The lasting effects and analysis of the supreme court's decision in the national federation of independent business v. sebelius

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The Lasting Effects and Analysis of the Supreme Court's Decision in: The National Federation of Independent Business v. Sebelius

by

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ABSTRACT

The purpose of this thesis is to examine the Affordable Care Act through an analysis of the United States Supreme Court's holding in The National Federation of Independent Business v. Sebelius. In order to better understand the Supreme Court's reasoning in that case, this paper will first examine the history and the function of the Supreme Court, which will demonstrate the Court's power to either augment or diminish the power of the states in relation to the federal government. This paper will then discuss the background of the Affordable Care Act, the procedural history of the case, and the majority's analysis supporting its decision. The concurring and dissenting opinions of the other justices will be discussed to present the various viewpoints regarding the proper role of the federal government and the implications this case may have on federal/state conflict.

The Supreme Court ruled in favor of the Department of Health and Human Services. The 5-4 decision was extremely close and the opinions given by each Justice highlighted the various flaws and benefits of the Act it was looking to uphold. Further research of Supreme Court cases in our country's history reveal the trend of augmenting and diminishing state's rights. This thesis will examine the constitutionality of the aforementioned decision, the effects it will have on each of the states within the United States, and the impact the citizens will experience.

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The United States Supreme Court

The Supreme Court of the United States of America was established pursuant to Article III of the United States Constitution[1] when it was adopted in 1789, Article III is quite brief in comparison to Articles I and II, which addressed the powers of Congress and the President respectively. Essentially, Article III established the existence of the Supreme Court, but left it to Congress to establish the parameters of that court, as well as the entire federal court system. The result of this Constitutional mandate was the Judiciary Act of 1789, which established the number of Supreme Court justices (a Chief Justice and five Associate Justices), as well as establishing the federal circuits and district courts throughout the country.[2]

Not all members of Congress approved of the Judiciary Act because some believed that by putting into place a central "supreme court" the Federal government would be given too much authority. There are few official records regarding the passage of the Judiciary Act, so historians must rely on the personal accounts of those involved in the proceedings. William Maclay was one of the first senators elected from the state of Pennsylvania, and he was also one of the first senators who spoke out against this idea for an all-powerful centralized court. In fact, on the very day the Judiciary Act of 1789 was signed into effect he claimed it was a "vile" law and that it intended to "draw… all law business into Federal court".[3] Maclay was joined in his concerns by

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[1] The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.
U.S. Const. art. III, § 1

[2] Judiciary Act of 1789, *Primary Documents in American History*. The Library of Congress, (Mar. 7, 2011), http://www.loc.gov/rr/program/bib/ourdocs/judiciary.html

[3] *Id.*

James Madison who is best known as one of the framers of the constitution. He studied history and law at Princeton[4] before being elected to serve in the Continental Congress. Like Maclay, Madison preserved the otherwise shrouded actions of Congress in letters written to an accomplice regarding the days leading to the signing of the Judiciary Act. Madison expressed his distaste for the proposed laws. Madison found the formation of the Supreme Court to be "defective". Although Madison knew it was too late to make proper changes to the law, his only hope rested in the hands of the "Judges who alone will be able perhaps to set it to rights."[5]

The concerns of the drafters of the Constitution over the power of the central government are also reflected in the text of the Constitution, as well as the first ten amendments, collectively referred to as the Bill of Rights. Specifically, the language of Article I reflects that the powers of the federal government were meant to be limited to certain enumerated subjects, including "interstate commerce." Further, the 10th Amendments states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively . . . ."

These various public and private-writings exemplify the concerns the founding fathers had when they designed our current legal system. Even though over 200 years have passed since the statements by William Maclay and James Madison, the same issues continue to be expressed today.

[4] Michael Beschloss & Hugh Sidey, The Presidents of the United States of America (2009). At the time James Madison went to Princeton it was actually called the College of New Jersey.
[5] *Id.*

The John Jay Court established the Supreme Court's influence early when it decided the matter of *Chisholm v. Georgia*[6]. This case not only showed the significant effect the Supreme Court would have on a growing nation, it laid the groundwork for increased states' rights. In *Chisholm*, a resident of the state of South Carolina attempted to bring a lawsuit against the State of Georgia in Federal Court. The action was being brought because Chisholm was in charge of the estate of a man to whom Georgia owed money. In order to collect this money, Chisholm brought a suit in federal court against Georgia. The issue in the case was whether a citizen of one state, had the right to sue another state of which he was not a resident. The Court held that the right to hear cases between private citizens and states was solely reserved for the federal courts as enumerated in Article III, Section 2, of the Constitution[7]. Although the holding of the Supreme Court may appear to have negated some of the rights of states, the passage of the Eleventh Amendment to the United States Constitution insulated states from being sued in a court of law or equity by a resident of a different United State or a foreign state. [8] However the ability to have an issue heard in front of a federal court is still available if the state involved gives consent. Interestingly, the Eleventh Amendment was first ratified in New York[9], the home state of John Jay, who authored the majority opinion in *Chisholm*[10].

Although, the Judiciary Act of 1789 was enacted and *Chisholm* decided over 200 years ago, the issue regarding the sharing of powers continues to provoke controversy. This was reflected the Supreme Court's deep division over the power of the federal government to

[6] Chisholm v. State of Georgia, 2 U.S. 419 (1793)
[7] U.S. Const. art. III, § 2.
[8] U.S. Const. amend. XI.
[9] *Amendment XI*, The Founders Constitution The University of Chicago (2000), http://www.press-pubs.uchicago.edu/founders/toc/amendXI.html.
[10] Chisholm v. State of Georgia, 2 U.S. 419 (1793).

implement the ACA. The federal government won a narrow victory over the states in a decision that may be the most important in our generation.

Introduction to NFIB v. Sebelius

In The National Federation of Independent Business v. Sebelius the court[11] addressed the constitutionality of the 2010 Patient Protection and Affordable Care Act[12] ("ACA"). The act, called "Obamacare"[13] by some pundits and politicians, sought to expand the coverage of Medicare dramatically, and put in place an individual mandate that required citizens to have health insurance or face a financial penalty. Specifically the ACA requires individuals to take part in a state-based American Health Benefit Exchange, which provides coverage with premiums and cost sharing credits. Businesses that employ individuals participating in the exchange will be charged a penalty for not providing health insurance. Additionally the ACA increases coverage from Medicaid to all non-Medicare eligible individuals under the age of 65.[14] The focus of the ACA is to maximize the number of American citizens who are covered by health insurance.

