

OBAMACARE AS A WINDOW ON JUDICIAL STRATEGY

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This Article provides an in-depth examination of the strategic judicial maneuvering witnessed in the Supreme Court's 2012 healthcare decision. Through that lens, it is possible to gain a detailed understanding of the doctrinal groundwork that Chief Justice Roberts was laying for future conservative revolutions in the Commerce Clause Power, the Necessary and Proper Clause, and the Taxing and Spending Power. Understanding Roberts's actions as sophisticated judicial strategy reveals much about where he plans to take the Court. Although Roberts was clearly pursuing legal policy goals, his willingness to uphold the individual mandate without a clear majority for his conservative jurisprudential innovations suggests that his dominant interest was not doctrinal, but rather institutional. Roberts's driving aims were to protect the institutional legitimacy of the Court from the appearance of partisan decision-making immediately before a presidential election, to guard his own personal reputation from charges of partisan manipulation, and to increase judicial power. Roberts's evident strategic action is an ideal vehicle for understanding this case, his federalist constitutional agenda, judicial strategy more generally, and its relation to doctrinal development.

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INTRODUCTION

The decision in *National Federation of Independent Business v. Sebelius*¹ (*NFIB v. Sebelius*) to uphold the legislative individual mandate to purchase health insurance presents a puzzle: why did Chief Justice Roberts break ranks with the other conservative Justices, giving a political gift to President Obama in the lead-up to the 2012 election? A common assertion in the media was that the choice was strategic. For example, one commentator declared that “[t]he Supreme Court’s decision in the healthcare case is best understood as an attempt to maximize damage to

1. Nat’l Fed’n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566 (2012).

established legal precedent while . . . avoid[ing] getting pilloried as a right-wing extremist who doesn't care whether people get health insurance or not."² These and other like statements make many assumptions about Roberts's preferences—for instance, that Roberts cares about the public's opinion of himself or the Court—but they still leave much unexplained.

How did Roberts weigh these presumed institutional interests against the possibility that his decision would help President Obama win reelection, potentially enabling the President to appoint justices with far different preferences and jurisprudential views to Roberts?³ And why did Roberts's preferences lead him to decide the case differently than the other conservative Justices?⁴ A fuller analysis of Roberts's strategy simultaneously suggests answers to these difficult questions and explains the intricacies of the doctrinal changes that he was carefully developing in the case. Along the way, it also reveals much about the nature of judicial power in our constitutional system.

In deciding the fate of the Affordable Care Act,⁵ the Chief Justice displayed a refined strategic sense, engaging in what political scientists call "sophisticated decision-making"—sacrificing short-term goals in favor of long-range doctrinal manipulation.⁶ In a case that upheld congressional action, Roberts managed to forge an opinion that dramatically read down both of Congress's two main avenues of regulatory power—the Commerce Clause and the Taxing and Spending Powers. First, Roberts held that instituting an individual mandate requiring all citizens to purchase health insurance is beyond Congress's Commerce Clause Power, as Congress may regulate but may not compel entry into a market.⁷ Given that the Court

2. Timothy Noah, *States of Confusion: John Roberts, Unwitting Healthcare Visionary*, NEW REPUBLIC, Aug. 8, 2012, at 2.

3. For an analysis of how judges might alter their votes in anticipation of future nominations, see Alvaro Bustos & Tonja Jacobi, *Strategic Judicial Preference Revelation* 57 J.L. & ECON. (forthcoming 2014), available at <http://ssrn.com/abstract=2027498>.

4. See discussion *infra* Part IV.B.2.

5. Patient Protection and Affordable Care Act, Pub. L. No. 111-48, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 U.S.C.) [hereinafter Affordable Care Act or ACA]. Specifically, 26 U.S.C. § 5000A concerns the individual mandate, which requires most Americans to maintain a "minimum essential" level of insurance coverage, and 42 U.S.C. §§ 1396c and 1396d require states to expand the existing Medicaid program to include adults with incomes up to 133% of the federal poverty level, conditional upon losing funding for Medicaid coverage otherwise. *Id.*

6. Gregory A. Caldeira, John R. Wright & Christopher J. W. Zorn, *Sophisticated Voting and Gatekeeping in the Supreme Court*, 15 J.L. ECON. & ORG., 549, 550 (1999) (defining sophisticated voting as that where judges do not vote for their preferred alternative at one stage in the voting procedure in the hope of bringing about a more favorable outcome at a later stage). This topic is discussed further in Part I, *infra*.

7. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2599–602 (majority opinion and opinion of Roberts, C.J.). This topic is discussed in further detail in Part III.A.3,

nevertheless accepted Congress's power to institute an individual mandate under the Tax Power,⁸ Roberts's detailed new Commerce Clause jurisprudence could be taken as dicta; however, in a unique strategic move, Roberts explicitly made his consent to his own tax analysis contingent on the Court adopting his Commerce Clause analysis.⁹ Second, while upholding the mandate as a tax, Roberts struck down the other central pillar of the healthcare legislation, the spending condition on the Medicaid expansion, as an overly coercive form of congressional spending.¹⁰ This was the first time the Supreme Court had ever found an exercise of Congress's Spending Power unconstitutionally coercive.¹¹ Moreover, Roberts declared the novel proposition that prior grants of funds to the states cannot be withdrawn if the states are not adequately put on notice of specific *type* of change to the federal spending condition that Congress will later enforce.¹²

Roberts was able to craft so much new conservative doctrine not despite the liberal outcome of the case, but because of it. Giving with one hand enabled Roberts to take with the other. Such is the mantra of judicial restraint: "Paradoxical though it may seem, the Supreme Court often gains rather than loses power by adopting a policy of forbearance."¹³ By giving his political opponents a win in the case at hand, Roberts laid the groundwork for a far more restrictive view of congressional power in the long run. Under the guise of judicial restraint—recognizing "our own limited role in policing [congressional] boundaries"¹⁴—Roberts made a calculated choice to take a short-term hit in order to craft a larger long-term gain.

Giving with one hand while taking with the other suggests an obvious analogy to *Marbury v. Madison*, in which Chief Justice Marshall refused to strike down his political opponents' failure to honor appointments made by the previous administration; but, in doing so, he laid the groundwork for the power of judicial review over legislative and executive action more generally.¹⁵ However, the common and overused *Marbury* metaphor is

infra.

8. *Id.* at 2594–600 (majority opinion). This topic is discussed in further detail in Part II.A, *infra*.

9. *Id.* at 2600–01 (majority opinion and opinion of Roberts, C.J.). This topic is discussed in further detail in Part III.A.2, *infra*.

10. *Id.* at 2601–08 (opinion of Roberts, C.J.). This topic is discussed in further detail in Part III.C, *infra*.

11. *Id.* at 2630 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

12. *Id.*

13. ROBERT McCLOSKEY, *THE AMERICAN SUPREME COURT* 30 (2010).

14. *NFIB*, 132 S. Ct. at 2577 (opinion of Roberts, C.J.).

15. 5 U.S. 137 (1803).

misleading. *Marbury* was a unanimous decision,¹⁶ whereas Roberts could not forge a majority opinion for most of his positions.¹⁷

Roberts's sense of strategy—his sophisticated maneuvering to maximize long-term doctrinal development—was more advanced than his tactics—his short-term means of crafting a coalition in the case at hand. Although Roberts wrote the Opinion of the Court in *NFIB v. Sebelius*, he was unable to hold together the splintered coalition. In two of the four major parts of his opinion, those on the Commerce Clause and the Necessary and Proper Clause, Roberts was writing only for himself.¹⁸ The other four Justices in the majority joined Justice Ginsburg's concurring and dissenting opinion on those points.¹⁹ In addition, Roberts wrote on behalf of just two other Justices in the part addressing federalism restrictions on Congress's Spending Power.²⁰ The dissenting Justices, who agreed with Roberts's conclusions about the Commerce Power and the Spending Power, nonetheless refused to join those parts of Roberts's opinion they agreed with, and even declined to join as to Roberts's decision,²¹ a slap in the face to Roberts from his usual stalwarts.

Roberts has stressed throughout his chief justiceship that building large coalitions is key to the Court's legitimacy and his own measure of success,²² yet he forged ahead regardless of this lack of collegial support. Given his failed tactics in forming a coalition in this most publicly watched case, if conservative doctrinal development had been Roberts's primary goal, he would have been wise to switch sides²³ and join his conservative colleagues in striking down the individual mandate. The fact that he wrote alone, upholding the mandate as narrowly as possible, suggests that other concerns dominated. Put another way, Roberts's tactics reveal his strategy.

This Article examines Roberts's strategic and tactical behavior in deciding the fate of "Obamacare," and how each of the other Supreme Court Justices responded. This individual case provides a unique vehicle for understanding judicial strategy in general and the direction in which the Chief Justice is attempting to push constitutional law overall. Although *NFIB v. Sebelius* constitutes a great political win for Democrats and the Obama Administration, the decision is by no means liberal. It is a conservative opinion that is strategically engineered to have a long-range conservative impact. While it may be natural to question how significant

16. Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235, 1239 (2003).

17. *NFIB*, 132 S. Ct. at 2577 (opinion of Roberts, C.J.).

18. *Id.*

19. *Id.* at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

20. *Id.* at 2577 (opinion of Roberts, C.J.).

21. *Id.* at 2643 (Scalia, Kennedy, Thomas, and Alito, J.J., dissenting).

22. See *infra* text accompanying note 409.

23. Or, if the rumors are true, to switch back. See *infra* Part I.

the impact of the case will be without a clear coalition, this Article argues that much of the ambiguity of Roberts's opinion will actually strengthen its conservative impact. By redefining many of the questions in these areas of constitutional law but only providing amorphous answers, the decision creates enormous discretion for the Court in numerous areas of constitutional law. The greatest legacy of *NFIB v. Sebelius* will not be the diminishment of congressional power that it created, but the enormous judicial discretion it gives future courts to create *more* such limits.

Some have suggested that a strategic analysis of *NFIB v. Sebelius* is overly cynical; after all, Roberts may have simply set out his genuine view of the law in a restrained manner.²⁴ But a close examination of the opinions belies this claim. Although it is possible to read the case at face value, the decision can be better understood by recognizing both the social forces that drive the law and the complex preferences of the individuals who decide what the law is.

Part I begins by showing why both empiricists and doctrinalists consider Roberts a conservative Justice, and why, as a conservative, he was expected to strike down the mandate—which he reportedly initially decided to do. It then shows how, consistent with his ideology, Roberts did everything he could to undermine his own ruling in upholding the mandate, suggesting that the mandate was a cost he bore, but sought to minimize, as part of a broader strategy.

If Roberts was pursuing a strategy to promote conservative ends, and upholding the mandate was costly, why then did he—and, in fact, all of the justices—not avoid the case altogether? Part II shows how, in writing the majority, Roberts had many options of avoidance, and he instead engaged in highly artificial intellectual sophistry to address the question.

Part III provides part of the explanation as to why: doctrinally, the case allowed him to develop new limitations on congressional power. First, in this case, he created a new coerciveness-based limitation on Congress's Taxing Power, relying on largely repudiated *Lochner* Era cases to forge this distinction.²⁵ Second, Roberts crafted new constraints on Congress's

24. For example, on the day of the decision, in response to my characterization of Roberts as being highly strategic, Above the Law commentator Elie Mystal claimed that this view was cynical and Roberts was actually being very restrained. *The Afternoon Shift with Steve Edwards* (WBEZ radio broadcast Jun. 28, 2012), available at <http://www.wbez.org/blogs/bez/2012-06/thursdays-game-plan-afternoon-shift-100506>; see also Joan Biskupic, *Analysis: Why Roberts Saved Obama's Healthcare Law*, REUTERS, Jun 29, 2012, available at <http://www.reuters.com/article/2012/06/29/us-usa-healthcare-court-roberts-idUSBRE85S02U20120629> (The "extraordinary conclusion to the bitterly fought healthcare battle was quite ordinary in some ways. Roberts hewed to a traditional Supreme Court principle that if the justices can find any constitutional grounds on which to uphold a law, they should do so.").

