

Sec. 8—Powers of Congress

Cl. 3—Power to Regulate Commerce

shifting by those who would otherwise go without it. In addition, the mandate forces healthy individuals into the insurance risk pool, thus allowing insurers to subsidize the costs of covering the unhealthy individuals they are now required to accept.

Chief Justice Roberts, in a controlling opinion,⁸⁰⁵ suggested that Congress' authority to regulate interstate commerce presupposes the existence of a commercial activity to regulate. Further, his opinion noted that the commerce power had been uniformly described in previous cases as involving the regulation of an "activity."⁸⁰⁶ The individual mandate, on the other hand, compels an individual to become active in commerce on the theory that the individual's inactivity affects interstate commerce. Justice Roberts suggested that regulation of individuals because they are doing nothing would result in an unprecedented expansion of congressional authority with few discernable limitations. While recognizing that most people are likely to seek health care at some point in their lives, Justice Roberts noted that there was no precedent for the argument that individuals who might engage in a commercial activity in the future could, on that basis, be regulated today.⁸⁰⁷ The Chief Justice similarly rejected the argument that the Necessary and Proper Clause could provide this additional authority. Rather than serving as an "incidental" adjunct to the Commerce Clause, reliance on the Necessary and Proper Clause in this instance would, according to the Chief Justice, create a substantial expansion of federal authority to regulate persons not otherwise subject to such regulation.⁸⁰⁸

SPECIFIC APPLICATIONS

Historical Background

As note previously, toward the end of the 19th century through the New Deal, the Court in effect followed a doctrine of "dual federalism," finding that the Tenth Amendment limited the authority of the Congress to regulate the internal activities of a state. Under this doctrine, Congress' power to regulate was limited to where it had a "direct" rather than an "indirect" effect on interstate com-

⁸⁰⁵ Although no other Justice joined Chief Justice Roberts' opinion, four dissenting Justices reached similar conclusions regarding the Commerce Clause and the Necessary and Proper Clause. *NFIB*, 567 U.S. ___, No. 11–393, slip op. at 4–16 (joint opinion of Scalia, Kennedy, Thomas and Alito, dissenting).

⁸⁰⁶ See, e.g., *Lopez*, 514 U.S. at 573 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained").

⁸⁰⁷ 567 U.S. ___, No. 11–393, slip op. at 20, 26.

⁸⁰⁸ 567 U.S. ___, No. 11–393, slip op. at 30.