The action originated in the Federal District Court for the Northern District of Florida[15]. Twenty-six states along with the Federation of Independent Business and multiple individuals joined in the suit. The district court held that the Act was in part within the ability and power of Congress to increase "spending" on Medicaid. However, the district court found that the same

[11] Nat'l Fed'n of Indep. Bus. V. Sebelius (NFIB), 132 S. Ct. 2566 (2012)

[12] The Patient Protection and Affordable Care Act of 2010, 2 U.S.C. 551

[13] Associated Press, House approves ObamaCare Repeal in First Vote Since Supreme Court Ruling, Fox News www.foxnews.com?politics/2012/07/11/house-approves-obamacare-repeal-in-first-vote-since -court-ruling/

[14] Erika K Lunder and Jennifer Staman. *NFIB v. Sebelius: Constitutionality of the Individual Mandate,* Federation of American Scientists, Congressional Research Service, (Sept. 3, 2012), http://www.fas.org/sgp/crs/misc/R42698.pdf

[15] Case Comment, *National Federation of Independent Business v. Sebelius: The Patient Protection and Affordable Care Act*, 126 Harv. L. Rev. 72 (2012) at 73

could not be said for the individual mandate. The mandate was not within the reach of Congress's ability to regulate commerce under the Commerce Clause. This was because the mandate did not qualify as a tax and therefore the District Court held it was a fiscal penalty not covered by the language in the Clause. Further, the mandate attempted to regulate inactivity, which the district court stated would be a "radical departure" from current case law. It was the opinion of district court Judge Vinson that because the individual mandate played such a key role in the ACA, if it were unconstitutional the entire Act must be voided.

The Eleventh Circuit of the Court of Appeals did not find that the entire Act must be rendered unconstitutional and thus defeated. Instead the appellate court found the individual mandate was severable from the rest of the Act. The Eleventh Circuit also addressed the issue of whether or not the individual mandate could be upheld as a tax. The Eleventh Circuit stated that while other federal courts were split regarding all aspects of the ACA, each maintained that the mandate could not be classified as a tax. While the federal courts believed the power to tax was enough to make the making this distinction between the rest of the Act and the penalty provision, the balance of the ACA was upheld by the 11th Circuit.

The Opinion of the Supreme Court

The U.S. Supreme Court faced several critical issues within this case, most notably the limits on the federal government's ability to actually create interstate commerce, not just regulate it. This issue was addressed by Chief Justice Roberts, who argued that the idea of creating commerce instead of merely regulating it was an over extension of authority under the Commerce Clause[16]. Roberts began his opinion by citing Chief Justice John Marshall, who once said that as long as our current form of government exists, the question of how much power is actually granted to the Federal Government will be perpetual. Roberts continued his opening allowing that the enumeration of powers in not a finite idea. It implied that there are powers that are not enumerated and therefore out of the power of the federal government.

Chief Justice Roberts cited *Gibbons v. Ogden*[17] a pivotal case on the interpretation of Congress regulatory power under the Commerce Clause. In *Gibbons*, there was a disagreement between two parties regarding who was allowed to transact business in interstate waterways. The business being transacted was between New York and New Jersey, and New York asserted that the laws of that state controlled. The Supreme Court was charged with deciding whether the federal government could seize authority from the state and implement federal policies. In a unanimous decision the Supreme Court found that New York did not have the right to impose state taxes on interstate commerce as that was a function of the federal government. *Gibbons* was among the first cases to define the prose "among the states" as it is employed in the Commerce Clause.

[16] U.S. Const. art. I, § 8 Cl. 3
[17] *Gibbons v. Ogden*, The Oyez Project at IIT Chicago-Kent College of Law, http://www.oyez.org/cases/1792-1850/1824/1824_0

The Commerce Clause, contained in Article 1, Section 8, Clause 3, of the United States Constitution, gives Congress the power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[18] While the language of the Commerce Clause seems relatively simple, the meaning of the term "commerce" as used in the Constitution has been the subject of much debate. The Courts have been faced with deciding whether the Constitution intended for commerce to be limited to financial exchanges of goods and services. Perhaps the framers intended the meaning to be more ambiguous and to allow commerce to cover all exchanges, social, fiscal, and other to allow the federal government more authority.

Historically, the Court has held a very expansive view of federal power under the Commerce Clause. For example in *Wickard v. Filburn*[19], a 1942 case involving an Ohio farmer's dispute with the interpretation of the Commerce Clause. Amendments made to the Agricultural Adjustment Act of 1938[20] imposed a limit on crops farmers could grow based on the acreage of their farm. Filburn was instructed to destroy wheat crop that exceeded the status quo designated by the federal government and to pay a financial penalty. Filburn argued that the excess wheat was intended for intrastate use, i.e. to feed the livestock on his farm. He did not intend on trading the wheat at all, let alone on an interstate basis. However the Court held that regardless of the usage, growing the excess wheat would affect interstate commerce because Filburn would be less active in the wheat market. This lack of activity could in turn affect the price of wheat. It has been argued that *Wickard* demonstrated that Congress could regulate the behavior on individuals who were not active in a market, if a lack of regulation would affect the market or its prices.

[18] *Id.*
[19] Wickard v. Filburn, 317 U.S. 111 (1942)
[20] Agricultural Adjustment Act of 1938, Feb. 16, 1938, ch. 30, 52 Stat. 31 (7 U.S.C. 1281 et seq.)

Despite a long term expansion of the definition of interstate commerce, more recent decisions of the Supreme Court have favored restricting the Commerce Clause, notably the 1995 decision in *United States v. Lopez*[21]. In *Lopez,* the Supreme Court faced the issue of whether the federal government could regulate firearms in a school. The government relied on its Commerce Clause[22] power for justification that it could regulate. However stating the presence of firearms in schools would affect general economic conditions. The Supreme Court held the Gun Free School Zone Act of 1990[23] exceeded the authority of Congress "to regulate Commerce… among the several States…" Similarly, *Sebelius* presented the Supreme Court with another opportunity to interpret the reach of the Commerce Clause.