25. *NFIB*, 132 S. Ct. at 2594–95 (majority opinion).

Commerce Clause Power as well as on the Necessary and Proper Clause. In the former, he fashioned a distinction between activity and inactivity,²⁶ which has the potential to revolutionize even the most settled aspects of Commerce Clause jurisprudence. In the latter, Roberts transformed the Necessary and Proper Clause from an expansion on congressional power into a restriction,²⁷ sharply recharacterizing leading precedent in order to do so. Third, while the mandate decision distracted everyone, Roberts achieved a significant conservative policy win by striking down the Medicaid expansion, as well as developing future limits on the Spending Power.²⁸ Once again, these limits are based on the notion of coerciveness. In relation to the Spending Power, Roberts articulated two aspects of coerciveness—transformation and numerical size—but, as with the other distinctions he developed, he failed to articulate any boundaries on these concepts.²⁹

All of these doctrinal developments, however, were not cemented into precedent by a majority. Part IV describes how Roberts's failure to craft a majority coalition belies the claim that strategic doctrinal development was his dominant motivation. It becomes evident that other factors were at play, and a driving concern for Roberts was credibility—the institutional legitimacy of the Court, and his own reputation and legacy, including the special role of the Chief Justice.

This was not, however, the self-protection of the meek: Part IV also shows that Roberts pursued a strategy of increased judicial power. Despite his claims of championing judicial restraint, the doctrines he developed in this case not only promote an ideologically conservative agenda to restrict congressional power, they also more broadly promote greater judicial power by leaving enormous judicial discretion to take the law in a variety of potentially radical directions in future cases.

I. SACRIFICING THE QUEEN—UPHOLDING THE INDIVIDUAL MANDATE AS A TAX

There are many potential benefits of deciding any Supreme Court case, and many potential costs. This is particularly true in a case as salient and high-profile as that deciding the fate of healthcare reform, and the benefits and costs only increase for the Justice writing the opinion.³⁰ The empirical

26. *Id.* at 2589 (opinion of Roberts, C.J.).

27. *Id.* at 2591–92.

28. *Id.* at 2607.

29. *Id.* at 2604–06.

30. Some scholars go so far as to assume the assigned writer has monopoly power over an opinion. See Jeffrey R. Lax & Charles M. Cameron, *Bargaining and Opinion Assignment on the U.S. Supreme Court*, 23 J.L. ECON. & ORG. 276, 277 (2007). But this view is disputed. See Tonja Jacobi & Matthew Sag, *Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases*, 98 GEO. L.J. 1, 16 (2009) (showing

legal literature, of both legal realists³¹ and political scientists,³² has established that ideology is a significant, and arguably the dominant,³³ determinant of judicial decisions, and that judges pursue ideological outcomes strategically. That is, judges do not just vote according to their immediate preferences; they sometimes vote against their favored outcome at one stage in order to bring about a more favorable outcome at a later stage.³⁴ Through this strategic judicial analysis, a wide range of legal phenomena has been explained,³⁵ and explanations of judicial decision-making have become more coherent as a result.³⁶

empirically that the median of the Court coalition will dominate).

31. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (American Bar Association 2009) (1881) (“The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”).

32. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993) (finding the attitudinal model predicts 76% of cases correctly in search and seizure cases); Richard Reversz, *Environmental Regulations, Ideology and the DC Circuit*, 83 VA. L. REV. 1717, 1719 (1997) (finding that ideology significantly influences judicial decision-making and judges’ votes are also greatly affected by the party affiliation of the other judges on the panel in environmental cases).

33. *See* Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 33 (1997) (reviewing the attitudinalist literature and arguing that the attitudinal model has strong empirical support); Jeffrey A. Segal & Harold Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 AM. J. POL. SCI. 971, 983 (1996) (showing that Supreme Court justices decide cases according to their pre-existing revealed preferences in 90.8% of cases).

34. This literature started in the 1950s and 1960s with Glendon Schubert, *The Study of Judicial Decision-Making as an Aspect of Political Behavior*, 52 AM. POL. SCI. REV. 1007 (1958); C.H. PRITCHETT, *CONGRESS VERSUS THE SUPREME COURT* (1961); and WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964). Today, an extensive empirical and theoretical body of work is dedicated to advancing strategic accounts of law and legal institutions. *See, e.g.*, FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* (2000); Caldeira, Wright & Zorn, *supra* note 6, at 550; Jeffrey R. Lax & Charles M. Cameron, *Bargaining and Opinion Assignment on the U.S. Supreme Court*, 23 J.L. ECON. & ORG. 276 (2007). Evidence suggests that justices vote in a way that strategically maximizes not only the chances of achieving their desired outcomes in Supreme Court cases, but also the chances of other courts promoting the justices’ outcome preferences to maximize the proportion of total cases supporting their ideology, so enabling justices to seek policy change throughout the nation. *See generally* GLENDON SCHUBERT, *THE JUDICIAL MIND* (1965); Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, 57 LAW & CONTEMP. PROBS. 65 (1994); Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326 (2007).

35. *E.g.*, Ryan C. Black & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 J. POL. 1062 (2009) (further developing evidence

This is not to deny that justices also have strong interests in the development of doctrine reflecting their views of the law, as the observable consistency across judicial decisions reflects.³⁷ But the strategic evidence is now so strong that the debate has shifted from *whether* judges maximize to *what* judges maximize; the main argument against the thesis that judges consistently strategically maximize their policy impact is that doing so in every case is resource intensive and judges need to control their workload.³⁸ As such, the basis for viewing Roberts's behavior through a strategic lens has a solid foundation.

To show that Roberts's decision in *NFIB v. Sebelius* was strategic, it is first necessary to show that both his ideological tendencies and doctrinal views would have led him to the opposite conclusion, but for the larger goal he tried to achieve. Accordingly, this Part first briefly establishes what will

of strategic choice in certiorari grants and denials); Cohen & Spitzer, *supra* note 34, at 65 (explaining the selective application of the *Chevron* doctrine); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998) (explaining divergence in voting coalition patterns according to presence of a potentially dissenting voice).

36. *E.g.*, LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824 (1995); Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions*, 23 RAND J. ECON. 463 (1992).

37. Even the social science literature on the importance of ideology in shaping judicial choices has empirically established that methodological and doctrinal rules also motivate judges. For instance, Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503 (1996), provides an account of judges as motivated by both substantive policies and rules—be those rules methodological or doctrinal. Others have found further empirical support for the influence of law in addition to ideology. *See, e.g.*, Arthur D. Hellman, *Precedent, Predictability, and Federal Appellate Structure*, 60 U. PITT. L. REV. 1029, 1039 (1999) (finding that, at the federal court level, outcomes are predictable from Supreme Court precedent); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1497 (1988).

38. *See generally* Lawrence Baum, *Policy Goals in Judicial Gatekeeping: A Proximity Model of Discretionary Jurisdiction*, 21 AM. J. POL. SCI. 13 (1977) (showing that judges seek to promote prestige and audience respect, as well as the reduction of future workload); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993) (arguing that judges are ordinary people who rationally attempt to minimize their own work). Even those who still adhere more to a jurisprudential notion of judging acknowledge strategic judicial behavior. *See* H.W. PERRY, *DECIDING TO DECIDE* 278 (1991) (interviewing Justices who attest to considering whether a case constitutes a good vehicle or whether there is a need for more percolation in the lower courts).

be obvious to many: Roberts is a conservative Justice. As such, if voting sincerely, he would have likely favored striking down the ACA, both because it was arguably a considerable incursion into individual liberty, and because it was the Obama Administration's signature legislation. By instead upholding the individual mandate, Roberts bore a hefty policy and political price. This Part then shows how he strategically maneuvered to reduce that price as much as possible.

A. *Conservative Justice: Expectations of an Anti-Mandate Position*

There are many reasons for labeling Roberts a conservative Justice, including his record before he sat on the Court, his judicial record as Chief Justice, and objective empirical scores of his voting record. Even before his elevation to the Supreme Court, it was understood that then-Judge Roberts was conservative—the only debate was whether he would be moderately or extremely conservative.³⁹ This was because Roberts had strong conservative credentials, having served as a Reagan appointee who advocated right-wing positions.⁴⁰ Since beginning his service on the Supreme Court, Roberts has proven to be a solid conservative vote.⁴¹ He signed onto the conservative positions taken in the Court's most controversial cases during his tenure: *Citizens United v. Federal Elections Commission*,⁴² striking down federal restrictions on corporations and unions funding express advocacy in elections; *District of Columbia v. Heller*,⁴³ recognizing an individual right to bear arms and striking down firearm

39. Compare Peter Rubin, *US Supreme Court Nominee: What Does John Roberts Believe?*, SPIEGEL ONLINE (Jul. 21, 2005, 10:20 AM), <http://www.spiegel.de/international/us-supreme-court-nominee-what-does-john-roberts-believe-a-366130.html> (reporting that many believe Roberts may be as conservative as Justices Scalia and Thomas), with John Yoo, *Supreme Court: Roberts Confirmation Hearings*, WASHINGTON POST (Sept. 12, 2005, 11:00 AM), <http://www.washingtonpost.com/wp-dyn/content/discussion/2005/09/08/DI2005090801076.html> (quoting John Yoo's claim that Roberts is a moderate conservative and not an ideologue).

40. For instance, Roberts authored a memorandum that gathered material that "should be highly useful in the campaign to amend or abolish the exclusionary rule." Memorandum from John G. Roberts, Assoc. Counsel to the President, to Kenneth Cribb, Jr., Assistant Counselor to the President (Jan. 4, 1983), available at <http://www.reagan.utexas.edu/Roberts/Box24JGRExclusionaryRule1.pdf>.

41. See, e.g., Adam Liptak, *Roberts Court Shifts Right, Tipped by Kennedy*, N.Y. TIMES (June 30, 2009), <http://www.nytimes.com/2009/07/01/us/01scotus.html> ("Roberts . . . plant[ed] seeds in this term's decisions. If his reasoning takes root . . . the law will [shift conservatively] on questions as varied as what kinds of evidence may be used against criminal defendants and the role the government may play in combating race discrimination.").

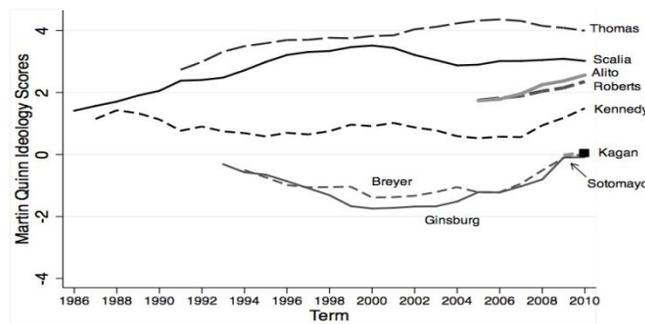
42. 558 U.S. 310 (2010).

43. 554 U.S. 570 (2008).

prohibitions in one of the most crime-ridden cities in the United States; and *Wal-Mart Stores, Inc. v. Dukes*,⁴⁴ restricting class-action lawsuits and thus limiting the accountability of large businesses. Moreover, Roberts wrote the decision in *Winter v. National Resources Defense Council*, which allowed the Navy to use sonar tests that put thirty species of marine life at risk,⁴⁵ and his opinion in *Herring v. United States*⁴⁶ announced a new “exclusionary rule standard” whereby the rule has to “pay its way” before being applied in any case.⁴⁷ In addition, the business-friendly nature of the Roberts Court has been much discussed.⁴⁸

Empirical scores of judicial behavior confirm these impressions. Figure 1 shows the distribution of judicial preferences for the nine current Justices over their respective tenures, using one such measure, the Martin-Quinn scores.⁴⁹

Figure 1: Current Supreme Court Justices’ Ideology Scores over Time



Source: Martin & Quinn (2002, updated 2011).

The chart depicts the ideological score of each Justice (on the y-axis) over time (on the x-axis, by term of the Court)—the higher the score, the more conservative the Justice.⁵⁰ The historical average of the Court in the

44. 131 S. Ct. 2541 (2011).

