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Federalism, Liberty, and Risk in *NFIB v. Sebelius*

Aziz Z. Huq*

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Abstract

This book chapter analyzes the Supreme Court's decision in *National Federation of Independent Business (NFIB) v. Sebelius*. Contra conventional wisdom, it argues that the pivotal opinion of Chief Justice Roberts is not well explained in federalism terms. Rather, the decision is best understood in light of entrenched historical understandings of the federal government's appropriate role in managing diverse species of risk.

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1. Introduction

In the end, the market had it wrong. On June 28, 2012, Intrade estimated a seventy-percent-plus probability that the individual mandate component of the Patient Protection and Affordable Care Act (PPACA)[1] would be invalidated. Reporting the decision's hand-down, CNN ran a banner proclaiming invalidation for several minutes before switching content. But if the decision in *National Federation of Independent Business (NFIB) v. Sebelius*[2] was a shock to mainstream media, it was no less surprising to constitutional scholars. Once its fragmented opinions had been assembled, the decision turned out not to flow simply from earlier precedent. To the contrary, the decision overruled no Supreme Court precedent and has ambiguous downstream consequences for legal doctrine. Its place in constitutional history is accordingly a puzzle.

This essay offers an account of how *NFIB v. Sebelius* fits into that constitutional tradition. Rather than arising from the lawyerly paraphernalia of precedent, rules, and syllogistic reasoning, I argue that the *NFIB* Court's reasoning takes root in profound (if poorly specified) first-order normative principles about the appropriate role of the federal government. To this end, I make two claims—one negative, the other positive. The first concerns federalism. The *NFIB* decision superficially turns on the relationship of the federal government to the states, and so reflects judicial calibration of an appropriate "federal balance."[3] Federalism, of course, has been a central term of American political contention.[4] By the late twentieth century, 'federalism' was invoked most often against federal regulation to favor state autonomy.[5] On superficial reading, *NFIB v. Sebelius* seems to advance that decentralizing vision of federalism. But, I argue, federalism explains very little of its outcome. Examination of its central holdings suggests that the Court left the federal balance largely untouched.

Second, in lieu of federalism, I suggest that a dyad of opposing values—liberty and risk—animate the Court's ruling. The first half of this

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[1] Pub. L. No. 111-148, 124 Stat. 119 (2010). The PPACA was enacted alongside the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 123 Stat. 1029. References to the PPACA or "Act" encompass both.
[2] 132 S. Ct. 2566 (2012).
[3] United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).
[4] Alison L. LaCroix, The Ideological Origins of American Federalism (2010).
[5] It is hard to generalize here. Some Justices who have fervently pressed federalism values, understood as states' rights, in respect to state sovereign immunity and congressional power also are exceedingly willing to find federal law preempts state regulation.

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pair is familiar: claims about liberty figured large in debates about the PPACA.[6] It was less frequently observed in those debates that many species of risk management by the state limit some sort of 'liberty' as a cost of spreading or mitigating risk. The ensuing trade-offs implicate questions about when individuals should bear the costs of diffusing shared risks. While framed as a case about constitutional law, the *NFIB* opinion is, in my view, better glossed as a function of the Justices' normative judgments about the permissible domain of risk-liberty equilibria the federal government can strike.

2. The PPACA

In an obvious sense, the PPACA concerns risk and how we manage it. Unique among wealthy democracies, the pre-PPACA United States possessed no "guaranteed health coverage for all (or virtually all) citizens or measures to contain costs at a high level of aggregation."[7] Consequently, nearly 87 million people were without insurance at some point between 2007 and 2009, and 45,000 working-age Americas dying annually due to underinsurance.[8] This is hardly a surprise. In a market-dominated system, competition predictably drives insurers toward actuarially fair pricing by which individuals must pay in line with the risks they represent regardless of ability to do so.[9] Growing economic inequality since the 1970s has inevitably cashed out as more uneven distributions of healthcare coverage.[10]

Despite these high social-welfare costs, serial attempts at healthcare reform since the Truman presidency have foundered in a "policy trap": "[A]n increasingly costly and complicated system … satisfied enough of the public and so enriche[d] the health care industry as to make change extraordinarily difficult."[11] A combination of tax subsidies for employer-provided insurance, 'universal' benefits such as Medicare, and some

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[6] See Christopher Schmidt, The Tea Party and the Constitution, 39 Hastings Const. L. Q.193, 237 (2011).
[7] Jacob Hacker, Health Care Reform 2.0: Fulfilling the Promise of the Affordable Care Act, in Shared Responsibility, Shared Risk: Government, Markets and Social Policy in the Twenty-First Century, 185, 186–87 (Jacob Hacker & Ann O'Leary eds., 2012).
[8] Id. at 189-90.
[9] See generally Jacob S. Hacker, The Great Risk Shift 140-43 (2006) [hereinafter Hacker, Great Risk Shift] (arguing that adverse selection leads to pervasive health care market failure in the United States).
[10] Paul Starr, Remedy and Reaction: The Peculiar American Struggle Over Health Care Reform 5 (2011).
[11] Id. at 2.

measure of 'welfare' measures such as Medicaid left uninsured "a mostly low-income population with no coherence, organization, or political power."[12] Given this, it was somewhat remarkable reform occurred at all.