However, before Chief Justice Roberts could begin analysis of the Act he first had to ensure that the court had the authority to do so. The primary concern of Roberts's initial opinion was in regard to the Anti-Injunction Act[24] which bars all law suits that challenge the government's authority to collect taxes. This Act allows the government the ability to collect taxes first, then only facing suit if an individual is entitled to a refund. This was relevant to *Sebelius* because under the ACA the fee for noncompliance with the individual mandate would be enacted and collected in 2014[25]. Accordingly, the lawsuit was being presented before any "tax" money had been collected. Justice Roberts analyzed the language of the ACA used by Congress to clarify whether the dispute would end prematurely on the grounds that the Anti-Injunction Act prevented the lawsuit. In the ACA Congress described the "shared responsibility

[21] United States v. Lopez, 514 U.S. 549, 560 (1995)

[22] *Id.*
[23] Gun-Free School Zones Act of 1990, 18 U.S.C § 922 (1990)
[24] Tax Anti-Injunction Act 26 U.S.C. § 7421 (1867)
[25] *Id.*

payment[26]" as a penalty not a tax. Although the use of "penalty" and "tax" were intertwined throughout this decision, in this context they were held to be different. The reasoning was that in other sections of the ACA Congress indicated taxes they intend to implement with the passing of the Act. However when Congress chose to use the word "tax" in some scenarios and "penalty" in others the Court assumed Congress had a specific intention in doing so. Because both the ACA and the Anti-Injunction Act were creations of Congress, the Court deferred to Congress and the language they used in their statutes. The Court therefor deemed the Anti-Injunction Act inapplicable in this case and then proceeded to analyze the ACA.

At the most basic level, the issue the ACA was meant to resolve was that many Americans do not have health insurance. This was problematic because 42 U.S.C. §1395dd[27] mandated that hospitals must provide a certain degree of care to patients regardless of their health insurance status. This resulted in hospitals receiving only a portion of the compensation they were owed for their services. Further it was not just hospitals that were affected by this chain of events. If hospitals couldn't fully recover the funds it had distributed to help uninsured patients they had to raise the rates for insurers. Insurers then had to raise the cost of their policies. Eventually, citizens bear the brunt of this burden, when families saw an increase on premiums each and every year.

[26] *Id.*
[27] Examination and treatment for emergency medical conditions and women in labor 42 U.S.C. § 1395dd

The Application of the Commerce Clause

The first of the two justifications given by Congress[28] for the passing of the ACA was the Commerce Clause, which allowed the federal government to regulate activities that affect interstate commerce. Justice Roberts had concerns with the passing the ACA under the commerce clause because of the individual mandate. He viewed previous cases and warned that the lack of comparable decisions might be an indication of a "severe constitutional problem."[29] Roberts observed that government may "regulate" but not create commerce. In order for commerce to be regulated it must exist previous to the regulation.

Justice Roberts drew comparisons to other powers given to the federal government to illustrate his point. First there was the power to regulate money, and its value. If government was allowed to create the things it was charged with regulating then the power of regulation would be frivolous. The same could be said about the power to bring together and regulate armed forces to protect our country; if this power included the ability to bring armies and navies[30] into existence then we simply would not need the ability to regulate them.

When an individual does not purchase health insurance they are deciding not to participate in a particular market. Previous decisions interpreting the Commerce Clause required "action" to qualify as justification for the Federal Government's involvement. Justice Roberts considered the logic behind the *Filburn*[31] decision in analyzing *Sebelius.* He observed that even in *Filburn*, which was considered one of the most far reaching cases in Commerce Clause

[28] *Id.*
[29] *Id. at 18*
[30] *Id.* at 23
[31] *Id.*

history, the issue was an action. Filburn acted by producing wheat for personal consumption. The ACA contained no action. The way the individual mandate is proposed is too forceful. This way of thinking would have had the government forcing the people to buy wheat when they wanted to regulate the wheat market. *Filburn* would not have been an issue since those who were not buying wheat and thusly affecting the market would have been pushed into the market. There can be no counter to the statement that individuals buying and not buying wheat affect the market, but the Commerce Clause was not used to control their lack of action.

Another issue raised by Justice Roberts was the topic of obesity and health insurance. The example of the wheat market was effective in illustrating the flaw in the ACA's logic. Roberts used the fact that people who do not eat a healthy diet or exercise enough were negatively affecting the health care market. In fact according to a study done by Finkelstein, Trogdon, Cohen, & Dietz[32], individuals at unhealthy weights account for ten percent of all medical spending. Further, the costs of these individuals were more substantial than the uninsured. Roberts asserted the government could easily fix this by forcing everyone to buy more vegetables. A healthier population would lower the cost of insurance and thus would affect the interstate commerce of health insurance. However, like the wheat example, it was not the function of the government to force citizens to act as they would like them to act. The Commerce Clause could not be used to uphold the individual mandate because there was simply nothing to regulate and a lack of activity did not constitute enough for regulation.

[32] Annual Medical Spending Attributable to Obesity: Payer- and Service-Specific Estimates, 28 Health Affairs w822 (2009)

Justice Ginsburg[33] did not find this assertion to be without flaws. Both Justice Ginsburg and Justice Roberts agreed the individual mandate could be upheld. However their reasoning was distinctly different, and that difference stemmed from their interpretation of the Commerce Clause. Ginsburg used a two prong test drawn from *Gonzales v. Raich*[34] to explain how the creation of commerce could be found constitutional. The first factor of this test was the effect the activity in question had on interstate commerce. [35] Ginsburg emphasized the language used in *Wickard*[36] used to describe the type of activity government is allowed to regulate. In *Wickard* the court held that "whatever its nature", if it substantially affects commerce it can be controlled by Congress under the Commerce Clause. The second prong of the test was a reasonableness standard used by the courts. Justice Ginsburg believed that the Court's opinion should not substitute for that of Congress if there was a reasonable relationship between the method of regulation and the result it intended to achieve. An act of Congress should only be reversed by the Supreme Court if it was shown plainly that Congress acted irrationally. Under this test Justice Ginsburg determined that the individual mandate would be appropriate under Commerce Clause legislation. The uninsured consume billions of dollars of health care products and services each year.[37] The products they receive are often sent across state lines, directly effecting interstate commerce. There are also cases where individuals will leave the state of which they are a resident to go to a neighboring state for health care. This was commonly done to receive better care by those who have not paid in advance by purchasing health insurance. Sometimes the

