If we get a vaccine against a national epidemic, could Congress pass a law requiring everyone to get vaccinated? That very question was asked during the Supreme Court argument in the 2012 constitutional challenge to Obamacare's individual mandate. The lawyer challenging Obamacare said "no, Congress couldn't do that."

What's shocking is that this may have been the correct answer. Conservatives on the Supreme Court have curtailed Congress's ability to legislate about anything other than economic transactions. And an epidemic is not an economic transactions.

The 2012 Oral Argument in the Supreme Court.

> JUSTICE BREYER: I'm just picking on something. I'd like to just — if it turned out there was some terrible epidemic sweeping the United States, and we couldn't say that more than 40 or 50 percent . . . — you'd say the Federal Government doesn't have the power to get people inoculated, to require them to be inoculated, because that's just statistical.
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> CARVIN [the lawyer]: Well, in all candor, I think *Morrison* must have decided that issue, right? Because people who commit violence against –
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> JUSTICE BREYER: Is your answer to that yes or no?
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> CARVIN: Oh, I'm sorry; my answer is no, they couldn't do it, because *Morrison* –
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> JUSTICE BREYER: No, they could not do it.
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> CARVIN: Yes.
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> JUSTICE BREYER: They cannot require people even if this disease is sweeping the country to be inoculated. The Federal Government has no power, and if there's — okay, fine. Go ahead.

As we'll see, the lawyer's reliance on the *Morrison* case may not have been misplaced.

Supreme Restrictions on Congressional Power

What was *Morrison*, and why did the lawyer think it was relevant? The commerce clause gives Congress the power to regulate commerce among the states. Congress has used that clause to regulate everything from job discrimination to industry pollution. But starting in the 1990s, the conservative majority on the Supreme Court began imposing new limits on Congress's power. *Morrison* is one of those cases.

The *Morrison* case involved a challenge to the Violence Against Women Act. The Supreme Court held that even if domestic violence had important economic repercussions, Congress, using its broadest power, which is under the commerce clause, could not take steps to address it.

Morrison built on the Court's earlier decision in the *Lopez* case, which struck down the Gun-Free School Zones Act. That law prohibited carrying a gun within a thousand feet of a school. Congress pointed to the impact of gun violence on education and on the economy. In his dissent, Justice Breyer amassed evidence to support Congress's conclusion. The conservative majority on the Supreme Court considered that evidence irrelevant. It announced a general rule that Congress cannot use the commerce clause to regulate noncommercial activities. Getting sick is not a commercial activity.

Think of it this way. *Lopez* says Congress can't ban guns in schools to protect kids. *Morrison* says Congress can't protect women from being killed by their partners. If so, it's hard to see how Congress could make them get vaccinated in order protect them.

Some nuances in Supreme Court doctrine.

If you want to dive a little deeper into this, the Court did recognize three exceptions from this general rule. But none of the exceptions seems to apply here. (Feel free to skip ahead if you don't care for the details.) Here are the three exceptions:

1. Congress can regulate conduct that itself involves interstate commerce. Congress might be able to ban unvaccinated people from traveling on airplanes, but that doesn't mean it can force them to get vaccinated.
2. Congress can protect the "channels of communication." Thus, it can ban

damages to transportation or communication systems, even if the damaging conduct does not itself involve interstate activity. But it would be quite a stretch to say that Congress can make it safer to travel, or improve the health of workers in the travel industry, by regulating the private conduct of everyone else in the country.

3. Congress can regulate noncommercial conduct as part of a larger regulation of related commercial conduct. For example, as part of a program controlling crop prices, Congress can regulate the growing of crops for a farmer's own use as animal feed. It doesn't make much difference to the economy when one farmer does this, but when many farmers do so, they impact market prices. But the vaccine situation doesn't fit this exception. A vaccine mandate isn't part of a broad regulation of similar commercial conduct by individuals.

Of course, people may have to pay for vaccinations. That *would* be a commercial market. And doctors are paid for their work. So when people choose to get vaccinated, Congress could probably regulate who does it and how. But that doesn't imply that Congress can make people get vaccinated when they'd prefer not to.

Can Congress require people to enter the market for vaccination services? Chief Justice Roberts' opinion in the Obamacare case says that the power to regulate interstate commerce does not include the power to force anyone to engage in that commerce in the first place. That's why he held that the individual mandate was beyond Congress's powers under the commerce clause. (He then found a way to uphold it as a tax measure, but that's not a useful dodge here.)

Does all this seem like hairsplitting? The answer is yes, but that's exactly the kind of hairsplitting the Supreme Court's opinions call for.

Would the Court actually apply these rules?

As a matter of common sense, a national vaccination requirement makes perfect sense. Some people can't be vaccinated — maybe they're too young or too old, or maybe they're immune-compromised. The only way to protect them is to ensure that everyone else gets vaccinated. Action by individual states isn't enough; we need to be sure people in every state are vaccinated.

Under the Supreme Court doctrines that I've just discussed, however, it's doubtful that Congress could actually legislate a vaccination mandate. The Court has already said that Congress can't protect someone against being assaulted and

killed by a spouse, or shot in a school. Nor can it require someone to buy health insurance, without which they may later be unable to get lifesaving treatments. Logically, there's no obvious reason why vaccination against a virus would be any different.

Do I actually think that the Supreme Court would follow this logic and strike down a federal law requiring people to get vaccinated for the coronavirus? I certainly hope not.

I'm hopeful that a majority would find some way around those earlier decisions. Hopeful, but far from certain. I'm pretty sure that Justice Thomas at least would vote to strike down a vaccination mandate, quite likely with Justice Gorsuch by his side. It might well be a 5-4 decision either way, depending on how Roberts voted.

What does it say about the law, when a lawyer can make a perfectly good argument that Congress is powerless to protect the nation against a pandemic? In my view, it indicates that something in the Supreme Court's federalism rulings has gone really awry.