Even if political constraints did not foreclose reform, they nonetheless shaped it. The PPACA is thus modest along two salient dimensions. First, the Act focused on underinsurance, not cost-containment. Second, it made no attempt to recast the existing patchwork of private and public healthcare coverage. It instead accepted and broadened existing fonts of coverage. As a result, many dysfunctional elements remain, such as the regressive tax expenditures on employer contributions for medical insurance that cost the federal government about $177 billion in 2011.[13]

At its core, the PPACA expands three longstanding elements of American healthcare provision.[14] First, roughly sixty percent of working-age Americans are now covered by employer-sponsored health insurance.[15] The Act largely exempts this large-group market from new regulations. It does require employers with more than 100 personnel to provide "minimum essential coverage" by 2014.[16] The large-group market, though, is already regulated to redistribute risk. The Health Insurance Portability and Accountability Act prohibits group health plans from discriminating on the basis of health factors respecting eligibility, benefits, or premiums.[17] Interestingly, this nondiscrimination rule injects risk spreading into market provision of health insurance, but is not (to date) politically controversial.

Second, approximately a fifth of the public are covered by federal statutory programs such as Medicare or Medicaid.[18] The 2010 Act "made

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[12] Id. at 7.
[13] Suzanne Mettler, Reconstituting the Submerged State: The Challenges of Social Policy Reform in the Obama Era, 8 Persp. Pol. 803, 806 (2010).
[14] The following relies on Tom Baker, Health Insurance, Risk, and Responsibility after the Patient Protection and Affordable Care Act, 159 U. Pa. L. Rev. 1577, 1580-1607 (2012).
[15] Elise Gould, The Erosion of Employer-Sponsored Health Insurance: Declines Continue for the Seventh Year Running, 39 Int'l J. Health Servs. 669, 669 (2009) ("Employer-sponsored health insurance (ESI) remains the most prominent form of health coverage in the United States, at 62.9 percent of the under-65 population; however, the rate of this coverage has fallen every year since 2000, when 68.3 percent had ESI.").
[16] See Baker, supra note 14, at 1592–93 (summarizing PPACA regulation of the large-group market).
[17] 29 U.S.C. §1182 (2006). Health care plans are also covered by the Employee Retirement Income Security Act of 1974
[18] Kaiser Family Foundation, Fast facts, Health Insurance Coverage in the U.S., 2011, available at http://facts.kff.org/chart.aspx?ch=2874

no fundamental changes to Medicare,"[19] but its changes to Medicaid catalyzed public and judicial attention. Medicaid is a cooperative federalism program. It is jointly funded by the states and the federal government, although precise coverage definitions vary by state.[20] States submit a "State Plan" to the Secretary of Health and Human Services for authorization.[21] Until the PPACA, the plan had to cover a series of defined groups, including the elderly, disabled, blind, pregnant, and children.[22] The PPACA is the fifth statutory expansion of Medicaid,[23] and adds a new mandatory category to state plans as of 2014. This new category comprises all citizens and legal residents with incomes up to 133 percent of the federal poverty line.[24] It will add to Medicaid largely "non-elderly, non-disabled, low-income single adults or couples without children."[25] The federal government provides full funding for the first three years of this expansion, gradually reducing its contribution to a floor of 90 percent in 2020.[26] Under longstanding language in Medicaid's organic statute, the Secretary of Health and Human Services may cut some or all of a state's Medicaid funding if it fails to comply with certain obligations.[27]

The final, and least functional, element of the healthcare landscape is the small-group and individual market. It is here that the PPACA does most of its work. As many readers will know, it introduces a suite of measures designed to expand and render accessible the private market for healthcare insurance. To this end, it imposes *inter alia* minimum essential coverage and community-rating rules on insurers; a mandate on states to create insurance exchanges to facilitate consumers' purchases; and an "individual mandate" on lawful U.S. residents and citizens. With exceptions, the individual mandate provision requires any lawfully present person who lacks a defined quantum of minimum coverage as of 2014 to pay an escalating series of "penalt[ies]" (or "shared responsibility