[34] 545 U.S. 1 (2005)
[35] *GONZALES v. RAICH*, The Oyez Project at IIT Chicago-Kent College of Law,http://www.oyez.org/cases/2000-2009/2004/2004_03_1454/
[36] *Id.*

[37] *Id* at 16

reason could be more spontaneous, as citizens are often injured when traveling forcing, them to seek health care services in different states. Justice Ginsburg also asserted that these uninsured were unable to pay for a significant portion of the health care they received. This nonpayment bloated the cost of coverage for others, making obtaining efficient health insurance nearly impossible. With the effects being so numerous and widespread Justice Ginsburg did not believe that refusing to take part in the health care market was the same as complete inactivity.

Because the two prong test was satisfied, Justice Ginsburg addressed her disagreement with the logic of the Chief Justice. While Justice Roberts held that just because you will one day take part in the health care market does not make you "active" in that market, Ginsburg believed the opposite. They differ centrally on the issue of proximity of health care services. Roberts stated that an individual was not active in the market unless they were about to consume health care the next instant. Ginsburg stated that nearly ninety percent of the uninsured would visit a doctor or hospital within five years.[38] She did not believe that the time delay should exclude them from being classified as "active" members in the market. She maintained that there was no way for the government to predict when an individual would take part in the health care market. Therefore it was a reasonable measure of Congress to address the future of the health care market.

Justice Ginsburg interpreted *Filburn*[39] as supporting the reach of the Commerce Clause in this case. While the government was taking action on something that had already happened, i.e., wheat grown for personal consumption, it was future market activity Congress was trying to protect. The market was not immediately affected by the wheat grown for personal consumption.

[38] *Id* at 19
[39] *Id.*

However, it would, over time, affect the open market of wheat. Ginsburg drew similarities between the two markets and the steps taken by Congress to prevent future possible events. She did not shy away from the Chief Justice's analogies to the vegetable market either. It was her logic that while there were similarities between these two markets, health care and vegetables, there was also a staunch difference. The difference arose from the fact that in no other market is an unpredictable need guaranteed to be provided regardless of an individual's resources. If an individual is hurt unexpectedly and has not taken the step to become active in the health insurance market, the hospitals will treat them anyway. In contrast, if an individual decides to consume vegetables they cannot impose their lack of economic resources upon others. Justice Ginsburg believes that the fact that an individual will have to pay for the goods before receiving them marks a stark contrast in comparison to the health care market.

The next issue Ginsburg addressed were the "free riders"[40]. She considered those who were young and healthy and do not reasonably expect to need health care services to be taking advantage of the system. It was the insured who bore the costs when these "free riders" suddenly and unexpectedly needed care. The uniqueness of this market was emphasized time and time again, Ginsburg did not believe there was another market where necessary services were guaranteed through burdening others.

Justice Ginsburg next criticized the logic of the vegetable[41] example provided by the Chief Justice piled too many inferences on top of each other. The individuals who purchased these vegetables could easily sell or give them away. If one assumed they did not do so and they instead consumed them as intended, it would have to be assumed they were preparing them in a

[40] *Id.* at 6
[41] *Id.* at 29

healthy manner. For example, deep frying the vegetables would negate the positive health effects the legislation intended. Or perhaps the vegetables would be properly prepared, however the individual would not supplement their consumption with proper exercise or proper sleeping habits. It was this type of thinking and inference that the Supreme Court denied in *Lopez*.

In her conclusion regarding the Commerce Clause's applicability in this case Justice Ginsburg observed that the Necessary and Proper Clause[42] allowed Congress to enact complex legislation that embodied many isolated pieces of legislation. While the Commerce Clause may not justify the enacting merit of the individual components of legislation, if those components were inseparable from the rest, the statute would still be constitutional. In National Federation of Independent Business v. Sebelius[43] the individual mandate was the component legislation and the ACA was the larger act. Justice Ginsburg contended that without the individual mandate, the government could not reach its intended goal. This contention relied heavily on the provision of the ACA that declared it illegal for health insurance providers to raise the price of coverage or outright deny coverage to an individual with a preexisting medical condition. Her logic was that without the individual mandate, the rates for insurance would increase drastically, and it would force the providers out of the market. However, with the mandate included, access to health insurance would increase, rates would not increase drastically and the goal desired by the ACA would be reached.

Justices Scalia, Kennedy, Thomas, and Alito dissented. Similar to the Justices who favored the majority decision, the dissenters viewed the Commerce Clause as the central issue in

[42] U.S. Const. art. I, § 8 cl. 18 The Congress Shall have Power – To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer therof.
[43] *Id.*

this case. The Dissenters also cited *Filburn* as one of the major cases that needed to be considered. In their view *Filburn* favored striking down the individual mandate. They observed that requiring the individual mandate was comparable to finding those who were not growing wheat in *Filburn* to be equally guilty of affecting interstate commerce. This kind of logic would allow the federal government to extend its reach over any facet of citizens' personal life via the Commerce Clause.

Contrary to Justice Ginsburg's opinion regarding the "free riders"[44], in the opinion of the dissent this same group was viewed in a much different light. Rather than characterizing their inactivity in the insurance market as a burden, the dissent viewed it as a fair byproduct of circumstance. They stated that if the ACA were to pass and preexisting conditions were disallowed as reasons for higher rates, this young group would lose incentive to purchase health insurance. The reasoning was that if an individual was young and without health issues they had less concern that they may need health care services. If that same individual developed a medical condition later in life, they could acquire the same health insurance as if they were still young and healthy. This same insurance would be provided at the same cost, which rendered buying the insurance in advance senseless. The dissent also maintained that without the participation of these healthy, above risk individuals the insurance companies would not be able to afford to take on high risk individuals, which would cripple the purpose of the ACA.

The Justices did not see the industry as unique. They suggested that it was not uncommon in economics for regulation of an industry to create more extensive costs. It was unique though, for this added cost to be forced upon those individuals who were furthest away from

[44] *Id.* at 6

participating in the industry in question. The dissent warned that this situation was exactly the "hideous monster" Alexander Hamilton warned of in "The Federalist Papers[45]".

