reducing insurance premiums and helping insurers remain in business: “For instance, those who did not purchase insurance could be subjected to a surcharge when they do enter the health insurance system. Or they could be denied a full income tax credit given to those who do purchase the insurance.” A “surcharge” is of course a polite term for a tax. We agree with the dissenters that, in enacting Obamacare, Congress did not actually avail itself of its broad authority to tax, and we believe it should be forced to exercise the tax power openly and directly.

More significant than Roberts’s resort to the tax power was the Court’s embrace of justiciable limits on Congress’s so-called spending power—that is, its ability to impose conditions on the receipt of federal funds. In striking down Congress’s attempt to coerce states to accept a dramatic expansion of Medicaid, the Court restrained the spending power for the first time in over 60 years. In *South Dakota v. Dole* (1987), the Court had articulated limits on the conditions Congress could place on a state’s receipt of federal funds, but then failed to enforce them, and only one federal appellate court had ever found these limits meaningful. In *NFIB v. Sebelius*, however, seven justices rejected the notion that Congress has free rein to impose conditions on federal funds. Given how often Congress seeks to use the spending power, the Court’s decision may open a new front in the war to reinvigorate constitutional federalism, and occasion a reexamination of statutes from No Child Left Behind to the Clean Air Act.

As the dust settles, we may begin to see that the legal consequences of the Court’s decision are both more limited and more significant than they may have first appeared. The power to tax is strong, but nothing in the Court’s opinion fundamentally expands its inherent dangers. The Commerce Clause has been stretched beyond anything that the Founders would recognize, but this was not the case to snap it back into shape. It was, however, a case in which to hold the line, and the line was held. And finally, the Court’s spending-power holding creates important new opportunities for challenging federal encroachments.

The post–New Deal remnants of our original constitutional order were very much at stake in this case, and although the mandate survived, at least for today those remnants still remain. **NR**

By the Roots

The Supreme Court should overturn unsound precedents

BY RICHARD A. EPSTEIN & MARIO LOYOLA

PRECEDENT is the glue that holds the American legal system together, giving both adaptability and predictability to the decisions of our courts. When a precedent is good, it’s great, but when it’s bad, its effects can be terrible. The real story of the Obamacare decision is that it was driven by flawed precedents that should have been modified long ago. To make matters worse, the Court’s decision created a new precedent that could do lasting damage to the Constitution if it is not reversed.

Those flawed precedents have a couple of things in common. First, they replace binary, categorical, yes/no decision rules with tests that rely on indeterminate sliding scales, leaving legislators and the public little guidance for the future. Second, they blur important limitations on the power of the federal government, thereby undermining the accountability and institutional competition that were the genius of the original constitutional scheme. In Obamacare, the Court not only missed an important opportunity to fix these problems, it entrenched them more deeply.

The individual insurance mandate was unprecedented. The federal government had never before claimed the power under the Commerce Clause to force individuals to purchase something merely because they were alive. A bare majority of the Court properly refused to uphold the mandate as an exercise of the federal power to regulate interstate commerce. The Framers might have wondered: How did we ever get here? The Constitution made it unequivocally clear that the federal government could not regulate the “purely internal commerce” (in the Supreme Court’s phrase) of any state, a position to which the Court held adamantly for 150 years.

The distinction between local and national activities is a structural-design principle of our Constitution that was meant to set a proper boundary between the respective spheres of national and state governments. The Court sharpened that distinction in its 19th-century and early-20th-century Commerce Clause cases by insisting that Congress could regulate only those economic activities that involved transactions in interstate commerce. The myriad activities that had only an “indirect effect,” by altering the quantity of goods produced or the prices at which they were sold in local markets, were kept beyond the power of the federal government to regulate. Local contracts between you and your neighbor were no business of Washington, D.C.

In the course of the 1930s, all three branches of government lost sight of this clear categorical distinction. Many defenders of the new legal order claimed that the federal government had to regulate all aspects of an integrated economy. The fantastic economic expansion of the previous 150 years had not revealed any flaw in the earlier categories; nonetheless, in the New Deal period, the Supreme Court changed course by adopting a rule that allowed the federal government to regulate any activity with a “substantial effect” on interstate commerce. In the 1942 decision of *Wickard v. Filburn*, it reached the reductio ad absurdum: Congress could regulate the amount of wheat you produce for your own farm on your own land, because the purely household production of wheat affects its national market price and therefore has a substantial effect on interstate commerce. Nothing but the Court’s arbitrary application of an indeterminate new distinction (substantial vs. insubstantial) now stood in the way of Congress’s regulating even the most local conduct under the commerce power. Congress used that power not to increase the flow of goods and services in interstate commerce but to cartelize the entire agricultural sector (with regulations that last until the present day), and from that point, federal regulation of economic activity expanded with no end in sight.