45. 555 U.S. 7 (2008).

46. 555 U.S. 135 (2009).

47. See Frank Cross, Tonja Jacobi & Emerson Tiller, *A Positive Political Theory of Rules and Standards*, 2012 U. ILL. L. REV. 1, 37 (2012).

48. See, e.g., *Issue Brief Documents Supreme Court’s Business-Friendly Tilt, Skepticism Toward Regulation*, AM. CONST. SOC’Y (Feb. 22, 2011), <http://www.acslaw.org/acsblog/issue-brief-documents-supreme-court%E2%80%99s-business-friendly-tilt-skepticism-toward-regulation>; see also Mike Sacks, *Supreme Court: U.S. Chamber of Commerce Undefeated This Term*, HUFFINGTON POST (June 22, 2012, 9:41 AM), http://www.huffingtonpost.com/2012/06/21/supreme-court-us-chamber-of-commerce_n_1617392.html.

49. See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 135 (2002). The scores are based on each Justice’s tendency to join, concur, and dissent. Thus, Justices’ labels as conservative or liberal depend on whether they vote with other conservative or liberal Justices. This is based on the most recent data available (up to and

Modern Era is approximately zero.⁵¹ Roberts's score in 2010–2011 was 2.35; the average for that term was 1.49; the median (Justice Kennedy) was 1.49; and the standard deviation was 1.55.⁵² As such, Roberts was over half of one standard deviation right of Kennedy, and more than one full standard deviation more conservative than the average Justice in the last seventy-three years.⁵³

Taking all of this evidence together, it is reasonable to conclude that Roberts is a solid conservative. Following oral arguments in *NFIB v. Sebelius*, and until the decision came down, all eyes were on the Court median, Justice Kennedy.⁵⁴ Yet even Kennedy, who is only moderately conservative by historical standards,⁵⁵ favored striking down the entire ACA.⁵⁶ As a solid conservative, then, it was widely expected that Roberts would also favor striking down the individual mandate, so his ruling in *NFIB v. Sebelius* surprised many.⁵⁷ Consistent with his conservatism, as the

including October Term 2010).

50. Martin & Quinn scores do not initially categorize Justices as liberal or conservative, but their measurements so closely accord with popular impressions that we can confidently label negative scores as liberal and positive scores as conservative. *See supra* Figure 1.

51. Martin & Quinn, *supra* note 49, at 135. The updated Martin and Quinn ideal point estimates are available at <http://mqscores.wustl.edu/measures.php> (last visited Sept. 27, 2013) (follow “2010 MQ Scores Data” hyperlink; then open “court.xls” file).

52. *Id.*

53. The standard deviation for all Justices during the 1937–2010 Terms is 2.10. *Id.*

54. Massimo Calabresi & David Von Drehle, *What Will Justice Kennedy Do?*, TIME MAGAZINE (June 18, 2012), <http://content.time.com/time/magazine/article/0,9171,2116699,00.html>; Sam Favate, *Justice Kennedy Remains ‘The One Key Vote’ On the Supreme Court*, WALL ST. J. L. BLOG (June 8, 2012, 2:16 PM), <http://blogs.wsj.com/law/2012/06/08/justice-kennedy-remains-the-one-key-vote-on-the-supreme-court/>. Not only is Kennedy the median, he dominates the center of the Court by straddling a large ideological space there; this ordinarily makes it very difficult to form a majority without him. *See* Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 51 (2008) (explaining that it is harder to form a coalition without incorporating those justices who sit at the center of the Court, and, as such, they have greater sway over what eventual opinions will look like).

55. In 2010, Kennedy was less than one standard deviation from the historical mean of zero, with a score of 1.49 (standard deviation = 1.55). *See* Martin & Quinn, *supra* note 49, at 135; *supra* note 49 and accompanying text.

56. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2643 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (“The Act before us here exceeds federal power both in mandating the purchase of health insurance and in denying nonconsenting States all Medicaid funding. These parts of the Act are [so] central to its design and operation . . . that the entire statute is inoperative.”).

57. For the reasons described in the following Parts, it was possible to predict not only that the mandate would be upheld, but that Roberts would be in the majority and write the opinion of the Court. *See The Afternoon Shift*, *supra* note 24 (describing the author’s prediction that Roberts would be in the majority, that he would write the opinion, that the

analysis below shows, Roberts mostly set out strongly conservative principles throughout the opinion, even in sections relating to the Taxing and Spending Powers, under which he upheld the individual mandate.

In fact, Roberts is rumored to have initially voted to strike down the law, including the mandate, before switching sides. Numerous leaks from the Court stated that Roberts originally sided with the other conservatives in striking down the individual mandate.⁵⁸ In addition, a source leaked that Roberts wrote both the majority opinion and a draft of what became the dissenting opinion (the dissenting Justices may have adopted his original majority opinion ruling the mandate unconstitutional),⁵⁹ although these leaks are at odds with one another.⁶⁰

opinion would probably be splintered, and that the opinion would partially uphold the law and partially strike it down).

58. See Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 1, 2012, 1:29 PM), http://www.cbsnews.com/2102-3460_162-57464549.html?tag=contentMain;contentBody. Another hint that Roberts may have switched sides is that Justice Ginsburg's concurring and dissenting opinion reads like a dissent, whereas the dissenting opinion reads like an amended majority decision. Subsequently, Ginsburg admitted that she originally authored her opinion as a dissent. Joan Biskupic, *Exclusive: Justice Ginsburg Shrugs off Rib Injury*, REUTERS, Aug. 8, 2012, available at <http://www.reuters.com/article/2012/08/09/us-usa-court-ginsburg-idUSBRE87801920120809>.

Ginsburg insisted she would not reveal whether the Chief Justice switched sides, saying only that she wrote her opinion prior to Roberts circulating his opinion. *Id.* Nonetheless, her comments strongly suggest a switch because Roberts could only have assigned himself the opinion if he had already committed to a position at conference. Saul Brenner, *Majority Opinion Assignment in Salient Cases on the U.S. Supreme Court: Are New Associate Justices Assigned Fewer Opinions?*, 22 JUST. SYS. J. 209 (2001).

59. Paul Campos, *Roberts Wrote Both Obamacare Opinions*, SALON (July 3, 2012, 2:13 PM), http://www.salon.com/2012/07/03/roberts_wrote_both_obamacare_opinions/. For other hints throughout the opinions supporting speculation that Roberts switched his vote, see, e.g., David Bernstein, *Was the Dissent Originally a Majority Opinion?*, VOLOKH CONSPIRACY (June 28, 2012, 11:23 AM), <http://www.volokh.com/2012/06/28/was-scalias-dissent-originally-a-majority-opinion/>; Lawrence Solum, *Evidence that the Votes Shifted After Conference (Initial Vote to Declare Mandate Unconstitutional) (Updated)*, LEGAL THEORY BLOG (June 29, 2012), <http://lsolum.typepad.com/legaltheory/2012/06/evidence-th-at-the-votes-shifted-after-conference-initial-vote-to-declare-mandate-unconstitutional.html>.

60. Campos's source directly rebuts Crawford's:

This source insists that the claim that the joint dissent was drafted from scratch in June is flatly untrue. Furthermore, the source characterizes claims by Crawford's sources that "the fact that the joint dissent doesn't mention Roberts' [sic] majority . . . was a signal the conservatives no longer wished to engage in debate with him" as "pure propagandistic spin," meant to explain away the awkward fact that . . . the first 46 pages of the joint dissent never even mention Roberts' opinion for the Court

If Roberts did switch, he faced considerable personal costs for doing so: his conservative colleagues, normally his allies, are said to have been furious with him and may have been the source of the leaks (or have given approval to their proxies to leak information) as punishment for Roberts's betrayal of his conservative ideals.⁶¹ Roberts joked⁶² that he was so unpopular after the decision that he had to flee to Malta for his own protection.⁶³

Why then, given that Roberts disfavored upholding the law and faced the ire of his conservative colleagues, conservative elites, and the conservative punditry for doing so,⁶⁴ did the Chief Justice choose to uphold the law? The answer explored in this Article is that Roberts made a strategic decision, concluding that the long-term payoffs of such a choice outweighed the short-term, outcome-based costs. In order to reap both doctrinal benefits (narrowing the Commerce Clause, the Necessary and Proper Clause, and the Taxing and Spending Clause, as well as striking down a major part of the legislation) and, even more importantly, institutional benefits (maintaining the legitimacy of the Court, protecting his own reputation, and maximizing judicial power) Roberts had to uphold, contrary to his preferences, the most politically salient part of the legislation: the individual mandate under the Taxing Power.

B. *Paying the Price: Upholding the Mandate*

The conclusion that ruling the individual mandate constitutional contradicted Roberts's preferences rests not only on his conservative tendencies, as described above, but also on his evident distaste for that

Id.

61. See Adam Sorensen, *John Roberts, Conservative Outcast, and the Supreme Court's Unprecedented Leak*, TIME SWAMPLAND (July 2, 2012), <http://swampland.time.com/2012/07/02/john-roberts-conservative-outcast-and-the-supreme-courts-unprecedented-leak/>.

62. "Many a true word is spoken in jest." JONATHAN SWIFT, POLITE CONVERSATION 103 (Eric Partridge ed., Oxford Univ. Press 1963) (1738).

63. Joe Mandak, *John Roberts Jokes that He'll Spend Some Time in an "Impregnable" Fortress*, HUFFINGTON POST (June 29, 2012, 3:10 PM), http://www.huffingtonpost.com/2012/06/29/john-roberts-joke_n_1637841.html.

64. See, e.g., W. James Antle III, *John Roberts's Betrayal*, AM. CONSERVATIVE (June 28, 2012), <http://www.theamericanconservative.com/articles/john-robertss-betrayal/>; Randy Barnett, *Quin Hillyer: John Roberts' Travesty, Point by Point*, VOLOKH CONSPIRACY (July 9, 2012, 2:23 PM), <http://www.volokh.com/2012/07/09/quin-hillyer-john-roberts-travesty-point-by-point/>. These comments come despite Roberts's conservative bona fides in so many other major cases since he has been on the Court, as concisely summarized by Linda Greenhouse, *A Justice in Chief*, N.Y. TIMES (June 28, 2012, 5:19 PM), <http://opinionator.blogs.nytimes.com/2012/06/28/a-justice-in-chief/> ("For most of his tenure so far . . . his goal has seemed clear. It has been to turn the Court to the right on the hot-button issues of race, religion and abortion, as well as to harness the First Amendment as a deregulatory tool.").

determination, as shown in the following sections. Even while upholding the Obama Administration's key policy initiative, Roberts attempted to diminish the value of that outcome for liberals and, conversely, to diminish the cost to conservatives (although conservatives did not much appreciate these efforts on the whole). He did this by both reducing the cost of his conclusion that the mandate constituted a tax and garnering policy and doctrinal advantages regarding the various issues of law that the case raised.⁶⁵ This Section examines the former strategy.

Roberts held that the payment compelled by the individual mandate (the fee) was within congressional power under the Taxing and Spending Powers.⁶⁶ Seemingly undercutting this conclusion, the ACA describes the fee as a legal command to buy insurance, and Roberts and the four dissenting Justices found that the Commerce Clause cannot justify such a command.⁶⁷ Nonetheless, Roberts and the four liberal Justices decided that it is legitimate for legislation to have more than one meaning: the fee could be simultaneously characterized as a tax on those who do not purchase health insurance.⁶⁸

Roberts used many factors to justify the characterization of the fee as a tax. For example, the fee is not so high that there is no effective choice but to buy health insurance⁶⁹—in fact, four million people are expected not to purchase health insurance and instead to pay the fee.⁷⁰ Consequently, the fee constitutes a form of revenue collection for failing to buy health insurance, expected to amount to approximately \$4 billion.⁷¹ In addition, the fee looks like other taxes: the Internal Revenue Service collects it;⁷² and it applies factors common to other taxes, such as income level, number of dependents, and an income threshold.⁷³ The fee also lacks characteristics of penalties: it is not limited to willful violations, hinging on scienter (which would suggest penalizing a voluntary choice);⁷⁴ and the law still permits the

65. *See infra* Parts I.B.1–2.

66. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2600 (2012) (majority opinion) (“The Affordable Care Act’s requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax.”).

67. *Id.* at 2593.

68. *Id.* at 2594 (opinion of Roberts, C.J.) (“[T]he mandate can be regarded as establishing a condition—not owning health insurance—that triggers a tax—the required payment to the IRS. Under that theory, the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the Government taxes . . .”).

69. *Id.* at 2595–96 (majority opinion).

70. *Id.* at 2597.

71. *Id.* at 2594.

72. *Id.* at 2596.

73. *Id.* at 2594.

74. *Id.* at 2595.

conduct to which the fee applies—instead of making non-compliance unlawful,⁷⁵ the law simply taxes that conduct.⁷⁶

These arguments are quite reasonable, but these facts by no means tied Roberts's hands. As shown below, these same factors could lead to a contrary ruling, as Roberts himself illustrated when he used the same factors to conclude that the fee was not a tax for injunctive purposes.⁷⁷ This ruling was instead a choice that Roberts made. And it was a choice that he made very reluctantly: upon upholding the mandate, Roberts immediately set about mitigating both the import and the cost of that ruling. For the import, Roberts explicitly downplayed the significance of his finding that the mandate was constitutional as a tax; for the cost, he provided jurisprudential conservative compensation by creating future limitations on the Taxing Power, as well as political conservative compensation by maximizing the rhetorical advantage of finding that the mandate was a tax.⁷⁸

1. Downplaying the Significance

One of the most striking strategic moves by Roberts in minimizing the cost-to-benefit ratio of upholding the individual mandate lies in the brief section justifying why his Commerce Clause analysis is not dicta.⁷⁹ This is discussed in more depth in Part III.A.2, below, but it is worth examining briefly here because it also constitutes a comment by Roberts on the marginality of his own constitutional finding regarding the Taxing Power. Roberts wrote:

But the statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it. It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question. And it is only because we have a duty to construe a statute to save it, if fairly possible, that §5000A can be interpreted as a tax. Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction.⁸⁰

Roberts was saying here that his own ruling that the fee is a tax is so close to the tipping point between constitutionality and unconstitutionality that he only upheld the law because of the canon of finding legislation

75. *Id.* at 2597.

76. *Id.*

77. *See infra* Part II.A.

78. *See infra* Parts I.B.1–2.

79. *NFIB*, 132 S. Ct. at 2600–01 (opinion of Roberts, C.J.).

80. *Id.*

constitutional when in doubt. Roberts used a novel rhetorical device to bring into question his own analysis as borderline. This provided the advantages of both justifying the inclusion of his Commerce Clause analysis, as described below, and minimizing the impact of the doctrinal price he had to pay in relation to the Taxing Power, at the same time as paying it.

Essentially, Roberts simultaneously found that the Taxing Power legitimated the law, while reading that power narrowly.⁸¹ At the same time as he was laying out the numerous reasons the fee qualified as a tax, he was describing his own analysis as marginal—so thin that it would not apply except as a saving construction after failing to find the law constitutional under the Commerce Clause.⁸² Roberts attempted to make clear that while this law may be constitutional, that does not guarantee that the Court will allow similar laws in the future. According to Roberts, similarly borderline legislation could easily cross the line into unconstitutionality.⁸³ As we see in the next section, he also put his finger on the scale by raising the specter that it may even be more difficult to pass such laws in the future.

2. Creating Future Limitations

The second way Roberts cuts his own costs was that even while acknowledging the legitimacy of the fee as a valid exercise of Congress's Taxing Power, Roberts added to the limits on that power.⁸⁴ He first made clear that he was in no way expanding Congress's Taxing Power; he stated that, whereas upholding the law under the Commerce Clause would expand congressional power, his finding that Congress has such power under the Taxing Clause does not do so.⁸⁵ Then he went further and explicitly left open the possibility of imposing additional limits on the Taxing Power in the future by finding such taxes overly coercive.⁸⁶

Roberts opened his discussion⁸⁷ with reference to *United States v. Butler*⁸⁸ and *Bailey v. Drexel Furniture Co.*,⁸⁹ two *Lochner* Era cases.⁹⁰

81. *Id.*

82. *Id.*

83. *Id.* at 2601.

84. *Id.* at 2599–2600 (majority opinion). The ruling did, however, necessitate a narrow reading of what could potentially limit the Taxing Power by rejecting the argument that it is a direct tax and therefore can only be exercised if the burden falls proportionally on the states. *Id.* at 2599. Roberts rejects the direct tax argument, concluding that it only applies to capitations and land taxes, which this tax is not. *Id.* (“A tax on going without health insurance does not fall within any recognized category of direct tax.”).

85. *Id.* (“Upholding the individual mandate under the Taxing Clause thus does not recognize any new federal power. It determines that Congress has used an existing one.”).

86. *Id.* at 2599–2600.

87. *Id.*

Neither case has been overturned, but subsequent cases have entirely repudiated their logic (although they are sometimes still cited).⁹¹

The first case, *Drexel Furniture*, concerned the Child Labor Tax Law, which imposed a tax on manufacturing income gained using child labor.⁹² This tax was an attempt to circumvent the same regulation found unconstitutional under the Commerce Clause in *Hammer v. Daggenhart*.⁹³ The Court held that the tax directly, not incidentally, regulated child labor, constituting a penalty rather than a tax; this was because, at that time, some other enumerated power had to independently justify any tax.⁹⁴ This view of the law that Roberts relies on, however, was rejected in 1936 in the *Butler* case,⁹⁵ even during the *Lochner* Era and before Justice Owen Roberts's "switch in time" to join the Court's New Deal supporters.⁹⁶ *Butler* rejected *Drexel Furniture*'s conception of the Taxing Power, holding instead that the confines of the Taxing Power "are set in the clause which confers it," so there is no need for additional empowerment through other clauses.⁹⁷

Nonetheless, *Butler* embraced a different restriction on congressional power posited in *Drexel Furniture*, one based on the Tenth Amendment. The Court in *Drexel* also held that control of child labor was explicitly a state function, so the Tenth Amendment, which defined congressional power subject to state power, prohibited the law.⁹⁸ Similarly, *Butler* held that to allow Congress to regulate state police powers indirectly through taxing and spending would allow it to "become the instrument for total subversion of the governmental powers reserved to the individual states."⁹⁹ But these two cases' Tenth Amendment arguments were in turn rejected in 1937 in *Steward v. Davis Machine Co.*¹⁰⁰ and *Helvering v. Davis*.¹⁰¹ *Steward* and *Helvering* held that just because a power belongs by accepted

88. 297 U.S. 1 (1936).

89. 259 U.S. 20 (1922).

90. David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 10 (2003) ("[T]he *Lochner* Era unofficially began in 1897 . . . and ended in 1937.").

91. See, e.g., *New York v. United States*, 505 U.S. 144, 158 (1992) (citing *Butler*, 297 U.S. at 72–75).

92. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 22 (1918).

93. *Hammer v. Daggenhart*, 247 U.S. 251 (1918).

94. *Drexel Furniture*, 259 U.S. at 38.

95. *Butler*, 297 U.S. 1.

96. Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 70 (2010).

97. *Butler*, 197 U.S. at 66.

98. *Id.*

99. *Id.* at 75.

100. 301 U.S. 548 (1937).

101. 301 U.S. 619 (1937).

practice to the legislatures of the states, the Constitution does not deny it to Congress.¹⁰²

Between *Butler*, *Steward*, and *Helvering*, then, the Court repudiated both arguments of *Drexel Furniture*; and the latter two cases, in turn, denounced *Butler*'s "aggressive policing" of regulating behavior through the Taxing Power. Roberts's reliance on these Lochner Era cases for their policing of limits on the Taxing Power, then, was a sleight of hand to return to the Lochner Era.¹⁰³

There is good strategic reason, if little sound jurisprudential basis, for Roberts to equate the Lochner Era cases with their post-New Deal counterparts, despite the fact that the latter rejected all logic of the former that constrained the Taxing Power and only accepted those parts of *Butler* that gave breadth to the Taxing Power. Doing so helped to lay the groundwork for Roberts's next claim: that the Court has consistently maintained that the punitive nature of a fee designed to regulate behavior as well as to raise revenue may become so great that the fee loses its character as a tax, and so too its constitutional basis.¹⁰⁴ In making this pronouncement, Roberts claimed to quote a 1994 case called *Department of Revenue of Montana v. Kurth Ranch*,¹⁰⁵ but a close reading reveals that, in fact, the quote is entirely and exclusively from *Drexel Furniture*.¹⁰⁶

So, the notion that there is a coercion limit on the Taxing Power relies entirely on repudiated Lochner Era cases, and one subsequent quotation of those repudiated cases. But having asserted the possibility of this limit, Roberts will be free to quote himself in subsequent cases for part of the Court's "consistent maintenance" of some theoretical upper limit on the extent to which Congress may regulate behavior through its Taxing Power.

Roberts kept the nature and position of that upper limit unspecified, concluding that it was unnecessary to decide the "precise point at which an exaction becomes so punitive that the taxing power does not authorize it."¹⁰⁷ He justified this imprecision on the basis that the tax was not struck down under those limits.¹⁰⁸ However, as shown below, he concluded that it

102. *Helvering*, 301 U.S. at 640; *Steward*, 301 U.S. 548.

103. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2599–600 (2012) (majority opinion) ("A few of our cases policed these limits aggressively. . . . More often and more recently we have declined to closely examine the regulatory motive or effect of revenue-raising measures."). Elsewhere, Roberts conceded that structuring the incentives of the states with bribes is not coercion. *Id.* at 2596.

104. *Id.* at 2599–600.

105. 511 U.S. 767, 779 (1994).

106. *NFIB*, 132 S. Ct. at 2599–600 (majority opinion).

107. *Id.* at 2600.

108. *Id.* ("Because the tax at hand is within even those strict limits, we need not here decide the precise point at which an exaction becomes so punitive that the taxing power does not authorize it.").

was similarly unnecessary to specify the point at which conditions on grants become coercive for precisely the opposite reason: because the Medicaid penalty is so clearly *beyond* the point of legitimacy.¹⁰⁹ Part IV explores in detail the strategic advantage of this vagueness; it suffices for now to note that doing so keeps Roberts's options as open as possible for future cases.

3. Maintaining the Moral High Ground—Maximizing Rhetorical Advantage

Roberts's final tactic to minimize the price he had to pay in upholding the mandate was to undermine the political value of that win for the Democrats. Finding the mandate constitutional under the Taxing Power instead of the Commerce Clause provided the rhetorical benefit of allowing Roberts to label the signature policy of the Obama Administration's first term as a tax. Obviously, this did not grant the same political advantage to conservatives that actually striking down the law would have—prior to the Court's healthcare decision, Republican presidential candidate Mitt Romney prospectively crowed that a repeal of the law would render Obama's first term "entirely wasted."¹¹⁰ Nonetheless, within the confines of upholding the mandate, heralding it as a tax provided the rhetorical advantage of tainting the entire law with the stigma of a tax increase.

Roberts made it clear throughout his opinion that he was holding his nose while upholding the mandate as a tax. He characterized the decision to implement the tax as tolerated by the Court, but by no means embraced: "Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness."¹¹¹ He conveyed his disapproval of the law as a policy,¹¹² even using the pejorative term "tax hike."¹¹³

Republicans quickly caught on to the rhetorical weapon that Roberts created for them. Because the Administration had characterized and justified the individual mandate as a governmental command rather than a tax, Republicans were able to use the tax holding to make two attacks on Obama. First, conservatives "accused Obama and congressional Democrats of perpetrating a 'major fraud' on the American people by repeatedly insisting in 2010 that the law was not a tax, only to have the Court uphold the law as a tax."¹¹⁴ Although the Court may recognize simultaneous

109. *Id.* at 2606–07.

110. Jon Ward, *Mitt Romney, Surprised by Health Care Decision, Pivots to Tax Attack*, HUFFINGTON POST (June 29, 2012, 11:49 AM), http://www.huffingtonpost.com/2012/06/28/mitt-romney-health-care-tax-attack_n_1636040.html.