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[19] Baker, supra note 14, at 1581-83 (noting slightly increased progressivity of Medicare financing under PPACA).
[20] See Schweiker v. Gray Panthers, 453 U.S. 34, 37 (1981) (discussing scope of state discretion).
[21] 42 U.S.C. § 1396.
[22] 42 U.S.C. §1396a(a)(10)(A)(I)-(VII).
[23] Nicole Huberfield, Elizabeth Weeks Leonard & Kevin Outterson, Plunging into Endless Difficulties: Medicaid and Coercion in the Healthcare Cases 15 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128760
[24] 42 U.S.C. §1396a(a)(10)(A)(VIII).
[25] Huberfield et al. supra note 23, at 18.
[26] 42 U.S.C. §1397d(y)(1).
[27] 42 U.S.C. §1396c.

payments.”)[28] Through these measures, the PPACA aims to nudge insurers to expand some coverage to the most needy, while preventing healthy individuals from exiting the insurance pool. The net intended result is a broad, diverse, and actuarially secure risk-pool.

3. The Legal Challenges

Within minutes of the PPACA’s enactment, states, individuals, and employers filed suit challenging the Act.[29] The challenges, their counsel, and supporters drew from President Obama’s Republican and Tea Party opposition.[30] But the litigation marked a startling public volte face for a Republican Party that in 2008 proclaimed (in a party platform no less) that “[j]udicial activism is a grave threat to the rule of law because unaccountable federal judges are usurping democracy.”[31] In effect, elements of the Republican Party treated the federal courts as another stage in the federal legislative process on healthcare reform—one step beyond bicameralism and presentment. Whatever other long-term effects the case has, its first consequence was thus bipartisan ratification of the federal bench as the Toquevillian cockpit for resolution of divisive national policy questions.[32]

The federal courts, however, are not mere extensions of Congress. Interest groups well-positioned to influence elected officials are not necessarily capable of persuading judges. Law and politics are distinct mechanisms for the exercise of power in the United States. Different resources—fiscal and ideological—matter. In Congress, so-called big business, as represented by, say, the Chamber of Commerce, often prevails. In the courts, employers did not fare so well—their challenge to the PPACA’s employer mandate fizzled.[33] After divergent results in various

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[28] 26 U.S.C. §5000A(b).

[29] Complaint, Florida v. U.S. Dep't. of Health & Human Servs., No. 3:10-cv-91-RV-EMT (N.D. Fla. Mar. 23, 2010).

[30] For enumeration of plaintiffs and counsel, see Ilya Shapiro, A Long Strange Trip: My First Year Challenging the Constitutionality of Obamacare, 6 FIU L. Rev. 29, 33–34 (2010).

[31] Republican National Committee, 2008 Republican Platform, Government Reform, http://www.gop.com/2008Platform/GovernmentReform.htm

[32] Chief Justice Roberts’s averment of “respect for Congress’s policy judgments” at the opening of his opinion, 132 S. Ct. 2566, 25790–80 (2012), assumes a different cast in this light.

[33] See, e.g., Florida ex rel. McCollum v. U.S. Dept. of Health and Human Services 716 F.Supp.2d 1120 (N.D. Fla. 2010) (dismissing challenges to employer mandate).

federal courts of appeals,[34] it was the challenges to the individual mandate and the Medicaid expansion that made it to the Supreme Court.[35] It was states and self-declared mavens of liberty who seemed to have caught the Court's ear.

The bottom line of the ensuing decision is this: The Court upheld both the individual mandate and the Medicaid expansion but invalidated the federal government's power to punish states' failure to expand Medicaid by withholding all Medicaid funds.[36] All parts of PPACA went into effect, but the federal government lost a stick to punish recalcitrant states. That simple result, however, obscures complex details. Across 193 pages of the U.S. Reports, nine Justices filed four interlocking, overlapping, and antinomial opinions—an opinion "for the Court" by Chief Justice Roberts (joined in places by Justices Breyer and Kagan); a partial concurrence by Justices Ginsburg and Sotomayor (also joined in places by Breyer and Kagan); a joint dissent from Justices Scalia, Kennedy, Thomas, and Alito; and a short solo dissent from Justice Thomas. Discerning the legally binding 'holding' of the case requires some parsing to discern the narrowest ground of decision to which a majority of Justices ascribed.[37] But ignoring some important technicalities, it can plausibly be said that the opinion rests on three central questions: (1) Is imposition of the individual mandate within Congress's Article I power to regulate commerce, or, (2) alternatively within its power to tax for the General Welfare? And (3) does the Medicaid expansion violate the constitutional principle of federalism enshrined in the Tenth Amendment to the Constitution? Briefly, the answers are probably not, certainly yes, and somewhat.