Worse, while that federal regulatory expansion took precedence over contrary state regulation, it did not necessarily dis-

Mr. Epstein is the Laurence A. Tisch Professor of Law at New York University School of Law and a senior fellow at the Hoover Institution. Mr. Loyola is director of the Center for Tenth Amendment Studies at the Texas Public Policy Foundation.

place state regulation. Federal and state control of the economy would now substantially overlap, incentivizing government officials at the two levels to collude in blocking competition and granting special preferences for special interests. Preventing that collusion was the point of the old rule; facilitating it was the point of the new one, as Michael Greve shows in his masterly new book, *The Upside-Down Constitution*.

In deciding that the Obamacare mandate could not be sustained under the commerce power, the Supreme Court ruling by Chief Justice John Roberts reasserted that Congress can already regulate virtually all activity, and simply refused to extend that power into the realm of *inactivity*. But given the sweep of *Wickard*, the Court could easily have gone the other way: Hence, even this part of the Court's opinion was little more than the arbitrary application of a highly indeterminate standard.

If the federal taxing power can be used to regulate any activity, no matter how local, and any inactivity (which is neither local nor national), the distinction between state and federal spheres of authority vanishes completely.

Having refused to expand federal power under the Commerce Clause, however, the Court surprised everyone by devising a way to increase the sway of Congress under the taxing power. When, a century ago, Congress tried to use taxes as penalties to enforce compliance with mandates that were not constitutional under the Commerce Clause (or any other enumerated constitutional power), the Court nixed the attempt. Congress could not accomplish indirectly what it was prohibited from doing directly. Every law comprehends a penalty for disobedience; otherwise it is just a suggestion for good conduct. Hence the validity of any penalty must depend upon the validity of the mandate it's meant to enforce; even if it is in the form of a tax, a penalty cannot fall within Congress's power to levy taxes in order to provide for the "general Welfare of the United States."

This categorical distinction between a penalty and a "mere tax" held fast for generations—until last month, when the Court obliterated it. Once again, a clear distinction was replaced with an indeterminate sliding scale. The Court held that if a penalty was not particularly onerous, it might be considered a tax. This flew in the face of the obvious fact, and near-universal agreement, that the exaction associated with the individual mandate was a penalty, one meant to enforce a mandate that Chief Justice Roberts had just explained could not be sustained under any of the Constitution's enumerated powers. Who can now say what is a tax and what is a penalty? Only the Court, which will surely use the indeterminate rule to reach whatever result it wants.

This new precedent suffers from the same flaws as *Wickard*, as a matter both of logic and of constitutional principle. If the federal taxing power can be used to regulate any activity, no matter how local, and any *inactivity* (which is neither local nor national), the distinction between state and federal spheres of authority vanishes completely. The taxing power was the one area in which the Framers specifically contemplated that federal and state governments would have concurrent powers. This was justified, because the national government could tax in order to provide benefits to the United States as a whole, not a given region or faction. That constraint, if honored, allows the two levels of government to inhabit separate spheres as envisioned in the scheme of enumerated federal powers. But if the federal government can now use the taxing power to enact regulations regardless of whether the other enumerated powers specifically authorize it to do so, the distinction between what is local and what is national finally disappears. Who benefits? Government, at all levels.

"Were the lemons grown locally?"

The great strength of federalism is that it allows the states to decide matters of local concern, leaving matters of national import to be decided by the nation as a whole. The purpose of that system was distinctly *not* to saddle the citizen with multiple governments exerting power over exactly the same range of activities; aside from the taxing power, the federal and state governments were meant to inhabit distinct spheres of authority. With that boundary further eroded, regulation-heavy states have a new way to eliminate the competitive advantage of regulation-light states, if they can form a congressional majority to subject the latter to new federal controls under the head of the taxing power. The effect, as with *Wickard*, will be to eliminate the discipline that accountability and regulatory competition impose on multiple governments in a federal structure when each is confined to its distinct sphere of authority.

The Court's ruling on Obamacare's Medicaid expansion is of a piece with the rest of its handiwork. Obamacare requires that states expand their Medicaid programs from arrangements to help specific categories of poor people (pregnant women, the disabled, needy families, children) into a vast wealth-redistribution scheme for the bottom fifth of income earners. It threatens states with the loss of *all* federal Medicaid funds if they don't comply with the new mandates. That draconian penalty was too much for the Roberts Court: It ruled that the federal government could refuse the subsidies that Obamacare provides for the expansion itself, but could not cut off all Medicaid funds to states that refused to comply.

The Court affirmed that Congress may attach appropriate conditions to the receipt of federal funds by the states. But, it said, the conditions imposed in this case "cannot be justified on that basis. When . . . such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the

States to accept policy changes." The ruling imposes a critical new limitation—a categorical limitation—on the federal power to coerce states through its spending programs. It could affect the constitutionality of a wide range of federal programs and constitutes a significant limitation on the once-controlling precedent, *South Dakota v. Dole* (1987).

