The Supreme Court’s ruling to uphold the Affordable Care Act may have raised more questions than it answered. How will the country move forward?

By Rachel Wallach

HEALTHY DEBATE

Once upon a time, a farmer named Roscoe Filburn grew 23 acres of wheat to use on his Ohio farm. This was more than a Congressional act allowed him to grow during the Great Depression, so Filburn was fined $117.11.

He challenged the penalty, saying his small farm stood outside of Congressional authority. The case went to the Supreme Court, which in 1942 ruled that under the Commerce Clause, Congress does indeed have the power to regulate the wheat production of individual farmers in the interest of preserving higher prices for wheat farmers across the country. The Commerce Clause, said the Court’s Wickard v. Filburn decision, gives the federal government the power to regulate even local activity if it “exerts a substantial economic effect on interstate commerce.”

“Little did Mr. Filburn know that the fine he paid for growing excess wheat would play a pivotal role in the present debate about the constitutionality of the Affordable Care Act,” says UM Carey Law Associate Professor Leslie Meltzer Henry.

Henry, along with colleagues Diane Hoffmann and Ellen Weber, celebrated the day the Supreme Court announced its ruling on the Affordable Care Act last June, declaring the Act constitutional under the Congress’s taxing power. It seemed like such good news—that more people would be covered by health insurance, and that the Court had, at first glance, declined to fall into a partisan trap.

“I’m thrilled with the opinion. It gets us a long way,” says Hoffmann, a UM Carey Law professor.

But Henry’s elation was short-lived. “The opinion may not bode well for progressive social welfare policies at the national level,” she says. “After this decision, Congress simply does not have the Commerce Clause in its toolbox in the way it once did.”
The Individual Mandate

Numerous elements are at play in our new health care law, and numerous issues were at stake in its challenge. But at the heart of the law’s 2,700 pages lies the “individual mandate”—the idea that in order to finance health care reform on a large scale, Congress has the power to penalize anyone who does not buy insurance.

Historically, health insurance in the U.S. has been a private market affair. Those who want insurance and can mostly afford it buy in; those who don’t want it or can’t afford it, stay out; the very poor are covered by Medicaid, and the elderly are covered by Medicare.

For insurance companies, the traditional system means that people who need a lot of care tend to purchase coverage. Those who are healthier, and who would balance the costs of higher-needs individuals, elect not to. Costs rise for consumers. The individual mandate addresses this imbalance by bringing more healthy people into the risk pool.

“It’s all an issue of access and financing,” Hoffmann says. “How are we going to get access to everybody, and how are we going to pay for it?”

Because it was the Obama administration that passed the Affordable Care Act (ACA), we sometimes think of the mandate at its center as a Democratic proposition. But it was Republican Mitt Romney who first wrote the mandate into law, when as governor of Massachusetts in 2006 he required all residents to have insurance.

During the 2008 presidential race, both parties agreed that the U.S. health care system was broken and in urgent need of reform. Many leading Democrats saw a single government payer option as the solution. Many Republicans were skeptical, concerned about the high cost, and that a single payer option would limit personal choice. They preferred a private market solution.
A debate ensued over whether the private market solution would work without an individual mandate. If there was no requirement to purchase insurance, but the highly popular requirement that insurers be required to cover pre-existing conditions remained in place, healthy people would stay out of the risk pool until they were sick, making the risk pool small and exorbitantly expensive to cover.

Candidate Obama initially said the mandate would not feature in his health care plan. In the end, it became a cornerstone. Leading Republicans called his plan too coercive, but Congress eventually passed the bill and it was signed into law. Twenty-six states, all with Republican governors, challenged the law through the federal courts to the Supreme Court, arguing the mandate was unconstitutional.

The ACA essentially seeks to accomplish many of the same goals in terms of expanded coverage as a wholly government-funded program, but with costs largely passed on to private parties, including employers, insurance companies, and individuals subject
to the individual mandate, says Max Stearns, UM Carey Professor of Law and Marbury Research Professor.

Had the individual mandate been struck down, the idea of universal coverage as an alternative likely would have survived as a constitutional matter, he says, but it would not have passed for political reasons.