111. *NFIB*, 132 S. Ct. at 2600 (majority opinion).

112. *Id.* at 2579 ("It is not our job to protect the people from the consequences of their political choices.").

113. *Id.* at 2594.

114. Tracy Jan & Christopher Rowland, *Supreme Court Grants Victory to President*

arguments that the fee is a mandate or a tax, such slippery argumentation does not play as well with the public.

Second, the Administration faced a change in the debate from justifying congressional power generally to defending a tax bill. Shortly after the Court's decision, Rush Limbaugh claimed that the ACA instituted the largest tax increase in world history.¹¹⁵ Although this claim is not true,¹¹⁶ the idea caught on and was promulgated widely. Conservative political advocacy group Americans for Prosperity quickly announced its plans to spend \$9 million in a coordinated advertising campaign to push the tax increase message.¹¹⁷

In summary, although Roberts upheld the constitutionality of the individual mandate to protect the Court's credibility, he went to great lengths to do the minimum required to provide that protection. He emphasized that the ruling was not greatly significant and still allowed for future limits on the Taxing Power, and he disparaged the legislation as a "tax hike." This confirms that, as expected, the conservative Roberts was antagonistic to upholding the mandate. But taking on this cost would constitute a sound strategic choice by Roberts only if upholding the law as a legitimate exercise of Congress's Taxing Power was avoidable. Otherwise, Roberts may simply have been mitigating his unavoidable losses in upholding the mandate, rather than making a strategic choice to do so to reap benefits in return. The next Part addresses the question of avoidance.

Obama, Upholding Constitutionality of 2010 Health Care Law, BOSTON GLOBE (June 28, 2012, 4:00 PM), <http://www.boston.com/politicalintelligence/2012/06/28/supreme-court-grants-victory-president-obama-upholding-constitutionality-healthcare-law/4o5Rwiyv7QhIVPlaSBcmEP/story.html> ("Roberts has handed Obama one of the biggest victories of his political life.").

115. Elizabeth Dwoskin, *Why Obamacare's Tax Increase Isn't the Biggest Ever*, BLOOMBERG BUSINESSWEEK (July 3, 2012), <http://www.businessweek.com/articles/2012-07-03/why-obamacares-tax-increase-isnt-the-biggest-ever>.

116. The claim is false both because most people will receive subsidies that outweigh the tax increase they bear, and because the new tax is not a historical record tax increase. *See id.* ("Obama's tax increase will bring in less revenue as a portion of GDP than the tax increases put in place by presidents George H.W. Bush, Bill Clinton, or Ronald Reagan."); Aaron Sharockman, *Limbaugh, GOP Have it Wrong: Health Care Law is Not the Largest Tax Increase Ever*, TAMPA BAY TIMES POLITIFACT.COM (June 28, 2012, 12:50 PM), <http://www.politifact.com/truth-o-meter/statements/2012/jun/28/rush-limbaugh/health-care-law-not-largest-tax-increase-us-histor/>.

117. One ad says: "President Obama promised us his health care law is absolutely not a tax increase. Now we know that's not true . . . Obama's health care law is actually one of the largest tax increases in history." Tom Scheck, *Campaign Against Obama and Health Care to Focus on Taxes*, MINN. PUB. RADIO (June 29, 2012), <http://minnesota.publicradio.org/display/web/2012/06/29/politics/ad-campaign-affordable-care-act/> (internal quotation marks omitted).

II. AVOIDING AVOIDANCE—EVIDENCE OF STRATEGIC CHOICE

In fact, Roberts could have avoided upholding the mandate in multiple ways. First, there were two viable means to reach a contrary ruling on the immediate question of the constitutionality of the individual mandate as a tax. Second, Roberts could have avoided the case altogether.

A. *Upholding the Mandate as a Deliberate Choice*

An examination of the approach taken by the dissenting Justices suggests that Roberts could have found, as the dissenting Justices did, that the fee was a penalty, not a tax, and thus did not fall within the ambit of the Taxing and Spending Clause. The dissent argued that any act that establishes criteria for wrongdoing and then penalizes behavior which meets that criteria is in essence a penalty.¹¹⁸ The dissent also rebutted many of the above-described factors that Roberts pointed to as evidence that the fee is a tax.¹¹⁹ The dissenting Justices argued that although scienter is evidence of a penalty, it is not required to conclude that a penalty is being imposed; thus, the lack of a scienter requirement alone does not establish that the fee is a tax.¹²⁰ They also gave weight to textual considerations—the mandate and the fee both appear in Title I of the ACA rather than Title IX, which is the part of the law dealing with revenue.¹²¹

In addition, they suggested that the fee's characterization in the legislation as a mandate should not be dismissed so easily, suggesting it has significance beyond the realm of the Commerce Clause.¹²² The dissent argued that the legislation itself labels the fee as a mandate, not a tax, and that they should take the legislation at face value.¹²³ Both because the mandate provision uses mandatory language and because some individuals are exempt from the tax but not the mandate, they argued that it makes no sense to characterize the mandate as a tax.¹²⁴ What is important to note here is not whether the majority or the dissent was correct, but that the fee could arguably have been labeled either a tax or a penalty. As such, Roberts had a viable way of avoiding upholding the mandate.

A second way for Roberts to avoid upholding the individual mandate was to embrace the dissent's argument that the tax is a penalty but acknowledge Congress's power to pass the fee as a tax, if the fee could be

118. *NFIB*, 132 S. Ct. at 2651–52 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

119. *Id.* at 2654.

120. *Id.*

121. *Id.* at 2655.

122. *Id.* at 2652–53.

123. *Id.* at 2652.

124. *Id.* 2652–53.

characterized differently.¹²⁵ This argument has the appearance of ideological moderation because it acknowledges the power of Congress to pass the Obama administration's *policy*, while nonetheless striking down the law. Such a ruling would be analogous to "legislative remand," whereby courts refrain from making the ultimate determination of unconstitutionality on an issue, instead passing the matter to the legislative branch, albeit typically within newly articulated judicial constraints. Of course, given the political infeasibility of passing ACA 2.0, a decision on this basis might also be seen as disguised partisan judicial activism. Arguably, however, legislative remand constitutes a form of judicial restraint,¹²⁶ a characterization that would buttress Roberts's legitimacy in taking this path.

There were, then, at least two viable options that Roberts could have pursued instead of upholding the individual mandate as a tax. Accordingly, if a judge were amenable to finding the ACA unconstitutional, as Roberts's conservative credentials suggest he ordinarily would have been, and as his efforts to undermine his own ruling, as well as his alleged switch, show he in fact was in this case, then there existed a considerable basis upon which to rest such a conclusion. Clearly, then, the ruling was avoidable.

B. *Deciding to Decide: When a "Tax" Is Not a "Tax"*

Not only were there at least two viable options to avoid upholding the individual mandate as a tax within his opinion, Roberts also could have avoided the case in its entirety. In fact, avoiding the case was arguably the most natural route available to the Court. The Anti-Injunction Act prohibits litigation challenging the enforcement of any tax collection mechanism prior to its actual initiation,¹²⁷ yet the ACA's penalty provision for failing to comply with the individual mandate does not come into effect until 2014.¹²⁸

125. This suggestion may be attributable to prominent conservative William Bennett. What Bennett actually said, after the ACA was upheld, is that the fee is clearly a command and so cannot be legitimately characterized as a tax. William Bennett, *Health Care Ruling Can Help Romney*, CNN.COM (July 11, 2012, 11:57 AM), <http://www.cnn.com/2012/06/29/opinion/bennett-court-romney/index.html>. He then said: "Roberts could have characterized the mandate as a tax and sent it back to the Congress, whose role is to legislate taxation, to redo." *Id.* This actually makes no sense, for if the fee is a tax, it need not be sent back to Congress. Read in the most generous light, what Bennett actually means is that Roberts should have characterized the mandate as a *penalty*, but acknowledged that it could be passed as a tax if done differently, as is suggested here. *Id.*

126. See Tonja Jacobi, *Same-Sex Marriage in Vermont: Implications of Legislative Remand for the Judiciary's Role*, 26 VT. L. REV. 381, 386 (2002) (describing how remand to the legislature has judicially minimal elements, by deferring policy choice to a legislature, while also being somewhat activist by involving the Court in an ongoing supervisory role of the legislature).

127. 26 U.S.C. § 7421(a) (2006).

128. See 26 U.S.C. § 5000A(a)-(b).

Because the Anti-Injunction Act prohibits preemptive determination of taxation issues, and Roberts concluded that the individual mandate was a tax, an easy form of case avoidance was available to Roberts if he wanted to sidestep the controversy and costs of striking down the legislation, but did not want to uphold such an act of congressional power.

Not only did Roberts reject this ample opportunity to avoid the case, he went to great lengths to establish jurisdiction. First, he overcame the “syllogism” that if the penalty is a tax, the case was not ripe, but if the penalty is not a tax, then it could not be upheld under the Taxing Power; but he did so by creating a syllogism of his own. Second, he selectively used statutory interpretation canons to rebut the dissent’s position, while thwarting those canons himself.

1. Syllogisms as Prestidigitation

Roberts rejected the Court-appointed amicus’s argument that the Court should either not decide the issue, if it is a tax, or should strike the law down, if it is not.¹²⁹ The amicus argued that the Anti-Injunction Act bars challenges to any suit to restrain collection of any tax, although not a penalty.¹³⁰ Thus, the Court could only decide *NFIB v. Sebelius* if the fee associated with failure to meet the individual mandate is not a tax. However, the only basis on which the Court ultimately upheld the mandate was as a tax under the Taxing Power.

Roberts rejected this as a syllogism. He considered that whether Congress defined something as a tax or not cannot determine whether it has congressional power over a topic, whereas it can define such terms for the purpose of applying legislation.¹³¹ Since the ACA and the Anti-Injunction Act are statutory, Congress can decide how they relate to each other.¹³² Thus, Roberts concluded that the mandate fee is a tax for the purposes of constitutional law but not for the purpose of legislation.¹³³ That is, a tax is not always a tax.

Roberts’s logic may appear appealing because he was clearly correct that Congress cannot determine how its constitutionally defined powers

129. *NFIB*, 132 S. Ct. at 2652 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

130. *Id.* at 2583 (majority opinion).

131. *Id.* In contrast, the dissent gives significance to the fact that the legislation calls the extraction a penalty, not a tax: “We have never held that *any* exaction imposed for violation of the law is an exercise of Congress’ Taxing Power—even when the statute *calls* it a tax, much less when (as here) the statute repeatedly calls it a penalty.” *Id.* at 2651 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

132. *Id.* at 2583 (majority opinion). Note that the Amicus response to this was to argue that Congress does in fact effectively incorporate the mandate as a tax, *see id.* at 2583–84, but Roberts rebutted this argument. *Id.* at 2584.

133. *Id.* at 2583–84.

apply simply by using a particular label—that would allow it to effectively define its own power. But this argument distracts from the real problem: Roberts concluded, in contrast, that a label *does* determine the application of an *act*, and since Congress did not call this a tax, that legislative label determined the question.¹³⁴ But that logic still constitutes a syllogism when applied to a legislative label.

Roberts supported his conclusion with textual analysis, reasoning that because Congress labeled the fee for failing to satisfy the mandate a “penalty” but used the term “tax” in other legislation, statutory canons tell us the two words must have different meanings.¹³⁵ If his interpretation is correct, however, that means that Congress intended the Anti-Injunction Act to prevent litigation over anything not *labeled* a tax, rather than to prevent litigation over anything that actually *is* a tax. But this argument is contrary to Roberts’s own characterization of the purpose of the legislation. According to Roberts, the purpose of the statute was to “protect[] the Government’s ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes.”¹³⁶ Surely Congress did not intend, in writing the Anti-Injunction Act, to allow litigation obstructing collection of revenue through mechanisms simply not labeled taxes; rather it intended to protect its actual revenue stream.

