for the draft, to buy guns for use in the militia, to turn in gold coins for paper currency, and to file a tax return. The Chief Justice responded that those duties were “based on constitutional provisions other than the Commerce Clause.”

In any law school classroom, an instructor would have responded to the Chief Justice, “But, that's just like saying those cases were different because they were decided on Tuesdays.” What he needed to supply was a reason for thinking that those other provisions somehow conferred greater power on Congress than did the Commerce Clause. One candidate reason seems ruled out by general considerations of constitutional structure: It would be hard to defend the proposition that those powers were somehow “more plenary” than the Commerce Clause.

Another candidate might seem more promising at first. Straining only with respect to the requirement that people surrender their gold coins, one might say, as some of the litigants had, that those powers deal with

fundamental aspects of citizenship in the United States. Here the difficulty is subtler, though not much. Those who pursued that argument would have to explain why the Court—rather than Congress—was the institution entitled to specify what powers implicated fundamental aspects of citizenship. The case for lodging that entitlement in Congress is reasonably strong, with respect to both the ACA itself and the Commerce Clause more broadly. And, in any event, the question raises the general questions about the relationship between constitutional review and congressional power that are the bedrock of constitutional law. On those questions, the Chief Justice’s response was among the weaker available: “Our respect for Congress’s policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed.” Well, sure, but the whole point of the litigation was to determine what those restraints were.

Justice Ginsburg was too polite to respond to the Chief Justice’s discussion of other congressionally imposed mandates. She also was astutely silent when the Chief Justice addressed her argument with respect to the Medicaid extension. According to the Chief Justice, Congress could not threaten the states with the withdrawal of large grants when it adopted a “new” program. Justice Ginsburg replied that on the majority’s view, Congress could achieve the same result by the technique of repealing the existing program and reenacting it as part of the new, larger program to which the Court objected. The Chief Justice responded not by denying the accuracy of her analysis of the doctrine he set out, but by invoking political considerations: “Practical constraints would plainly inhibit, if not preclude, the Federal Government from repealing the existing program and putting every feature of Medicaid on the table for political reconsideration.” That depends, though, on timing. It’s hardly clear that had Congress known in 2009-10 that “repeal and reenact” was the only way to expand Medicaid as substantially as it wanted to do as part of a comprehensive program of health care insurance reform, it would have faced “practical” obstacles to doing so—or, at least, any greater practical obstacles than it faced over the adoption of the Affordable Care Act.

Things had changed as of 2012, of course, and the repeal-and-replace strategy was unavailable then. But, I wonder why the Chief Justice and his colleagues felt themselves entitled to predicate a holding of unconstitutionality on their not obviously correct assessment of practical politics.

In contrast to her silence on these questions, Justice Ginsburg did spend some time on the economics of health insurance, rebuking her colleagues for failing to understand elementary economics.

The joint opinion made much of the fact that young people were required to purchase an insurance package that covered a standard set of conditions, some of which they would never experience. So, they argued, young people were subsidizing older ones. When Justice Ginsburg first encountered that argument in a question from Justice Alito at the oral argument, she could hardly contain herself: “If you’re going to have insurance, that’s how insurance works.” She restated the point in more detail in her dissent. Insurance works by lumping people into groups and charging each member of the group a fee—the “price” of the insurance—based on the risks, here the likely consumption of health care, the group faces. There’s nothing “natural” about the groups lumped together for insurance purposes: Smokers and nonsmokers face different risks of lung cancer, but an insurance package might lump them together by providing everyone with coverage against “life-threatening ailments” for the same fee. The nonsmokers “subsidize” the smokers, but, as Justice Ginsburg put it, “in the fullness of time,” we expect things to even out. The healthy young, lumped together with the ailing old, appear to subsidize the latter, but eventually the young become old and they get back what they paid earlier, and perhaps even more, in the form of the health care they need when old.

Justice Ginsburg made the point in another way. When you insure your house against the risk that it will be destroyed by fire, it’s silly to complain that you’re wasting money each year your house doesn’t burn down. You’re buying a guarantee that in the event your house does burn down, you’ll be able to rebuild it. Similarly with health care insurance. The healthy young “are assured that, if they need it, emergency medical care will be available, although they cannot afford it.”

Then there's the "broccoli" problem, which the Court's majority made much of. Justice Ginsburg made two points. The Chief Justice offered a reasonably sophisticated version of the broccoli argument by tying a mandate about broccoli to health problems associated with obesity: Upholding the Affordable Care Act on the ground that Congress thought that requiring people to purchase health care insurance would eliminate the free ride given to those who counted on emergency services and the like for health care would, the Chief Justice said, allow Congress to address the free ride given obese people, who consume "too much" health care, by requiring that they buy broccoli. Justice Ginsburg responded sensibly enough that such a requirement would fail minimal standards of rationality, which everyone agreed applied to congressional action. The core of her point was simple: Requiring people to buy broccoli was different from requiring them to eat it.

The broccoli problem had a less sophisticated version. Those who raised it thought that requiring people to buy health care insurance would imply that Congress could require people to buy broccoli or cars. Justice Ginsburg carefully explained why insurance, as a product, differed from broccoli or cars, because insurance was affected by moral hazard and adverse selection problems not associated with broccoli or cars. Assume that Congress did mandate that the people buy a car every five years. The car's price isn't affected by the timing of the purchase: The fact that you need a car sometime soon, though not so imminently that the seller can milk you for all you're worth, doesn't lead car sellers to raise their prices (under the ordinary circumstances economists assume exist). Again in Justice Ginsburg's words, if someone eventually wants to buy a car, "she will be obliged to pay at the counter before receiving the vehicle."

Health care insurance is different. Last week you were fine, and the price of the health care insurance you could get would be based on the group of which you were a member—under the Affordable Care Act, your local community as a whole. Today, though, an ambulance takes you to the emergency room after you've been in a car accident. The "insurance" you'd have to buy at that moment is the cost of the health care

you're about to get—a much higher amount. With insurance companies required to issue insurance to everyone at the community rate, waiting to buy the insurance is a terrific deal.

There is much more in Justice Ginsburg's dissent in the Affordable Care Act. It is a masterful exposition of law and economics, the more so because she understood which targets to pick for her most direct analysis, and which to leave unaddressed because of their obvious weaknesses. The dissent shows us a judge at the height of her powers.