To begin with, the Chief Justice and the joint dissent reasoned that the Commerce Clause—long the most important repository of federal regulatory authority—could not underwrite the individual mandate.[38] According to the Chief Justice, the federal government has no Commerce Clause power to mandate insurance purchases by otherwise healthy individuals, even if they are likely later to need coverage. Previous cases, however, had permitted regulatory extrusions beyond the Commerce

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[34] NFIB, 132 S. Ct. at 2580–81 (describing outcomes in D.C. Circuit, Fourth, Sixth, and Eleventh Circuit courts of appeals).
[35] 132 S. Ct. 603 (2011).
[36] NFIB, 132 S. Ct. at 2608.
[37] See Marks v. United States, 430 U.S. 188, 193 (1977).
[38] NFIB, 132 S. Ct. at 2585-93 (Roberts, C.J.); id. at 2644-55. For a discussion of the Commerce Clause, see Aziz Z. Huq, Tiers of Scrutiny in Enumerated Powers Jurisprudence, 79 U. Chi. L. Rev. – (forthcoming 2013).

Clause's scope in light of Congress's supplemental power to enact "Necessary and Proper" additions to comprehensive federal regulatory schemes.[39] The mandate was fairly plainly a necessary element to the general scheme of healthcare regulation. Roberts, however, rejected this possibility by stating that Congress's Necessary and Proper did not encompass "any great substantive and independent power[s]" such as mandating the execution of a contract where none previously existed.[40]

A different coalition of five Justices, again with the Chief Justice penning the crucial opinion, then sustained the individual mandate as a valid exercise of congressional taxing authority.[41] Roberts semaphored that such authority had limits: A tax tipped over into an impermissible "mere penalty" when it eviscerated the individual's "lawful choice to do or not do a certain act."[42] Quite when this happens, Roberts declined to specify.

The final element of the decision concerned the Medicaid expansion. Again, Chief Justice Roberts's opinion is useful taken as the dispositive guide. Until 2012, the Court had placed only modest restraints on the federal government's power to impose conditions on grants to the states.[43] These largely pertained to the clarity of conditions.[44] This rule treated states as capable bargaining partners, but policed federal shading on statutory deals via a clear notice requirement. The notice rule found additional justification as a means of fostering democratic accountability: It lowered the cost to voters of ascertaining when a given rule was mandated by state or federal law. Under these precedents, the Medicaid expansion seemingly presented no constitutional worry. States have been on notice since the program's inception of Congress's unfettered "right to alter, amend, or repeal any provision" of the Medicaid statute.[45] Nor was there much doubt which level of government should be held accountable for "Obamacare."

But Chief Justice Roberts's opinion ignored the notice rule. He first said that the statutory reservation of authority to change Medicaid could not possibly mean what it said. Instead, Roberts asserted, the Medicaid

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[39] The leading case is Gonzales v. Raich, 545 U.S. 1 (2005).
[40] NFIB, 132 S. Ct. at 2591-92.
[41] Id. at 2593-2601.
[42] Id. at 2599-2600.
[43] South Dakota v. Dole, 483 U.S. 203 (1987).
[44] Sossamon v. Texas, 131 S. Ct. 1651, 1658 (2011).
[45] 42 U.S.C. §1304.

expansion was "a shift in kind, not merely degree," between "old" Medicaid and "new Medicaid."[46] The new program, he explained, "is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage."[47] Citing the magnitude of Medicaid spending as a proportion of state's budgets (about a fifth), Roberts proclaimed that the power to withdraw all Medicaid funding for failure to participate in the 2011 expansion was a "gun to the head" and "economic dragooning that leaves the States with no real option but to acquiesce."[48] Again without specifying any analytically crisp rule, he held that the power to withdraw all Medicaid funding was unconstitutionally coercive and therefore could not be exercised.[49]

4. Estimating the Footprint of *NFIB v. Sebelius*

Not since the New Deal has the Court seriously grappled with the constitutionality of a major federal social program.[50] So anticipation of the decision ran high. But the decision's immediate footprint, measured as a matter of constitutional doctrine or public policy, was faint. The Court overruled no earlier precedent, even though it had previously issued rulings upholding sweeping New Deal and post-New Deal regulatory programs. To the chagrin of commentators who hoped the Court would retrench federal power back to pre-New Deal contours, only Justice Thomas even hinted at a desire to go that far, and then in a conspicuously lonesome dissent.[51]

As to the cash value of *NFIB*'s new rules, the decision casts no existing federal program into constitutional peril. The leading legislative proposal that would face potential constitutional objections under the decision is the proposal to substitute social security with mandatory individualized retirement accounts—ironically, an idea typically offered by right-of-center politicians and think-tanks.[52] Even with social-security privatization, it is not hard to imagine that any now-unconstitutional mechanism could be replicated with well-designed tax incentives.