Thus, Roberts replaced the Court-appointed amicus’s syllogism with one of his own: since whether Congress defines something as a tax cannot determine its own constitutional power, the Court need not be bound by whether Congress labels something a tax. But this argument was just as weak as the one he rejected: just because Congress’s labeling something as a tax could theoretically determine whether something is a tax in the legislative arena, in contrast to the constitutional context, that does not mean it has in fact done so in this case. Answering that question requires a more detailed inquiry than Roberts undertook.

2. Selective Use of Canons

Another problem with Roberts’s analysis was his selective use of statutory interpretation canons. Those canons, he emphasized, tell us that two different words must have different meanings.¹³⁷ As such, the use of the term “penalty” elsewhere in the legislation suggested that the “fee” is not a penalty.¹³⁸ But, although Roberts incanted this canon as though it is determinative, in fact, it is only supposed to be the first step of an inquiry.

134. *Id.*

135. *Id.* at 2582–83.

136. *Id.* at 2582.

137. *Id.* at 2583.

138. *Id.*

Had he undertaken those subsequent analyses, they would have led to the contrary conclusion.

Although we rely on statutory canons of difference in language to suggest difference in meaning, statutory canons are, at most, a presumption, and sometimes essentially amount to a coin flip.¹³⁹ In fact, the Congressional Research Service stated in its 2008 report for Congress that when analyzing a statute's text, "the Court is guided by the basic principle that a statute should be read as a harmonious whole, with its separate parts being interpreted within their broader statutory context in a manner that furthers statutory purpose."¹⁴⁰ As such, any canons must give way "if context reveals an evident contrary meaning."¹⁴¹

Given that the Roberts opinion subsequently delved into the substantive question of whether to characterize the fee as a tax, and found that it was a tax, the statutory language difference that Roberts relied on should have fallen by the wayside to this substantive analysis. As discussed, Roberts concluded the fee was a tax for not buying insurance rather than a command (and penalty) for not doing so because of the following: the fee was capped, and thus was not so high that there was effectively no choice but to buy health insurance;¹⁴² the fee was not limited to willful violations, and thus did not turn on the intent of the lawbreaker;¹⁴³ the payment was to be collected solely by the IRS through normal means of taxation, raising an expected \$4 billion of revenue;¹⁴⁴ and the law does not make the conduct unlawful per se, or subject to any other penalty than taxation.¹⁴⁵ But these same factors go into both analyses—whether something is a tax for the purposes of the Anti-Injunction Act and the Tax Power.¹⁴⁶ As such, the conclusion for both questions should be the same, not because of a label but because the substantive analyses are the same.

Once again, comparing the substance of Roberts's doctrinal arguments confirms the impression that his analysis is an artifice for achieving his broader strategic goal. Or, as the dissent so flamboyantly put it, concluding that the mandate fee "is *not* a tax under the Anti-Injunction Act . . . [but] *is*

139. *Muscarello v. United States*, 524 U.S. 125, 138 (1998) (stating that the existence of statutory ambiguity is not enough to warrant the application of the rule of lenity, and it only applies where the court can make "no more than a guess as to what Congress intended" or where there is a "grievous ambiguity").

140. YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (2008).

141. *Id.*

142. *NFIB*, 132 S. Ct. at 2595–96 (majority opinion).

143. *Id.* at 2596.

144. *Id.* at 2594, 96.

145. *Id.* at 2597.

146. Compare *id.* at 2582–84, with *id.* at 2594–600.

a tax under the Constitution . . . carries verbal wizardry too far, deep into the forbidden land of the sophists.”¹⁴⁷

So not only did Roberts decline the opportunity to avoid upholding the mandate, as the dissenting Justices did, he also rejected the option to avoid the enormously controversial case altogether. Avoidance is more in line with the judicial restraint which Roberts claims to champion.¹⁴⁸ But selective and strategic use of avoidance canons is well established,¹⁴⁹ so Roberts is not unique in adopting this strategy. In fact, no Justice on the Court advocated dismissing the case, with good reason.

First, if the Court had found that the Anti-Injunction Act applied, it would have had to order that all lower courts vacate their rulings and leave the question undecided until 2014 when the relevant provisions of the act come into force¹⁵⁰ and thus could be challenged through injunction. Since Roberts’s ruling in *NFIB* contradicted his preferences, as established above, entirely avoiding the issue may have appealed to him, especially given the enormous criticism he faced from his own ideological brethren following the decision.¹⁵¹ But once the Court decided to take the case, it would have been anticlimactic to the point of judicial embarrassment for the Court to then decide not to decide. Three days of hearings,¹⁵² countless pages of newsprint (or the digital equivalent), and enormous anticipation by both political parties, only to have the Court say the issue was effectively not ripe? Unsurprisingly, this outcome was not attractive to Roberts, suggesting that part of his motivation for not dismissing the case as improvidently granted was concern for the credibility of the Court. Part IV develops this motivating factor in greater detail.

Second, Roberts would lose the opportunity to air his views and develop the law in the direction he favored, whittling back congressional power. The next Part shows how Roberts created these doctrinal benefits—

147. *Id.* at 2656 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

148. See *Text of John Roberts’ Opening Statement*, USA TODAY (Sept. 12, 2005, 4:31 PM), http://www.usatoday.com/news/washington/2005-09-12-roberts-fulltext_x.htm (“Judges have to have the humility to recognize that they operate within a system of precedent.”).

149. See, e.g., Michael E. Solimine & Rafael Gely, *The Supreme Court and the DIG: An Empirical and Institutional Analysis*, 2005 WIS. L. REV. 1421 (2005) (showing that the decision whether to dismiss a case as improvidently granted is strategically exercised).

150. *NFIB*, 132 S. Ct. at 2582 (majority opinion).

151. See, e.g., Justin Berrier, *Right-Wing Media Vilify Roberts, Ignoring His Very Conservative Record as Chief Justice*, MEDIA MATTERS FOR AM. (June 28, 2012, 2:56 PM), <http://mediamatters.org/research/2012/06/28/right-wing-media-vilify-roberts-ignoring-his-ve/184599> (summarizing right-wing attacks on Roberts following the decision).

152. *Supreme Court Determining the Constitutionality of Health Care Act*, C-SPAN (Mar. 29, 2012), <http://www.c-span.org/Events/Supreme-Court-Determining-the-Constitutionality-of-Health-Care-Act/10737429098/>.

narrowing the Commerce Clause, the Necessary and Proper Clause, and the Spending Power.

III. REAPING THE BENEFITS—DOCTRINAL REVOLUTIONS

In embarrassing gaffes on the morning of June 28, 2012 when the decision came down, both Fox News and CNN reported that Court had struck down the individual mandate.¹⁵³ As journalistically irresponsible as this was, the reporters' confusion was understandable because Roberts's opinion began with a preamble that reads like the beginning of a treatise on limiting federal power.

After a preliminary paragraph, Roberts began: "In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder."¹⁵⁴ He then embarked on a quick jaunt through all of the phrases that signal to those familiar with constitutional law (and narrative foreboding) that a piece of legislation was shortly to be struck down. First, he provided a paean to the enumerated nature of congressional powers, which, he suggested, even more than the Bill of Rights and hand-in-hand with the Tenth Amendment, restrains the possibility of legislative tyranny.¹⁵⁵ He then embraced *New York v. United States*,¹⁵⁶ the modern decision to most forcefully revive restrictions of the Tenth Amendment after their dismissal as a "but a truism" after the switch of 1937.¹⁵⁷ He approvingly quoted its language about "diffusion of sovereign power"¹⁵⁸—language that is contemporary jurisprudential code for dual sovereignty between the federal government and the states.¹⁵⁹ Roberts then made approving reference to the states' rights concept of subsidiarity—that those closest to the people, the lowest level of government, should exercise as much power as possible.¹⁶⁰ Finally, Roberts concluded that all congressional powers must be read narrowly so as not to confer a general power to legislate.¹⁶¹ Thus, the beginning of Roberts's opinion is saturated

153. Katherine Fung & Jack Mirkinson, *Supreme Court Health Care Ruling: CNN, Fox News Wrong on Individual Mandate*, HUFFINGTON POST (June 28, 2012, 3:52 PM), http://www.huffingtonpost.com/2012/06/28/cnn-supreme-court-health-care-individual-mandate_n_1633950.html.

154. *NFIB*, 132 S. Ct. at 2577 (majority opinion).

155. *Id.* at 2577–78.

156. 505 U.S. 144 (1992).

157. *United States v. Darby*, 312 U.S. 100, 123–24 (1941).

158. *NFIB*, 132 S. Ct. at 2578 (majority opinion).

159. This concept is arguably directly at odds with two pillars of constitutional law, the federalist cases *McCulloch v. Maryland*, 17 U.S. 316 (1819), and *Gibbons v. Ogden*, 22 U.S. 1 (1824). *See infra* p. 78.

160. *NFIB*, 132 S. Ct. at 2578 (majority opinion).

161. *Id.* at 2579–80.

with the sort of states' rights language that generally precedes a conservative opinion against federal legislative exercise of power.

In this, Roberts may have learned from that strategic titan, Marshall; yet it was not *Marbury* that Roberts emulated, as many have suggested,¹⁶² but rather *Gibbons v. Ogden*.¹⁶³ In invalidating a state law granting a monopoly over steam boating between states, Marshall provided a broad definition of commerce as covering all commercial intercourse,¹⁶⁴ refused to exclude purely internal state matters,¹⁶⁵ narrowed the role of the Tenth Amendment,¹⁶⁶ and provided the beginnings of the Dormant Commerce Clause analysis.¹⁶⁷ More than any of these enormously significant doctrinal rulings, however, the power of the case comes from Marshall's opinion, which amounts to an essay on federalism. Marshall's manifesto provided the rhetorical grounds for approaching federalism questions more generally from the premise that federation not only created the federal government, but changed the fundamental character of the states as well.¹⁶⁸ Roberts's opinion in *NFIB v. Sebelius* provided the mirror image of Marshall's federalism treatise, laying out a vision of states' rights as constraining congressional power. The federalist theory preliminaries set the rhetorical platform for the constraints on federal government that Roberts endeavored to achieve under the Commerce Clause.

A. *Cutting Back the Commerce Clause*

1. Craft New Law—Activity Versus Inactivity in the Commerce Clause

Roberts recognized that the power of commerce is broad under the Constitution,¹⁶⁹ but nonetheless maintained that the individual mandate

162. See, e.g., Daniel Epps, *In a Health Care Ruling, Roberts Steals a Move from John Marshall's Playbook*, ATLANTIC (June 28, 2012, 12:47 PM), <http://www.theatlantic.com/national/archive/2012/06/in-health-care-ruling-roberts-steals-a-move-from-john-marshalls-playbook/259121/>.

163. 22 U.S. 1 (1824).

164. *Id.* at 193 (“[T]hese words comprehend every species of commercial intercourse between the United States and foreign nations.”).

165. *Id.* at 209–10.

166. *Id.* at 197 (describing the Commerce Clause as “plenary as to [its] objects”). As such, if Congress has the authority to act, it is as if there were no state governments, and so no significant role of the Tenth Amendment.

167. *Id.* at 189 (proposing that whatever Congress can regulate is immune from state regulation and suggesting that it was not even necessary to have the federal legislation in this case for the state action to be unlawful).

168. *Id.* at 187 (stating that the “enumeration of powers expressly granted by the people to their government” resulted in federation and the states’ whole character changed).

169. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2585 (2012) (opinion of Roberts, C.J.).

went beyond that broad power because it regulated inactivity, rather than activity.¹⁷⁰ This distinction between activity and inactivity is the major doctrinal shift that Roberts develops under the Commerce Clause.¹⁷¹ To constitute a significant doctrinal payoff, this distinction needs to be both important and likely to be adopted. The following section shows how Roberts carefully maneuvered to prevent his Commerce Clause analysis from being dismissible as dicta; this Section shows why the distinction is important, providing a powerful means of striking down future congressional legislation.