NFIB presented various options of reducing insurance premiums and providing affordable insurance for the masses. The dissenting Justices believed this crucial difference was yet another reason the ACA could not be passed under either the Necessary and Proper Clause[46] or the Commerce Clause.[47] The Justices even proposed some alternative solutions to the issue, including a possible surcharge to those who enter the health insurance market later when they have an actual need. Also those who chose not to enter the market could have a portion of their income tax withheld from them.

The dissenting Justices also addressed the argument of the Justices who believed the individual mandate should have been upheld as part of the ACA. The Justices felt that the individual mandate threatened the relationship an individual had with their government. A decision supporting this statute would cloud the divisions between what government could control and what it could not. These Justices observed that the Constitution should not be viewed as an unrestricted license for the Federal Government to solve all our problems. Rather it contained an enumerated list of powers the government had available to them.

[45] The Federalist No. 33, at 202 (Alexander Hamilton)(Clinton Rossiter ed., 1961)

[46] *Id.*

[47] *Id.*

The Taxing Power[48]

The majority of justices ruled that the Commerce Clause could not justify the federal governments' intrusion into the insurance market. However, another justification was the power of Congress to "lay and collect Taxes"[49]. This argument was not only based on a different constitutional power, it contended that the ACA had two meanings. The government asserted that the ACA should not be looked at as a regulation of commerce. Rather, it should be viewed as a tax imposed on those who do not participate in the health insurance market. Chief Justice Roberts began his opinion by citing Justice Story who stated that "no court should choose a meaning of a dual meaning statute that violates the Constitution if the other meaning does not."[50] Justice Holmes upheld this opinion in 1927.[51] According to the ACA, the penalty for not participating in the health insurance industry was a monetary payment to the IRS. This cause and effect was looked at as a conditional event, not owning health insurance, and a tax that was activated by the condition. This theoretically changed the individual mandate by transforming it into a tax hike on those taxpayers who did not have health insurance. While this tax was not traditional, the Supreme Court was required to adopt the interpretation that would keep a statute from violating the constitution.

The Court's majority noted further characteristics of the ACA that made it appear as a tax. The first distinguishing characteristic was that, like other taxes, the penalty imposed by the

[48] U.S. Const. art. I, § 1
[49] *Id.*
[50] *Parsons* v. *Bedford*, 3 Pet. 433, 448–449 (1830)
[51] *Blodgett* v. *Holden*, 275 U. S. 142, 148 (1927)

mandate was paid to the United States Department of the Treasury.[52] This payment was made by individual "taxpayers" when they filed their yearly tax returns. Like other taxes the mandated penalty was not paid by those who did not receive sufficient household income to qualify for federal income taxes. Similarly if an individual qualified for the penalty, the amount of their penalty was decided by the same factors traditional taxes were based on. These factors include taxable income, dependents, and marital filing status.

This penalty would be collected by the Internal Revenue Service,[53] which in turn meant the IRS would have to collect it in the same manner it collected other taxes. The Court observed that this process resulted in the defining feature of any tax; additional revenue for the Federal Government. According to studies cited by the Court, the ACA would yield about four billion dollars per year by the year 2017. As discussed previously, the actual language in the ACA classified the payment as a "penalty" not a "tax". This was the main point considered when the Anti-Injunction Act was proposed as justification for denying jurisdiction. Even though this language was influential regarding that issue, when deciding whether the Taxing Power could be used to uphold a statute only the practical meaning of the statute was considered. Pursuant to this logic, the penalty paid for the individual mandate acted and looked like a tax, and therefore could be treated as such by the Court.

[52] *Id.* at 33

[53] Internal Revenue Service (IRS) A bureau of the Department of the Treasury and one of the world's most efficient tax administrators. In fiscal year 2012, the IRS collected more than $2.5 trillion in revenue and processed more than 237 million tax returns.
http://www.irs.gov/uac/The-Agency,-its-Mission-and-Authority

To provide support for this theory, the Court relied on *Drexel Furniture*[54] where the U. S. Supreme Court found that a penalty labeled a tax did not qualify under the taxing power. In *Drexel,* the fee imposed was ten percent of the company's net income, an amount the court viewed as exceedingly heavy. The penalty was also only applied to those who knowingly violated a specific statute.[55] This requirement was considered inappropriate, as it usually is attributed to punitive statutes that seek to penalize those who intentionally break the law. Lastly, in *Drexel* the agency in charge of applying the penalty was the Department of Labor. Which was not responsible for collecting revenue; instead it was in charge of punishing violations of the law. When these facts were compared those presented in *NFIB* many contrasts were apparent, which helped the Court see the individual mandate penalty as permissable under the power to tax.[56] The amount the individual would have to pay for violating the individual mandate would not be heavily burdensome. It would also, because of the language in the statute, never be allowed to surpass the price of insurance. This limit would prevent an individual from making an unwise financial decision by choosing to pay the penalty. Whether or not an individual intended on not violating the statute, their monetary penalty would be the same and would also be collected by the IRS as a normal tax. The Justices referenced the fact that even though the penalty would be collected as all normal taxes were, the IRS would not have the option to prosecute individuals for nonpayment. Punitive methods such as criminal prosecution were barred by the ACA[57].

The majority asserted that *Drexel* as applied to *NFIB* demonstrated the mandate had substance as a tax did not exclude the penalty from characterization as a tax. The majority stated

[54] Bailey v. Drexel Furniture Co. 259 U.S. 20 (1922)
[55] 1919 Convention on Child Labor (1919)
[56] *Id.*
[57] The Patient Protection and Affordable Care Act of 2010, 2 U.S.C. 551 at §5000A(g)(2)

that taxes intended to influence the behavior of individuals were not uncommon. For example taxes for cigarettes[58] do raise revenue, but their primary function was to discourage people from smoking. The Court also held that by definition every tax is in some way regulatory. This was because it exercises an economic effect on any market the taxes were imposed upon versus those the taxes were not. Therefore, simply because the ACA's individual mandate intended to influence people's behavior did not bar it from being passed under Congress' taxing authority. Justice Roberts stated that the most pertinent difference between a penalty and a tax was the concept of an unlawful act.[59] Penalties were punishments for an omission or an unlawful act. However the individual mandate did not include any language suggesting, that the failure to have health insurance was an unlawful act. It merely exacted a fee for not having adequate health insurance coverage. This meant if an individual did not acquire the necessary insurance coverage, and paid the penalty as required by the ACA, that individual had not committed an unlawful act.