In *Dole*, the Court ruled that Congress could penalize states that refused to raise their drinking age to 21 by taking away up to 5 percent of federal highway funds. Congress could not impose that restriction directly, because the 21st Amendment explicitly denied it the power to regulate intoxicating spirits within the several states, but the Court circumvented that limitation by allowing Congress to "encourage" states to adopt the federal drinking-age preference by imposing conditions on the receipt of federal highway funds. The Court cautioned that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion," without so much as hinting where that line should be drawn.

The distinction between "encouragement" and "compulsion" that is at the heart of *Dole*'s coercion doctrine is spurious. A coerced party always has a choice either to submit or to refuse, no matter how great the penalty; but whether the penalty is great or small, it constitutes coercion. Predictably, the practical result of the Court's vague sliding-scale rule has been to eliminate constraints on the expansion of federal power. It is no surprise that, before the Medicaid expansion was struck down last month, every federal court that applied the "rule" of *Dole* found mere "encouragement," no matter how severe or onerous the penalty.

The Obamacare ruling reversed course. Compared with the modest penalty in *Dole*, the threat of losing all federal Medicaid funding (more than 20 percent of the typical state's budget) was "much more than relatively mild encouragement," wrote Roberts: "It is a gun to the head." Wherever the point is between encouragement and compulsion, the penalty for not complying with the Medicaid expansion was well beyond it. But we are still left to wonder: Where is that all-important point? The answer is: Nowhere. The point doesn't exist, or rather, it exists wherever the Court may like to place it. Once again, even this happy aspect of the Court's opinion is cold comfort: Its arbitrary application of an indeterminate standard happened to go against the federal government this time, but it is not likely to do so in the future. The Court still has not recognized that conditional federal grants are coercive not by degrees but categorically. In all such cases, the federal government taxes money away from the residents of a state and offers to give it back only on condition that the state comply with federal preferences. Even under the Court's ruling, states that refuse to expand their Medicaid programs will be massively subsidizing the Medicaid expansion of the other states. That is coercion, pure and simple.

For the Constitution's structural framework of dual sovereignty, the continuing vitality of *Dole*'s imaginary sliding scale to distinguish between encouragement and coercion will continue to have serious consequences. No matter how many times the Court calls a spade "encouragement," it is still a spade that can be used to coerce state governments into complying with the federal will. And the "federal will" is merely the will of a group of states that have banded together in a congressional cartel to force their internal policy choices on other states, in order to eliminate any competitive advantage the latter may gain from keeping their social programs lean. State regulatory competition—the whole point of the Constitution's federal structure—is replaced by anti-competitive cartels that diminish self-government while increasing the pervasiveness of government itself.

Stability and consistency in precedent are the lodestones of the common law. But flawed constitutional decisions create cracks in our constitutional order, and when the Court hews to those precedents, the cracks become dangerous fissures.

Longstanding precedents don't usually change on a dime. Important shifts in the Court's doctrines are often glacial. From that standpoint, there is much in this opinion that a future Court could use to revise and eventually reverse the flawed precedents that weighed down the justices in the Obamacare case. Let's hope it does so, for every year that goes by without any correction to those precedents erodes further still the Constitution's guarantees against unlimited government power. **NR**

How Obamacare Harms The Poor

Where to begin?

BY AVIK ROY

THE story of Deamonte Driver illustrates how our health-care system leaves millions of Americans behind. Deamonte lived on the wrong side of the tracks, in Prince George's County, Md. He was raised by a single mother. He spent his childhood in and out of homeless shelters. He was an African-American kid on welfare. Deamonte died at age twelve—not, however, in a drive-by shooting, or in a drug deal gone bad. He died of a toothache.

In January 2007, Deamonte told his mother, Alyce, that he had a headache. She took him to the hospital, where he was diagnosed with a severe dental abscess and given some medication. But the next day, his condition worsened. It turned out that the infection from his tooth had spread to his brain. He was taken to the hospital again and underwent emergency surgery. After a second surgery, he got better for a while, but then began to have seizures. Several weeks later, Deamonte was dead.

According to Ezra Klein, Deamonte Driver's story shows us why it would be immoral to repeal Obamacare. "To repeal the bill without another solution for the Deamonte Drivers of the world? And to do it while barely mentioning them? We're a better country than that. Or so I like to think."

But Deamonte Driver died not because he was uninsured. Indeed, Deamonte Driver died because he *was* insured—by the government. Deamonte, it turns out, was on Medicaid.

Although Deamonte was insured, he never received routine dental care. It turns out that only 16 percent of Maryland dentists accept Medicaid patients. Fewer than one-sixth of Maryland kids on Medicaid

Mr. Roy is a senior fellow at the Manhattan Institute and a health-care adviser to Mitt Romney.