The Commerce Clause, Roberts argued, “presupposes the existence of commercial activity to be regulated.”¹⁷² As such, it cannot be used to “compel individuals . . . to purchase an unwanted product,”¹⁷³ as doing so regulates individuals precisely because they are *not* acting.¹⁷⁴ The individual mandate is necessary to the ACA because the legislation also prevents discrimination against people with pre-existing conditions; without the mandate, healthy people would not obtain health insurance until they became unhealthy, bankrupting the system.¹⁷⁵ Thus the entire point of the individual mandate, according to Roberts, is to target those who as a class are least likely to engage in the activity.¹⁷⁶

On the surface, the distinction between activity and inactivity may seem fairly trivial in terms of its likely impact beyond the facts of this case: Congress generally regulates directly that activity which it is interested in controlling, be it selling marijuana,¹⁷⁷ wheat,¹⁷⁸ or lottery tickets;¹⁷⁹ bringing guns near schools;¹⁸⁰ transporting women or girls across state lines for the purpose of sexual exploitation;¹⁸¹ or committing acts of violence

170. *Id.* at 2587.

171. *Id.* at 2618 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“The Chief Justice’s novel constraint on Congress’ commerce power gains no force from our precedent and for that reason alone warrants disapprobation.”).

172. *Id.* at 2586 (opinion of Roberts, C.J.).

173. *Id.*

174. *Id.* at 2587.

175. Technically, this is a problem of adverse selection. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 110 (2007).

176. *NFIB*, 132 S. Ct. at 2590 (opinion of Roberts, C.J.).

177. Controlled Substances Act, 21 U.S.C. § 801 (1970), *upheld in* *Gonzales v. Raich*, 545 U.S. 1 (2005).

178. Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, 52 Stat. 31 (codified as 7 U.S.C. § 1281 (1938)), *upheld in* *Wickard v. Filburn*, 317 U.S. 111 (1942).

179. Federal Anti-Lottery Act, 28 Stat. 963 (1895), *upheld in* *Champion v. Ames*, 188 U.S. 321 (1903).

180. Gun-Free School Zones Act, 18 U.S.C. § 922(q) (1994), *struck down in* *United States v. Lopez*, 514 U.S. 549 (1995).

181. Mann Act, 38 Stat. 825 (1910) (codified as 18 U.S.C. §§ 2421–24), *upheld in* *Cleveland v. United States*, 329 U.S. 14 (1946).

against women.¹⁸² But as the contrast between Roberts's and Ginsburg's analyses in this case makes clear, whether something is activity or inactivity is a highly amorphous concept.

Ginsburg noted that all people will consume healthcare products and services at some point in their lives—more than 60% of those without insurance visit the hospital or doctor's office within each year, 90% within five years.¹⁸³ As such, she maintained, most of those who have not sought health insurance nonetheless obtain healthcare, and thus participate in the relevant commercial activity.¹⁸⁴ The point is not which of these two Justices is correct, but rather that the distinction between activity and inactivity is far from clear in application. It thus provides a new means of judicial discretion in assessing the constitutionality of legislation. This is true both looking backward at prior precedent and looking forward, contemplating potential regulation Congress may wish to pass in the future.

It would vastly expand congressional power, Roberts contended, to allow Congress to regulate inactivity along with activity.¹⁸⁵ To do so would go further than *Wickard v. Filburn*,¹⁸⁶ arguably the outer limit of the Commerce Clause,¹⁸⁷ because in that case, farmer Filburn was engaged in producing wheat, and thus was involved in commercial activity.¹⁸⁸ But Ginsburg characterized *Wickard* differently: there the government forced farmers to enter the market rather than grow their own wheat because of the *possible* future flow of local wheat grown for personal consumption into the market.¹⁸⁹ Similarly, the plaintiff in *Gonzalez v. Raich*¹⁹⁰ was ordered to cease cultivating marijuana “because of a prophesied future transaction,” the eventual sale of marijuana in the interstate market.¹⁹¹ The only difference in the current case, Ginsburg maintained, is that future healthcare consumption is far more certain to occur eventually.¹⁹²

182. Violence Against Women Act, 42 U.S.C. § 13981 (1994), *struck down in* United States v. Morrison, 529 U.S. 598 (2000).

183. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2618 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

184. *Id.* at 2611 (opinion of Roberts, C.J.). Part of this disagreement also stems from divergent definitions of the relevant market—healthcare versus health insurance. *Infra* Part III.A.3.

185. *Id.* at 2587.

186. 317 U.S. 111 (1942).

187. For a critique of this claim, see *infra* Part III.A.4.

188. *NFIB*, 132 S. Ct. at 2588 (opinion of Roberts, C.J.).

189. *Id.* at 2619 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

190. 545 U.S. 1 (2005).

191. *NFIB*, 132 S. Ct. at 2619 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

192. *Id.*

This disagreement between the Justices illustrates two important points. First, it shows that it is quite disputable whether the distinction between activity and inactivity exists in the Court's precedents as Roberts claimed. Ginsburg argued that the distinction is entirely novel.¹⁹³ To attempt to show that the concept is well established, Roberts quoted multiple cases that use the term "activity,"¹⁹⁴ from *NLRB v. Jones & Laughlin Steel Corp.*¹⁹⁵ to *United States v. Lopez*.¹⁹⁶ However, not one of these quotes actually discusses the in/activity distinction; the cases simply refer in passing to "activities being regulated."¹⁹⁷ Roberts did nothing to show that any of the cases meant to make a distinction between allowed regulation of activity and disallowed regulation of inactivity. He only established that the term "activities" is often used as shorthand for "the topic being regulated." Thus, under the guise of prior precedent, Roberts actually invented a new criterion to apply to legislation passed under the Commerce Clause.

The second point that these divergent characterizations of *Wickard* and *Raich* illustrate is even more significant. It shows that it is possible to use the (arguably new) distinction between activity and inactivity to characterize the same legislative act in entirely contradictory terms. Because it is very hard to make this distinction meaningful in any way, the differentiation is simply a mechanism for subjective judicial choice.

Roberts actually acknowledged that, in terms of economics, there is no difference between activity and inactivity, and "both have measurable economic effects on commerce."¹⁹⁸ Nonetheless, he concluded that the power to regulate under the Commerce Clause does not include the power to compel inactivity, based on his understanding of the framers as "practical statesmen" who viewed the distinction as significant.¹⁹⁹ Although in many cases it may be justifiable to favor traditional distinctions over the logic of economics, it is particularly hard to justify this when analyzing what constitutes commerce. To make no effort to ensure that the inherently economic concept of commerce makes sense economically, and instead point to the utterly amorphous concept of what the framers as "practical statesmen" would favor, makes the in/activity distinction look like simply a

193. *Id.* ("[C]ontrary to the Chief Justice's contention, our precedent does indeed support '[t]he proposition that Congress may dictate the conduct of an individual today because of prophesied future activity.'" (second alteration in original) (quoting *id.* at 2590 (opinion of Roberts, C.J.))).

194. *Id.* at 2587 (opinion of Roberts, C.J.).

195. 301 U.S. 1 (1937).

196. 514 U.S. 549 (1995).

197. *NFIB*, 132 S. Ct. at 2586 (opinion of Roberts, C.J.).

198. *Id.* at 2589.

199. *Id.* ("The Framers gave Congress the power to *regulate* commerce, not to *compel* it . . . [and there] is no reason to depart from that understanding.").

device for distinguishing between favored and disfavored actions—which are indistinguishable in effect, differentiable only based on rhetoric.

The in/activity distinction, then, resembles levels of generality in constitutional interpretation, which are notoriously indeterminate and manipulable.²⁰⁰ Anything described sufficiently broadly can be covered by an open-textured constitutional clause and so exclude little.²⁰¹ Anything described sufficiently narrowly will be disconnected from previously established rights and thus will never be apparent from the broad protections of the Constitution.²⁰² For instance, are rights relating to contraception part of a broad right “to be free from unwarranted governmental intrusion into matters . . . fundamentally affecting a person,”²⁰³ or an even broader interest in “making certain kinds of important decisions” concerning “the most intimate of human activities and relationships”?²⁰⁴ Or is the question whether there is a “right of commercial vendors of contraceptives to peddle them to unmarried minors”?²⁰⁵

The choice in level of abstraction is easily manipulated to achieve the desired outcome,²⁰⁶ since the answer to the constitutional inquiry is typically apparent from the way the question is framed in the first place. The dispute between the justices over how specifically or generally to define purported fundamental rights, whether over contraception, sodomy,²⁰⁷ or many other topics,²⁰⁸ looks a lot like the dispute between Roberts and Ginsburg over whether a regulated action constitutes activity or inactivity. The exact same action—be it compulsion to purchase healthcare or wheat, or the prohibition against cultivating and selling marijuana—can

200. See Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1085 (1981).

201. LAWRENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 75 (1991).

202. *Id.*

203. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

204. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685–86 (1977).

205. *Id.* at 717, (Rehnquist, J., dissenting).

206. See JOHN HART ELY, DEMOCRACY AND DISTRUST 61 (1980).

207. *Bowers v. Hardwick*, 478 U.S. 186, 190–91 (1986), queried whether pre-existing rights bear “any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy,” and unsurprisingly concluded they did not. But *Lawrence v. Texas*, 539 U.S. 558, 562 (2003), framed the relevant interest as “an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” and found that it did.

208. One example is search and seizure law. See Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 666 (2011) (considering the difference in outcome stemming from an inquiry into the existence of a “reasonable expectation of privacy in hiding a murder weapon from the police in your car or in hiding a fugitive in your house,” versus “a reasonable expectation of privacy in having items in certain places in your car without them being subject to scrutiny and whether you have a right to privacy in your home”).

be characterized in entirely opposite terms, which just happen to coincide with the policy preferences of each justice.

The doctrinal maneuverability inherent in the in/activity distinction becomes even more stark when contemplating potential future legislative acts. Consider hypothetical legislation attempting to combat the financial crisis of 2008. Of all the dangers facing the international financial system at that time, the most potentially catastrophic was the lack of availability of money for borrowing.²⁰⁹ Essentially, the world's economic prospects appeared so precarious because, after prior reckless loans, financial lending institutions became extremely gun shy about lending money, even to seemingly more reliable sources, because of the potential domino effect of other institutional failures.²¹⁰ Legislation attempting to remedy this national and international crisis would seem to address the very definition of interstate commerce; however, under Roberts's in/activity distinction, it could be argued that *failure* of the market to provide money for lending is, by definition, inactivity, and thus not pre-existing commerce.

Roberts's central argument justifying the in/activity distinction was essentially a slippery-slope thesis. The most pressing health crises facing the nation, other than regulating its insurance mechanism, are surely the obesity epidemic and obesity-related illnesses.²¹¹ But just as the fact that healthcare makes up 15% of U.S. gross domestic product (which is considerably exacerbated by the fact that 16% of the population is uninsured)²¹² did not sway Roberts that its regulation came within the Commerce Clause, so, too, he argued that regulation attempting to combat obesity through diet would not constitute legitimate Commerce Clause legislation.²¹³ Essentially, Roberts accepted the "broccoli argument"—the contention that if the Court allowed the individual mandate, the government could then mandate that individuals eat broccoli.²¹⁴

209. Michael Lewis, *BOOMERANG: TRAVELS IN THE NEW THIRD WORLD* (2011); *Wall Street's Bad Dream*, *ECONOMIST*, Sept. 18, 2008, at 85, available at <http://www.economist.com/node/12273023>.

210. *Wall Street's Bad Dream*, *supra* note 209, at 85–86.

211. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2588 (2012) (opinion of Roberts, C.J.) (citing social science evidence of the link between obesity and rising medical spending) ("The failure of that group [the obese] to have a healthy diet increases health care costs, to a greater extent than the failure of the uninsured to purchase insurance.").

212. U.S. DEP'T OF HEALTH & HUMAN SERVS., *OVERVIEW OF THE UNINSURED IN THE UNITED STATES: A SUMMARY OF THE 2011 CURRENT POPULATION SURVEY* (Sept. 2011), available at <http://aspe.hhs.gov/health/reports/2011/CPSHealthIns2011/ib.shtml> (last visited Sept. 1, 2013).