Justice Roberts concluded with describing another parallel to a prior case *New York.*[60] In that case the Federal Government attempted to exact a penalty on states for disposal of radioactive waste. Any state that shipped its waste to another state was susceptible to a charge from the receiving state. A part of this charge was received by the Federal Government. Instead of viewing this as forcing the states dispose of their waste in a certain way, the Court viewed it as a series of incentives made to ensure states took responsibility for their waste. This approach was

[58] Children's Health Insurance Program Reauthorization Act of 2009 (2009) On Apr. 1, 2009 the tax on cigarettes per pack raised from $0.39 to $1.01.
[59] *Id.* at 37
[60] New York v United States 505 U.S. 144 (1992) This Supreme Court decision held that Congress had exceeded its authority under the Commerce Clause.

similar to the ACA because the incentives put in place by the ACA would influence people to take responsibility for their health insurance.

The dissenting[61] members of the Court believed that when Congress framed this as penalty, that kept it from being reclassified as a tax. The Constitution[62] mandated that a tax that was direct could not be imposed unless it was in proportion to the population of the states. Congress did not apportion the individual mandate penalty and the dissent believed this was reason enough to find it unconstitutional. The majority[63] opinion contradicted this assertion with examples of statutes that imposed direct taxes, without apportionment according to state populations. The first historical example of this was when the Federal Government decided to impose a tax on those who owned carriages.[64] This was a direct tax, and according to the Direct Tax Clause was to be apportioned according to each state's population. However it was not apportioned because to do so would have placed individuals at extremely different rates based on the state they lived in. This would have made it unfair to own a carriage in some states, as the financial burden would have been too cumbersome.

Therefore, the Court decided that two types of taxes classified as direct. The first was a capitation and the second was a tax on property (real or personal). A capitation is a tax paid by every single person no matter their property, profession, or any other circumstances. That definition clearly contradicted the ACA's individual mandate penalty because it is not that widespread. The penalty was also clearly not a tax on real property or personal property

[61] Justices Scalia, Kennedy, Thomas, and Alito, JJ.
[62] U.S. Const. art. I, § 9 cl. 4

[63] Justices Roberts, Ginsburg, Sotomayor, Breyer, and Kagan.
[64] James Madison voted against the taxation of carriage ownership.

according to the majority. This meant the shared responsibility payment was not a direct tax and need not have been prepared in a way that apportioned it to each state. This indicated that the ACA was not attempting to create a new federal power; instead the ACA used an existing power of taxation.

The Court recognized the issues presented with allowing a tax to be passed that was imposed on those who are inactive in a market. The concern was whether the Federal government would exceed its power under the constitution if it were to tax inactivity. The majority made three points which they believed negated this concern. The first point was the observation that the Constitution does not expressly protect citizens from being taxed for inactivity. If the Constitution allows for a tax to be levied on individuals simply for existing, capitation; then the court believed there was no protection to insulate citizens from taxation due to inactivity. The opinion cited Benjamin Franklin's letters to Jean-Baptiste Leroy[65] where he wrote "Our new Constitution is now established… but in this world nothing can be said to be certain, except death and taxes." The Court held that the question in the case had shifted. When determining the validity of the commerce clause as justification for passing the ACA, it was a question of "if" not "how". By contrast, once the court accepted the taxation power as justification, the question shifted to "how". As long as the Federal government followed the proper steps in levying the new tax, the ACA could be found constitutional.[66]

The second point the Court made was to acknowledge that taxation to influence conduct is not a new idea. Taxes of that kind were historically policed by the judicial branch. In the

[65] Benjamin Franklin, Letter to Jean-Baptiste Leroy (1789)
[66] *Id.*

present case the individual mandate penalty passed the strict rules set forth by the Supreme Court.

The third point provided by the majority was in reference to the amount of control the government has over individuals that they levy taxes on. If the ACA was permissible under the Commerce Clause individuals who did not follow the rules would be exposed to possible criminal sanctions. However the power to tax individuals only covered a monetary payment to the IRS. If an individual did not pay the penalty to the IRS, there were ramifications but they were not as steep as those possible under the Commerce Clause. On the other hand, if an individual paid the tax they were exempt from any further penalty. They could not be further motivated by the government to enter a market or purchase a product. Once an individual had paid their "tax" to the IRS, they were free to continue without health insurance if they so desired.

Justice Ginsburg argued that the Court should have upheld the Affordable Care Act under the Commerce Clause if it was allowed under the taxation power.[67] However the Chief Justice responded that the language in the ACA was most appropriately read as a command. The Commerce Clause did not allow the Federal Government to command individuals. Therefore, the ACA had to be disallowed under the Commerce Clause. It was the responsibility of the Court to save the ACA if it could do so within reason. It was reasonable for the Court to view the shared responsibility payment as a tax. Justice Roberts concluded that the only way the Court would have come to interpret the payment as a tax was by striking down the Commerce Clause argument first. It would have contradictory to then go back to the initial argument of the Commerce Clause and allow it, because it was allowed under the taxation power.

[67] *Id.*

Medicaid[68] Expansion

While the focus of the media, the populace, and even the Justices centered on the individual mandate, there was another very important issue decided. The ACA contained a section that aimed to expand Medicaid. Medicaid required the states to care for specific groups of individuals, such as the needy or at risk individuals like pregnant women, children, the elderly, and the visually handicapped. The obvious group that was left out was adults without children. There was no mandatory coverage for these childless adults. The states had the benefit of deciding how much assistance they would provide to the needy groups. The states could also set the level of poverty they required before administering Medicaid assistance. The ACA attempted to change the flexibility the states had by replacing the level of poverty needed to receive assistance. The new level required by the ACA would be all individuals under 65[69] years old who had incomes below one hundred and thirty three percent of the federal poverty line.