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[46] NFIB, 132 S. Ct. at 2605-06.
[47] Id.
[48] Id. at 2604-05.
[49] Id. at 2641-42.
[50] The Court, however, on several occasions grappled with the constitutionality of major civil rights laws. See, e.g. Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).
[51] NFIB, 132 S. Ct. at 2677 (Thomas, J., dissenting).
[52] Hacker, The Great Risk Shift, supra note 9, at 37.

Perhaps more consequential is the absence of any litmus test for ascertaining what constitutes an impermissibly coercive exercise of federal spending. This means there is no way to predict when any change to conditional spending efforts, including other elements of the PPACA's amendments to the Medicaid statute, may risk invalidation. Judicial refusal to elaborate a clear rule leaves legislative drafters at sea. Because legislators must labor under the burden of large ambiguity as to whether their compromises will hold, some otherwise-viable deals will not be made. Some states will not benefit from sought-for federal spending because they fear a 'heckler's veto' by other litigious states. When legislation does emerge, it is likely be delayed and impeded by judicial challenges, frittering away federal dollars on lawyering in lieu of social goods. Ironically, the Chief Justice has elsewhere railed against rules that create open-ended uncertainty.[53]

In sum, the *NFIB* presents something of a mystery. It does not break from, or even really extend, past precedent. It impacts immediately no federal program other than the PPACA—and then only at the margin. At best, its most immediate consequences flow from the absence of decision, not the content of its announced rules. How can we account for such an opinion? In what follows, I offer an account of its immanent logic, i.e., the first-order normative principles that best fit the Court's judgment. To begin with, though, we must examine and eliminate the most obvious explanation for the decision—federalism.

5. Federalism as *Faux Ami*

The Court typically frames questions about the scope of federal power as a matter of federalism—i.e., the balance of authority between the several states and the national government. Vigilant policing of the outer boundaries to Congress's power is underwritten by the Court's perception that wayward federal lawmakers have only fragile incentives to honor *states'* interests on Capitol Hill.[54] At first blush, the Medicaid holding—framed initially by litigators in terms of states' rights and the Tenth Amendment—seems squarely a function of judicial recalibration of the federal-state balance.

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[53] Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 893–99 (2009) (Roberts, J., dissenting),

[54] Id. at 578 (Kennedy, J., concurring).

Yet this moves too quickly. In my view, none of the main elements of *NFIB v. Sebelius* are well-explained by federalism concerns. To see this, we need to take each holding in sequence. As a threshold matter, neither the Commerce Clause nor the Taxing Power rulings have any clear effect on the scope of state regulatory authority. At best, the Court preserved a domain of state authority over mandatory purchases and capped one species of taxation. It is hard to see much practical significance in either holding. On the one hand, it is difficult to conjure up state mandatory-purpose laws that have free reign now given the Commerce Clause holding. But what good is fencing off a domain of independent state authority if it scarcely sees usage? In any case, it will often be feasible to reframe impermissible federal interference with inactivity as valid regulation of an activity. Consider, for example, the PPACA individual mandate. Had it been invalidated, Congress could—politics permitting—have rewritten the law to mandate receipt of healthcare on the possession of continuing adequate insurance coverage. Close, if not perfect, substitutes are thus often available when the constitutional bar on federally mandated purchases kicks in. On the other hand, the Court's constraint on the Taxing Power matters only so far as it protects states' purses by reducing the 'crowding out' effect of federal taxes.[55] But even if the Court limited federal taxes on activities, it did not address income or capital taxes. Any effect on federal crowd-out of state taxes from *NFIB* will consequently be *de minimus* in character.

Additionally, there is less federalism 'bite' in *NFIB*'s conditional spending holding than first appears. Indeed, the Court's holding may even diminish states' latitude to strike beneficial bargains with the federal government. After *NFIB*, the federal government must be leery of entering into long-term cooperative federalism programs pursuant to which states develop implementation apparatuses. It must rationally anticipate being locked into such relationship on judicially specified terms. At least in some cases, Pareto-optimal deals may not be struck because of this uncertainty. Some states will lose out because beneficial cooperative federal programs will not be created or expanded.