“A MORE RATIONAL KIND OF COVERAGE”

As creator of the law school’s Drug Policy Clinic, Professor Ellen Weber was deeply relieved when the Court upheld the mandate, and thrilled about the improvement she expects to see in the health of real-life individuals.

“The debate in the Supreme Court didn’t really touch on what the lives of people who can’t get insurance are like,” she says. The clinic works with low-income individuals who have addiction and/or mental health conditions, many of whom also have chronic health conditions. If they don’t have insurance and aren’t eligible for Medicaid, most can’t seek preventive care for these illnesses, and resort to emergency rooms when a condition becomes urgent.

By making possible broader coverage in both the public and private markets with access to primary care doctors, the mandate should greatly increase the amount of preventive care available, Weber says, allowing more comprehensive treatment of conditions like obesity, asthma, and diabetes. “Now you’ll have a much more rational kind of coverage,” she says.

Weber also believes that by requiring states to do the kind of outreach and education needed to enroll significant numbers of currently uninsured consumers, the mandate has the rare opportunity to change how people use health care.

“It doesn’t often just happen,” she says. “It requires a concerted effort, and the mandate is part of that push.”

One big unknown remains on the ground. The Supreme Court ruling eliminated the penalty that would have made it highly unlikely that any state would fail to comply with the proposed requirement for Medicaid expansion. Many states—Maryland included—are already poised to enact that expansion on their own, but what will happen to low-income individuals in those states that don’t?

“There’s still a gap,” Hoffmann says.

COMMERCE CLAUSE VS. TAXING POWER

Beginning with Farmer Filburn and his wheat farm, the Commerce Clause had long been interpreted as providing broad powers to Congress: After Wickard, the Court upheld every act that Congress passed under the Commerce Clause for 50 years, Henry says. But in recent years, its interpretation has been more mixed. In 1995 and 2000, the Rehnquist Court struck down two laws under the Commerce Clause. In 2005, a Commerce Clause-based act was again upheld.

Much of the speculation leading up to the Supreme Court decision focused on the question of whether the individual mandate was constitutional under the Commerce Clause, so many observers were surprised when the Roberts decision relied on Congress’ taxing power instead, especially because they believed the Court had signaled that consideration under the taxing power was unlikely [see sidebar on page 17].

Before the Court could reach the question of the mandate’s constitutionality under the Commerce Clause, it faced a threshold question about whether or not it could hear the case at all. The Anti-Injunction Act prevents the Court from hearing cases related to levying taxes until the tax has actually been collected. So if, as a threshold matter, the Court viewed the penalty for not purchasing insurance as a tax, it could have refused to hear the ACA challenge altogether. After the case was argued, most observers assumed
that the Court would focus its analysis of the law under the Commerce Clause.

“If a law is not a tax for the purposes of the Anti-Injunction Act, but is located in the Internal Revenue Code, as is the case with the individual mandate, that signals the mandate is not a revenue-raising measure but a regulatory measure,” Stearns says. “This suggests that if the individual mandate is going to be sustained, the more compelling basis for doing so is not on the tax clause but the Commerce Clause.”

“SHARED RESPONSIBILITY”

Under the ACA, the individual mandate adds healthy people to the risk pool, balancing the higher costs of care for the sick. Eligible individuals who don’t buy insurance are charged a penalty, called the “shared responsibility payment.” But shared responsibility, in the larger sense, does not always come easy to our multi-faceted nation.

Ours is one of just a few modern democracies without government laws or policies that provide access to health insurance or health care services to all citizens or residents, whether financed by government or a combination of government, employer payroll taxes, sales taxes, and optional additional private market coverage, Hoffmann points out—a legacy, perhaps, from our founders and their taste for individual freedom.

Many of us take pride in providing for ourselves and our families, she notes, while people in other nations tend to look out for one another more, taking greater responsibility for their neighbors. At the same time, some Americans also value this kind of interdependence.

“We’re divided,” Hoffmann says. “Are we a community, or a group of individuals standing on our own?”