The Spending Clause[70] of the United States Constitution allows the Federal Government to pay national debts and provide for the general welfare of citizens. A conflict between the states and the Federal Government was created because the ACA required the states to govern their residents in a specific manner. The Court had previously held that the central government could direct the states to take action that they would not otherwise take, if the states agreed to the terms of the agreement. The relationship between the states and the government was viewed as a "contract". The Court required that the agreement be presented and executed like a contract. If

[68] The Center for Medicare and Medicaid Services is an agency of the U.S. Department of Health and Human Services (HHS)
[69] *Id.* at 45
[70] *Id.*

the states did not agree to the terms, then the government could not force them into action. According to Justice Roberts, allowing the central government to acquire too much power would result in a diminishment of individual liberties.

Justice Roberts discussed the importance of recognizing when the states' rights to govern themselves were being lost. For example, in *Printz*[71] several states filed suit over a federal statute that required the Chief Law Enforcement Officer in districts across the country to perform manual background checks on handgun purchasers. The Court held that such a requirement overstepped the authority of the Federal Government and the act was unconstitutional.

Another issue the Court recognized was the political accountability for the decisions that would be made. The policies would change however the local politicians would not have had any say in the change. If the local residents are unhappy, the local politicians would be the ones voted out of position. The American system relies on "electoral ramifications"[72] so that those who make decisions can be held responsible for their results. The Court highlighted that if the states had the choice whether or not they were going to be taking part in the new system, there would be sufficient accountability. The states who did not partake in the ACA would lose all Medicaid funding.

The next question the Court addressed was amount of loss the states would incur if they opted out of the ACA. Spending related to Medicaid represented over twenty percent of states' budgets. Under the ACA, the Federal Government would cover between fifty and eighty three percent of the Medicaid related costs. In the Courts' view the states would have no choice but to

[71] Printz v. The United States 22 I11.521 U.S. 898, (1997).

[72] *Id.* at 48.

comply with ACA, which would violate the federal system of government by shifting more of the power to the central government. Justice Roberts then inquired whether the ACA modifications to the existing Medicaid program represented a completely new program. If the answer was the latter, he feared that the states would then be forced to take part in a new program they would otherwise abstain from because of fear of losing half or more of their federal assistance.

Criticism

The issue of Medicaid expansion and the decisions of the states was one of the issues addressed in an article by James F. Freeley,[73] who wrote of the confusion this decision would cause in the future. The Court found the Medicaid expansion unconstitutional. The Court also acknowledged that the ACA was one continuous piece of legislation that worked with all of its individual parts to achieve a common goal. But, when the Court found a part of this inseparable legislation to be unconstitutional it did not void the entire Act. This would leave uncertainty for the future of similar legislation that comes before the Supreme Court. Part of the reason our country used a system that relied on precedent was so people could reasonably expect what results they would receive. Freeley pointed out that the dissenting opinion highlighted this issue and suggested that in the future it would be very difficult to know if similar statutes will be valid.

Many legal experts provided opinions regarding this pivotal case. James F. Freeley III, a Lecturer in Law from the University of Massachusetts School of Law-Dartmouth offered some enlightening discussion. The crux of Freeley's opinion revolved around the decision to find the ACA constitutional under the taxation power. He pointed out that while some politicians and citizens may see the Chief Justice's decision as strategic or politically motivated, analysis of the Court regarding the Spending Clause contradicted that stance. Justice Roberts may have sided with the more liberal Justices; however it was in the best interest of the conservative party that the ACA was disallowed under the Commerce Clause. Freeley also observed that by siding with

[73] James F. Freeley III, Essay, *National Federation of Independent Business v. Sebelius: The Constitutionality of Health Care Reform and the Spending Clause*, 45 Conn. L. Rev. CONNtemplations 19 (2013)

the "liberal wing" of the Supreme Court, the Chief Justice permitted Congress and the states to have the final say on how successful the ACA would be.

Freeley did not find the decision in *Sebelius* without flaws. In his opinion, by allowing Congress to tax Americans for inactivity, the Court had opened a slippery slope. As long as Congress has a rational basis for enacting a tax, the amount of the tax is reasonable, and the IRS collects the tax according to policy, Congress can now force individuals to purchase unwanted products.

An article in Harvard Law Review[74] also analyzed the Court's decision in *NFIB v. Sebelius.* The focus of this comment was the political influences of modern society and how this case exemplified them. This article noted that Professor Gillian Metzger, a constitutional law professor at Columbia University, contended that while most people will assume the effect of this case will be on with the Commerce Clause or power to tax, in fact it will be the relationship between federal and state governments that will be most affected. The opinion showed the Court would rather give the states a choice and use incentives to influence activity rather than mandating it.

Another academic, the Dean of Harvard Law Martha Minow, argued that the ability of Justice Roberts to make a nonpartisan decision will have a positive influence on the current and future reputation of the Supreme Court. She noted that Justice Roberts was able to acknowledge and discuss the positions of the other eight Justices. However, Justice Roberts did not allow the other Justices to influence his decision. He remained neutral, evenly assessing each issue

[74] Case Comment, *National Federation of Independent Business v. Sebelius: The Patient Protection and Affordable Care Act*, 126 Harv. L. Rev. 72 (2012)

presented to Court. This resulted in both the protection of the United States Constitution and the individual rights of the American people. Ultimately, the entire legal field benefitted from this decision, because the Supreme Court showed that law is to be decided insulated from the external pressures of politicians and pundits.

In my opinion this case presented three issues: the constitutionality of the individual mandate, the Medicaid expansion, and the presence of politics in the judicial branch. On the first issue I initially disagreed with the Court's decision. The idea of being taxed, charged, penalized or whatever term for simply not doing something did not appeal to me. However upon reading the opinion of the Court, I found my opinion had changed. The Chief Justice accurately accounted for all the issues the ACA presented. He prevented a broad application of the Commerce Clause. I found this especially valid because of the immense power the Commerce Clause grants the Federal Government in regulating the actions of individuals. Justice Roberts did not allow the court to be constricted by technicalities such as the use of the word "penalty" instead of tax. He viewed the shared responsibility payment with an open mind and concluded that if the mandate acts like a tax, is collected like a tax, then it certainly could be considered a tax. I agreed with this very literal view of whether or not to consider the mandate a tax. It was pleasing to see that rather Justice Roberts considered the larger picture, knowing that if the ACA was permitted under the taxation power, the government could not easily manipulate the actions of individuals. This made the risk of allowing the ACA to be deemed constitutional much less than if it were approved using the Commerce Clause.