The Court's claim that states were 'coerced' also hides analytic confusion. In other constitutional cases, the Court tends to disparage individual claims of coercion.[56] As a result, it has developed no definition

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[55] See Brian Galle, A Republic of the Mind: Cognitive Biases, Fiscal Federalism, and Section 164 of the Tax Code, 82 Ind. L.J. 673, 702–09 (2007)

[56] See Janice Nadler, No Need to Shout: Bus Sweeps and the Psychology of Coercion, 2002 Sup. Ct. Rev. 153.

of individual coercion. In *NFIB*, this inchoate, haphazard concept of individual coercion is applied to an anthropomorphized, subnational sovereign.[57] The result inevitably has an ad hoc flavor. So although the Court intimated that states' settled expectations had been disrupted,[58] it is unclear why. Unlike individuals, states lack psychological dispositions such as anticipation. They also lack any constitutional entitlement to Medicaid funding. To the contrary, they can plainly operate without such federal subvention. As recently as 1982, Arizona opted wholly out of Medicaid.[59] A funding cutoff now would leave a state with two options: raise taxes or allow the poor to go without healthcare. Why should states be spared this fundamental public choice? Why in particular should deregulation-minded Republican governors who resisted the PPACA benefit from an entitlement to federal subsidies for welfare programs? Isn't this to allow them to have their deregulatory cake while also 'consuming' federally funding for regulation?

Even if states could be coerced, another problem comes into view. Judicial protection of states against coercion rests on the assumption that states are not full sovereign entities capable of contracting freely with the federal government. Superseding a notice regime with a coercion regime, the Court treated states as callow naïfs unable to navigate the political world. Rather than treating them with "dignity,"[60] the *NFIB* Court took states as wards. In expressive and substantive terms, then, the conditional-spending holding in *NFIB v. Sebelius* cannot be glossed in terms of federalism terms any more than the Commerce Clause and Taxing Power holdings can. Another analytic frame is needed to explain the decision.

6. The Liberty-Risk Dyad

A central role of government is managing risk through prevention, risk-shifting, and -spreading.[61] Since the Founding, governments in the United States have installed risk management policies, from limited liability, early banking regulation, and bankruptcy laws, to intellectual and

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[57] For a review of debates on coercion, see Aziz Z. Huq, Peonage and Contractual Liberty, 101 Colum. L. Rev. 351, 367-70 (2001).
[58] NFIB, 132 S. Ct. at 2604-05.
[59] Huberfield et al., supra note 23, at 11, n.71.
[60] Judith Resnik & Julie Chi-hye Suk, Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty, 55 Stan. L. Rev. 1921 (2003).
[61] Tom Baker & David Moss, Government as Risk Manager, in New Perspectives on Regulation 87 (David Moss & John Cisternino eds., 2009).

real property rights.[62] In recent decades, the federal government has experimented with new institutional forms to produce security against pandemic illnesses, terrorist attack, natural catastrophes, and economic shocks.[63]

Yet risk regulation has always been controversial.[64] It often entails taxes, liabilities, or penalties on others better able to mitigate or absorb risk. The marginal social welfare cost of suffering different risks varies immensely by wealth and social circumstances. As a result of these dynamics, the choice of which risk to address (and how to do so) necessarily has redistributive consequences. Concomitantly, risk regulation is a focal point for interest-group activity and intensive ideological investments aimed at either legitimating or discrediting the federal regulatory state. Anti-statist, laissez-faire intuitions, coupled to nostalgic invocation of a prelapsarian smaller state, persist in American political culture.

NFIB is profitably understood as an attempt to constitutionalism the fraught question of how to calibrate the federal role in managing risk in relation to lost liberties. Although the Constitution contains no express theory of risk regulation, each of the three elements of the *NFIB* decision can be interpreted as an attempt to place boundaries around the state's operation as risk manager—to calibrate, that is, the permissible range of equilibria between social risk and individual liberty. Rather than grounding this analysis in a simple or familiar social welfare function, however, the Court's analysis employs categories drawn from American history to articulate a normative vision of what the federal government can and cannot do.

Consider first *NFIB*'s Commerce Clause and the Taxing Power holdings. Both turn on a judgment about the appropriate quantum of social risk that can be assigned to an individual. The axial moment in Roberts's Commerce Clause reasoning holding is his assertion that a federal power to mandate purchases falls outside both the Commerce Clause and the Necessary and Proper powers because it is a "great substantive and independent power." Set aside for a moment the peculiar genealogy of that

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[62] David A. Moss, When All Else Fails: Government as the Ultimate Risk Manager 2-9, 295-325 (2002).
[63] See Mariano-Florentino Cuéllar, Governing Security: The Hidden Origins of American Security Agencies (2012).
[64] Moss, supra note 62, at 296-302.

last phrase, which has not figured in the U.S. reports for almost 200 years.[65] Focus rather on the question why *a power to mandate purchases* should fall into the category. Only two years before *NFIB*, the Court had read the Necessary and Proper Clause to extend other enumerated powers to reach a confinement power even in the absence of any criminal conviction.[66] Since this earlier ruling was not overruled, *NFIB*'s conclusion implies that it is "great substantive and independent power" to require a person to enter a contract, but not to lock that same person up without criminal trial. To say the least, the intuition here is not obvious. Nothing in the Constitution's text predicts it. Nor is it obviously justified in welfarist terms.