From the beginning, Weber had high hopes for the mandate’s potential to boost our sense of shared responsibility, but believes it may be a slow road. Relying on the tax power instead of the Commerce Clause may reflect less of a commitment to a national, shared response to the health care crisis, she says. But she hopes it’s still a step in the right direction.

“I think the decision does promote a sense of shared responsibility for the health of our fellow travelers,” she says. “At the same time, we continue to hear a lot of public resistance to the notion that we’re all in this together to improve the health of everyone. Hopefully that sentiment will subside over time.”

The ACA essentially seeks to accomplish many of the same goals in terms of expanded coverage as a wholly government-funded program, but with costs largely passed on to private parties, including employers, insurance companies, and individuals subject to the individual mandate, says Professor Max Stearns.
THE DEBATE IS NOT DONE
Regardless of the source of Congress’ power to enact it, we now have a law that intends to make coverage for everyone more possible and more affordable than ever before. Does it really matter which clause makes the mandate constitutional?

Henry is deeply troubled that the Court relied on Congress’ taxing power to uphold the mandate instead of the Commerce Clause, and by the strike against Congress’ spending power represented by the elimination of the Medicaid expansion requirement. These choices may set a disturbing precedent against progressive causes by weakening Congress’ ability to use federal powers to address the greater good, she says.

“The question is, how will the Court’s decision affect future federal solutions to social problems?” she asks. “Will it limit Congress’ ability to respond? One might ask, how far can Congress go in addressing national social welfare issues in the 21st century? Probably not as far as it used to.”

When the Civil Rights Act was passed in 1964, it was on the strength of the Commerce Clause; Southern businesses were not likely to integrate without being ordered to by the federal government, which viewed civil rights, like health care, as an issue affecting interstate commerce and one that individual states could not solve on their own, Henry says.

We won’t really know the full impact of the Court’s opinion until future rulings begin to clarify it by referring back to this one. But what seems likely is that we are nowhere near done debating what the Commerce Clause does and does not mean.

“The constant reinterpretation of the Commerce Clause since Wickard is the key to all of this,” Henry says.

WHEN IS A TAX NOT A TAX?

Given all the initial focus on the Commerce Clause, Supreme Court watchers were perhaps most surprised by the Court’s decision to uphold the mandate under Congress’ taxing power. Many thought the case contained a “Catch-22” that made consideration of the taxing power unlikely. A threshold question to the case was whether the Anti-Injunction Act applied. The Act prohibits lawsuits to prevent the collection of a tax before it has been paid. No one has yet paid a “shared responsibility payment,” as the ACA calls it. If that payment was construed as a tax, the Anti-Injunction Act would have barred the ACA lawsuit, and the Court would not have reached the question of the mandate’s constitutionality.

But the Court’s one point of unanimity was that the Anti-Injunction Act does not apply. By a vote of 9 to 0, the Court held that for purposes of that Act, the “shared responsibility payment” is not a tax, and therefore its constitutionality could be considered.

So now comes the Catch-22: If the “shared responsibility payment” was not a tax, how could it be constitutional under the taxing power? Joined by Justices Kagan, Sotomayor, Ginsburg, and Breyer, Roberts wrote that even though the ACA calls the penalty paid for not purchasing insurance a “shared responsibility payment” rather than a tax, for purposes of constitutional analysis, the payment functioned as a tax.

How did the Majority reconcile these two seemingly contradictory views? When is a tax not a tax? The Court suggests the answer turns on the difference between interpreting a statute—an Act of Congress—and interpreting the Constitution. When interpreting the meaning of one statute under another, the Court looks to the exact language chosen as an indication of Congress’ precise intentions and what those intentions mean about the resulting relationship between two statutes. Interpreting the Constitution is a different task. The Constitution limits Congress’ power, and were the plain language all that mattered, Congress could easily circumvent those limits just by calling something by another name. Two different kinds of questions resulted in two different answers.

“I think the decision does promote a sense of shared responsibility for the health of our fellow travelers. At the same time, we continue to hear a lot of public resistance to the notion that we’re all in this together to improve the health of everyone. Hopefully that sentiment will subside over time.”

—UM Carey Law Professor Ellen Weber