Then second issue of the case dealt with state sovereignty and the amount of "coercion" Congress could use against the states. I believe that the intentions of the framers of the US

Constitution were that a country with two levels of government would protect our democracy. Anything that would disrupt the balance of such a system would be a threat to the freedom it provided. The Court acted with best interests of the people in mind when invalidating the Medicaid expansion as was written. While federal funding is an important part of the American system, I do not believe it should be allowed to control the decisions states make regarding their residents. The states would have no choice but to accept the new terms of the ACA if they were threatened to lose all existing Medicaid funding. No state representative or leader could, in good conscience, lose half or more of their Medicaid funding without harming the general welfare of their people. It is the responsibility of all leaders to care for their people's welfare and therefore I agree with the Court that the Medicaid expansion was unconstitutional as written.

The third issue presented in the case was how politics have influenced and affected the judicial branch. Clearly politicians are not the only ones who must practice the art of politics, which are present in everyday life. We demand that the Supreme Court be outside the reach of these influences, because a court that made only partisan decisions would never be able to enact true justice. There would be no purpose of arguing an issue because those who were responsible for deciding would have already made up their mind from the beginning. This is relevant to this case because the court appeared to split by party affiliation. One side were the "liberal" justices who favored loose interpretations of the Constitution. The other side consisted of those who consider themselves more "conservative" and see the Constitution as a more finite document. This court, thanks to Chief Justice Roberts, did not suffer from this failing. Instead, I believe that this case will be viewed in years to come as not only a valid exercise of judiciary limits on both

the Spending and Commerce Clause, but also a testament to non-partisan decision making and the wisdom it requires.

Conclusion

The decision in this case showed a heavily divided court, where the majority held that the ACA exceeded Congress's power to regulate under the Commerce Clause. The majority, including Chief Justice Roberts, Justices Sotomayor, Kagan, Breyer, and Ginsburg, all agreed the ACA was constitutional under the taxing power.[75] It was Chief Justice Roberts's opinion that he extended his disagreement with the proposed individual mandate. Roberts argued that citizens should not be forced to buy an unwanted product (the health insurance in this case). The Chief Justice mentioned in his opinion that it is the language of the proposed Act that contradicts allowing it to pass under the Commerce Clause. The ACA states that it means to propel individuals into a market they are otherwise not going to enter. This raises the question of how something can be regulated if it has not yet been created. It would be unprecedented to penalize citizens for inactivity, instead of for the active participation in a market. While each Justice had their own analysis of the Commerce Clause and its effect in this case, it was the Chief Justice who foretold of a grim future if this mandate were allowed to be upheld. By finding it constitutional to force individuals to purchase health insurance under the commerce clause government could use these tactics to solve almost any problem.[76]

Perhaps the most confusing section of the Supreme Court's opinion was the section regarding the taxing authority of Congress. After lengthy opinions discrediting the authority of Congress to mandate commerce through the Commerce Clause the Court found that the mandate

[75] John H. Cushman Jr., *The Supreme Court Decision on the 2010 Health Care Law* The New York Times (Jun. 28, 2012), http://www.nytimes.com/interactive/2012/06/29/us/scotus-healthcare-document-annotations.html.
[76] *Id.*

was still constitutional through its taxing power. The individual mandate was found to fit into the category of a tax, however not a "direct tax".[77] A direct tax is a tax that is levied on the individual or the income of the individual rather than a good or service. By not classifying the mandate as a direct tax Congress would not be required to disburse the tax to the states based on population. The most important effect of the tax classification was that the Court had to defer to the other branch of government which meant the mandate was to be upheld. The argument was made that this tax could not be implemented because it was only put in place to influence the behavior of individuals. However, the Court disregarded this argument. Many taxes exist today that are meant more for the influencing of the public's behavior rather than raising revenue. Examples include taxes on cigarettes, meant to decrease smoking in the United States, and the taxes on gasoline, meant to motivate more energy efficient transportation decisions.

The Court also discussed another aspect of the ACA, the effects that would be put in place changing Medicare. In the ACA the changes to existing Medicare were so drastic that it would be essentially putting in place a whole new system. The focal point for the argument revolved around allowing the states to choose if they would like to take part in this new system, for as it was written the ACA withdrew existing Medicare funding from those states who do not participate. Chief Justice Roberts said that the thought of holding back funding to states that did not participate was like holding a "gun to the head" of the states.[78] This coercion to take part in the ACA was too strong and therefore had to be removed from the Act.

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[77] Erika K Lunder and Jennifer Staman. *NFIB v. Sebelius: Constitutionality of the Individual Mandate*, Federation of American Scientists, Congressional Research Service, (Sept. 3, 2012), http://www.fas.org/sgp/crs/misc/R42698.pdf

[78] Jess Bravin and Louise Radnofsky, *Court Backs Obama on Health Law*, The Wall Street Journal, (Jun. 29, 2012), http://online.wsj.com/article/SB10001424052702304898704577480371370927862.html.

This case pit large businesses like insurance companies against the interest of a centralized government and it consequently gained political significance. In this case the decision of the Supreme Court was handed down on an election year, in which healthcare was a major concern of many citizens. The incumbent, President Obama, gained political credibility when parts of his pioneering healthcare legislation were deemed constitutional. The President expanded Medicare to many who would not otherwise have coverage, which probably helped in the elderly demographic. Obama lost admiration from those who see the expansion as too vast and the strain it puts on governments both state and federal as too cumbersome. As stated by Freeley in his examination[79] of the case, the Chief Justice did not allow the Supreme Court to fall to partisanship in this decision. The Chief Justice helped the Supreme Court's reputation in the eyes of the people by proving that party affiliation should not dictate decision making.

The decisions of the Supreme Court regarding the issues of state's rights and its effects on citizens are numerous. The implications of the Supreme Court's opinions, both by the majority and the dissenting, have paved a new path for the interpretation of the Constitution regarding the Commerce Clause and limits to the federal government. *Sebelius* shows that the court still has constitutional view of interstate commerce. Accordingly, the states are now faced with how to implement the law as it continues to remain controversial.

[79] *Id.*

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