The basic idea that decisions about private contracting relationships are beyond the reach of the state, however, is not unfamiliar to students of American legal thought. In the postbellum "classical" period of American legal thought, scholars and judges refined a notion of the "liberty of contract." State and federal courts then pressed this into service to resist for Progressive-Era and the New-Deal regulation of a redistributive bent.[67] Under the liberty-of-contract rubric, judges struck down minimum wage and maximum hour laws, labor laws, and union-protective measures. According to one of its theorists, William Graham Sumner, liberty of contract reflected and promoted a "society of free and independent men, who form ties without favor or obligation, and co-operate without cringing or intrigue … [that] gives the utmost room and chance for individual development, and for all the self-reliance and dignity of a free man."[68] That is, it carved out a space of atomized, individual liberty against the emasculating risk-spreading depredations of the state.

The analogy between the *NFIB* opinion and old-style liberty of contract is, to be sure, inexact. The Court in 2012 did not invalidate a legislative *prohibition* on contracting, as in earlier cases. It stuck down a legislative *mandate* to contract. But both liberty *to* contract and liberty *from* contract are plausibly understood as rooted in the same ideal—Sumner's "society of free and independent men." Sumner implicitly contrasted a masculine norm of rugged, autonomous personhood against a vision of government risk-managers as the *fons et origo* of emasculating "ties [of]

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[65] See Andrew Koppelman, 'Necessary,' 'Proper,' and Health Care Reform, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2010192.
[66] United States v. Comstock, 130 S. Ct. 1949 (2010).
[67] See Cass R. Sunstein, Lochner's Legacy, 87 Colum. L. Rev. 873 (1987).
[68] William Graham Sumner, What Social Classes Owe to Each Other 23 (Caxton Printers 1986) (1883).

favor [and] obligation." Although there is little chance that the Court will return soon to a full-blooded embrace of liberty of contract, the *NFIB* decision demonstrates that latter idea may still inform at the margin judicial approaches in cases where government risk-regulation can be framed as constitutionally doubtful.

The Court's Taxing Power logic has a similar cast. The Court does not question the federal government's power to impose taxes, but intimates that it cannot use this power to mandate the internalization of all spillover effects of risky individual behavior.[69] The Court flags an outer boundary at which personal autonomy trumps collective social welfare. Each must then stand or fall on their own. To many, the Court's insistence that the Constitution protects the wealthy and healthy from being required to contribute to mitigating the health perils of indigence will seem ungrounded in constitutional text and morally obtuse. But perhaps that's the point. It is harsh medicine indeed to be "free and independent."

Just like the Commerce Clause and Taxing Power decisions, the Court's treatment of the Medicaid expansion rests on an implicit normative account of constitutionally permission risk-liberty trade-offs. Again, this normative theory is not derived from the Constitution's text. Again, it seems guided by unstated assumptions about the moral desert of different recipients of government largesse. Again, the Court's normative boundaries have a somewhat gendered cast.

There are two risk-related dynamics at work in *NFIB*'s conditional spending holding. First, recall that the *NFIB* Court took states to be incapable of freely contracting with the federal government, instead treating them as quasi-wards of the Court. This holding shelters not only states' purses by allowing them to resist changes to Medicaid while maintaining historical levels of federal support, but also sheltered state politicians, who could avoid potentially hard choices between raising taxes and slashing benefits. In effect, the Court gave states and their elected leaders a species of constitutionally embedded insurance against future federal-policy-change risk: Even if a statute warns plainly warns that a cooperative program may change over time, the Constitution thus requires the lion's share of change-related risk to fall on the federal government, not the states. Like any beneficiary of a compulsory insurance policy, state officials likely will fall

[69] Analogously, the Court has held that the Constitution bars tort judgments that aim to fully deter, and thus fully internalize social costs, in circumstances of imperfect enforcement. See, e.g., Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008).

prey to moral hazard—here, by shading on the new Medicaid program or scanting other federal requirements. This compulsory insurance term thus redistributes risk from state governments to individuals. It exposes the most impoverished and vulnerable slices of the population to greater expected health risk, while amplifying the political and fiscal capital of state elites.

The conditional spending holding implies a second normative judgment about when and how government can legitimately step in as risk manager. A central move in Roberts's analysis is the assertion that the PPACA effectuated "a shift in kind, not merely degree," between "old" Medicaid and "new Medicaid."[70] The Chief Justice glossed this assertion by noting that Medicaid, as expanded, was "no longer a program to care for the neediest among us."[71] Of course, given the relatively low floor on eligibility, it is not obvious this is literally true. Further, federal law already mandated coverage up to 133 percent of the poverty line for some groups. Why then was extending this higher cut-off to other groups the crossing of a constitutional Rubicon?[72] The reasons given in the opinion are unpersuasive. Roberts glossed his 'different of kind, not quantity' argument by pointing out that the Medicaid expansion had been enacted as part of comprehensive healthcare reform. But this is a non-sequitor. There is no reason to conclude that enactment context radically changed the effects of Medicaid reform. Moreover, it is not at all clear how the 2012 change is qualitatively distinct from five earlier changes beginning in 1967, which have included coverage expansions to reach young adults; redefinitions of mandatory benefit packages; and (most recently) major changes to the scope of prescription drug coverage.[73] All these had significant fiscal and health consequences. Why then was the 2010 amendment distinct?

To understand the Court's reasoning, we can instead focus on Chief Justice Roberts's italicized observation that the PPACA required states "to cover *all* individuals under the age of 65 with incomes below 133 percent of the federal poverty line."[74] The key word is the one that Roberts italicized: "all." The objection here is not that those at 133 percent of the poverty line are not in desperate straits –although that would be a controversial and

[70] NFIB, 132 S. Ct. at 2605-06.
[71] Id.
[72] Huberfield et al. supra note 23, at 14. The federal poverty is not an objective measure of need. Diana Karter Appelbaum. The Level of the Poverty Line: A Historical Survey, 51 Soc. Sci. Rev. 514 (1977).
[73] Huberfield et al. supra note 23, at 15–16.
[74] NFIB, 132 S. Ct. at 2601 (emphasis in original).

hardly self-evident claim. Rather, Roberts' point is that Medicaid had gone from covering *largely women and children* to one that covered *the poor generally*. That is, it was only when Medicaid ceased to concern women and children only—and when it extended to poor *men* too that the program changed in "kind, not merely degree." The expected gender identity of Medicaid recipients hence seems at work in the Court's analysis.

We might gloss this line of argument as follows. States, the Court reasons, have a constitutionally protected expectation of what Medicaid covers. This expectation rests upon a "recognizably gendered vie[w] of what a welfare state should offer"—one that has been extensively analyzed by social historians.[75] As summarized recently by one historian, the United States developed in the twentieth-century a "discriminatory 'two-track' welfare state" that endows "white, male industrial workers and their dependents" with stable *entitlement* programs, while women and minorities are streamed into fiscally fragile and socially stigmatizing *welfare* programs."[76] Notwithstanding the recent vintage of this model, the *NFIB* Court treated this dichotomized model of welfare as *constitutionally* protected. It assumed, in other words, that states were entitled by the Constitution to rely on the existence of cooperative welfare programs that encompassed only those traditionally treated as deserving within the moralized, stereotyping lineaments of a gendered welfare state. It is worth noting that different coalitions of the Court have elsewhere warned that rules resting on the "social and economic inferiority of women" receive heightened equal protection scrutiny.[77]

The Court's reasoning, in short, not only allocates risk between states and the federal government, but also entrenches hierarchical and subordinating modalities of managing social risk first developed in the early twentieth century. In this fashion, the decision can be understood as enforcing plural normative limits on the federal government's role as risk manager beyond the liberty of contract.

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[75] Linda Gordon, Social Insurance and Public Assistance: The Influence of Gender in Welfare Thought in the United States, 1879-1935, 97 Am. Hist. Rev. 19, 19 (1992)
[76] Karen Tani, Welfare and Rights Before the Movement: Rights as a Language of the State, 122 Yale L.J. 314, 323 (2012); Linda Gordon, Pitied but Not Entitled: Single Mothers and the History of Welfare, 1890-1935 (1994).
[77] United States v. Virginia, 518 U.S. 515, 538 (1996).

7. Conclusion

Not federalism, but a constitutionalized view of normatively permissible risk-liberty trade-off best explains *NFIB*. That normative vision is not grounded in constitutional text or tradition. It instead reflects laissez-faire instincts and gendered understandings of welfare familiar from the early twentieth-century. Designers of future social insurance programs would do well to bear in mind this lingering historical hangover in the federal bench. Others may well reflect on whether it reflects a desirable approach to managing risk in our diverse, hazard-filled Republic.

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