213. *NFIB*, 132 S. Ct. at 2589 (opinion of Roberts, C.J.) (stating that "[p]eople, for reasons of their own, often fail to do things that would be good for them or good for society," but this does not authorize Congress to compel them to so act).

214. James Stewart, *How Broccoli Landed on Supreme Court Menu*, *N.Y. TIMES*, June 14, 2012, at A1, available at <http://www.nytimes.com/2012/06/14/business/how-broccoli->

In accepting the broccoli-slippery-slope argument, Roberts did not actually explain why regulating a healthy diet is not commerce regulation; rather, he concluded that holding that it was would allow all sorts of similar regulation of individual choices from “cradle to grave,”²¹⁵ which would be contrary to a government of limited powers,²¹⁶ the intent of the framers,²¹⁷ and the relationship the Constitution authorizes between citizens and the federal government.²¹⁸ One response, then, to Roberts’s argument is simply that these amorphous concepts are protected not only by a carefully patrolled definition of commerce, but also by the many other notions of liberty and freedom contained in the Constitution, such as the Fourteenth Amendment.²¹⁹ As such, the slippery slope concern is misleading because comprehensive Orwellian government control over the minutiae of everyday life would be unconstitutional even without the in/activity distinction Roberts attempted to justify. There is no need to insert an in/activity distinction in the definition of commerce, at least on these grounds, because the Constitution provides many other protections against such terrors.

Even more interesting than rebutting the jurisprudential need for such a distinction in relation to the Commerce Clause is considering the ramifications of accepting his argument. Roberts said that there could be many more applications of his in/activity distinction. He pointed to the “markets for food, clothing, transportation, shelter, or energy” as potential unconstitutional attempts to use the Commerce Clause.²²⁰ So, if the United States lacked a pre-existing interstate railway system, Congress would be powerless to create one under the Commerce Clause because it would be regulating inactivity? Seemingly yes. Roberts argued that the fact that the Constitution grants Congress the power to “coin Money,” “establish Post Offices,” and “raise and support Armies” presupposes that it cannot do these things under any other power, due to the presumption against

became-a-symbol-in-the-health-care-debate.html.

215. *NFIB*, 132 S. Ct. at 2591 (opinion of Roberts, C.J.) (suggesting that legislation pertaining to clothing, transportation, shelter, energy, and other topics is analogous to regulating a healthy diet and the individual mandate).

216. *Id.* at 2589.

217. *Id.* (“That is not the country the Framers of our Constitution envisioned.”).

218. *Id.* (“Accepting the Government’s theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.”).

219. *Id.* at 2624 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause.”).

220. *Id.* at 2590–91 (opinion of Roberts, C.J.).

redundancy.²²¹ But he did not limit this argument to those clauses that specify the power to create, as no such power exists for healthcare. Because healthcare looks like transportation, creation of an interstate railway could arguably be regulation of inactivity, despite the fact that regulation of interstate mechanisms of travel has long been embraced as central to the Commerce Clause.²²² Roberts gave no indication that his in/activity distinction would be subordinate to the centrality of transportation to commerce—in fact, he specifically included transportation, with no caveats, in his list of potential markets that people participate in daily, but that Congress does not have license to regulate.²²³

Consequently, Ginsburg was wrong to emphasize that the application in *NFIB v. Sebelius* is different to other problems, and thus does not raise a slippery slope danger, rebutting Roberts's analogy to the car market, because healthcare is a national problem and entering the healthcare market is inevitable.²²⁴ Instead, it is the *similarity* between healthcare and other problems Congress may wish to address that makes Roberts's new distinction revolutionary. The fact that his distinction can be applied in the same way in many future cases gives it the potential to outlaw numerous possible legislative enactments.

As such, developing the in/activity distinction in Commerce Clause analysis is a very large doctrinal payoff for the conservative Roberts, offering a mechanism for striking down many potential future legislative acts that members of the Court might disfavor. In order to cement that strategic benefit, however, there were three difficulties for Roberts, each of which required a different strategic ploy to overcome. First, he had to ensure that his entire Commerce Clause analysis was not dismissed as dicta; second, he had to reinterpret the general term "commerce" as the more specific term "market"; and third, he had to redefine the outer limits of prior precedent. The following three sections deal with each of these strategic actions in turn.

221. *Id.* at 2577. For more on this textual implication, see the following section on selective textualism.

222. *United States v. Lopez*, 514 U.S. 549, 558 (1995) ("Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.").

223. *NFIB*, 132 S. Ct. at 2590–91 (opinion of Roberts, C.J.) ("Everyone will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize Congress to direct them to purchase particular products in those or other markets today.").

224. *Id.* at 2619 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (referring to *id.* at 2589–90 (opinion of Roberts, C.J.)).

2. Redefining “Dicta”—A New Saving Construction Doctrine

The first substantive topic Roberts addressed in his opinion, after his initial federalism-themed introductory remarks and discussion of the jurisdictional question,²²⁵ was the Commerce Clause,²²⁶ suggesting the importance of this doctrinal payoff to the Chief Justice. However, because he upheld the individual mandate under the Taxing and Spending Powers, his Commerce Clause analysis would ordinarily be considered dicta, as Ginsburg strongly implied it was.²²⁷ As such, future courts would easily cast it aside. It was vital for Roberts to overcome this strategic difficulty.

Roberts’s extensive Commerce Clause analysis²²⁸ not only constitutes dicta, its inclusion is contrary to norms of judicial minimalism, whereby the Court should only decide the minimum necessary.²²⁹ Furthermore, Roberts’s analysis offends the judicial canon of avoiding rulings on constitutionality wherever possible.²³⁰ Because the ACA was upheld under the Tax Power, it is not only dicta to surmise why it would not also be justified under the Commerce Clause, it would ordinarily be considered inappropriate to do so.

Roberts had an answer to the dicta accusation (if not the other two accusations), and it is there that we see what is arguably the most creative part of his opinion. In two paragraphs justifying why his analysis should not be considered dicta,²³¹ Roberts developed an entirely new concept of constitutional analysis.

As discussed above in Part II.A.1, Roberts described his own tax analysis as borderline. One advantage of this was to read down the significance of his own finding, the outcome he disfavored. But Roberts crafted a new advantage out of this unusually modest characterization of his

225. See *infra* Part II.B.1.

226. *NFIB*, 132 S. Ct. at 2585 (opinion of Roberts, C.J.).

227. In saying “I see no reason to undertake a Commerce Clause analysis that is not outcome determinative,” Ginsburg was essentially accusing Roberts of reaching beyond what was necessary to decide in the case, implying that he did so in order to write new Commerce Clause jurisprudence. *Id.* at 2629 n.12 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

228. *Id.* at 2585–91 (opinion of Roberts, C.J.).

229. E.J. Yera, Blakely, Apprendi, Booker, Begay, and Santos: *Judicial Minimalism and the U.S. Supreme Court’s Ill-Conceived Attempts at a Rational Jurisprudence*, 22 ST. THOMAS L. REV. 87, 93 (2009).

230. *United States v. Witkovich*, 353 U.S. 194 (1957); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (setting out “a series of rules under which [the Court] has avoided passing upon a large part of all the constitutional questions pressed upon it for decision”); *The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 HARV. L. REV. 1578, 1585 (1998).

231. *NFIB*, 132 S. Ct. at 2600–01 (opinion of Roberts, C.J.).

own reasoning: he argued that it made his Commerce Clause analysis central, rather than marginal.²³²

Roberts characterized the statute as “read[ing] more naturally as a command to buy insurance than as a tax”²³³ Consequently, he said, he would uphold it under the Commerce Power if at all possible, and he only turned to the Taxing Power question because it was not possible to justify it under the Commerce Clause.²³⁴ So far, that is reasonable, but he then went on to say: “Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction.”²³⁵ Roberts argued that since he only turned to the impliedly unnatural question of whether the mandate could be justified as a tax because the Court has a duty to attempt to find any legislation constitutional,²³⁶ the fact that he analyzed the Commerce Clause initially was not purely intellectual history, but rendered his analysis binding on future courts.

Giving constitutional significance to whether the legislative action “reads more naturally” as a command or a tax²³⁷—suggesting that it continues to be pertinent, either by expanding the impact of Commerce Clause analysis or limiting the impact of the tax analysis—is quite extraordinary. Either a regulation fits within a power or it does not—and thus it is either constitutional or it is not. Whether an analysis is strained is only relevant in determining whether that prevents it from crossing the line of constitutionality; once it crosses that line, it does not matter how close to that line the provision came.²³⁸

In fact, Roberts rebutted his own saving construction argument elsewhere in his opinion. When responding to criticisms from the dissent, Roberts acknowledged that “[t]he question is not whether that is the most natural interpretation of the mandate, but only whether it is a ‘fairly possible’ one.”²³⁹ Because he concluded that ample precedent established

232. *Id.*

233. *Id.* at 2600.

234. *Id.* at 2600–01.

235. *Id.* at 2601.

236. *Id.* at 2600.

237. *Id.*

238. Otherwise, on Roberts’s logic, he should also have written on whether the legislation would have been found unconstitutional under Section Five of the Fourteenth Amendment. See Deborah Pearlstein, *Early Thoughts on the Health Care Case*, BALKINIZATION (June 28, 2012), <http://balkin.blogspot.com/2012/06/early-thoughts-on-health-care-case.html>. Ginsburg’s critique is to instead focus on what level of scrutiny should be used, arguing that rational basis scrutiny should apply. *NFIB*, 132 S. Ct. at 2616 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“[W]e owe a large measure of respect to Congress when it frames and enacts economic and social legislation.”).

239. *NFIB*, 132 S. Ct. at 2594 (opinion of Roberts, C.J.) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). Furthermore, he pointed out that deference must be given to federal

Congress's power to impose the fee under the Taxing Power, and that § 5000A need not be read to do more than impose a tax, he then insisted "[t]hat [was] sufficient to sustain it."²⁴⁰ These quotes make clear that when it was in Roberts's interests to apply deference to Congress and the norms of judicial minimalism in upholding legislation, he jettisoned the need for further inquiry into the solidity of the grounds for upholding the Act. It was only when he wanted to promote his own Commerce Clause dicta that this novel saving construction notion reared its head.

Furthermore, Roberts justified his attempt to convert the lead of dicta into the gold of binding ratio on the basis of judicial minimalism, which turns that concept on its head. The only significance to whether legislative action "reads more naturally" under one given head of power than another is for justices to know where to start their analyses. This is important so that they decide as little as possible. If one starts with the most natural reading of a legislative provision, a justice is most likely to find that the particular head of power justifies it, and the analysis can stop there. This satisfies both the general norm of judicial minimalism and the expectation that the Court should do whatever possible to uphold legislation.

But if the legislation is not found constitutional under the most natural reading of the relevant power, the intellectual history of how a justice has considered it does not render any conclusion reached along the way suddenly binding just because she turned her mind to it first. Judicial minimalism holds that the Court should determine as little as possible in its ruling; this means that even if a justice has concluded that something is unconstitutional for some reason under a different head of power, he or she should not address that question.²⁴¹ Roberts inverted this logic, suggesting that judicial minimalism made his ancillary conclusions central. Roberts's saving construction, then, is not only completely novel, but contains quite perverse logic. To borrow Roberts's phraseology, it is therefore "most natural" to read his interpretation as strategic manipulation.

The question then becomes: Is it a good tactic? Put another way, if it is apparent to everyone that Roberts's saving construction analysis is mere subterfuge, does it still have any power? The answer is yes. As the previous Section showed, one of Roberts's key doctrinal advantages from making his sacrifice was setting out vast swathes of new Commerce Clause jurisprudence. Were that new doctrine all dicta, it would be of little benefit

statutes, and that there is considerable precedent to the effect that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Id.* (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

240. *Id.* at 2598 (majority opinion).

241. *Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("When the validity of [a congressional act] is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

to him. As such, his saving construction analysis was the only way to gain that advantage.

Roberts's analysis may not do much to persuade justices antagonistic to the substance of the Commerce Clause analysis,²⁴² but even if the argument is weak, it is something that subsequent opinions can point to if the justices are so inclined. That advantage is not dependent on changes in personnel on the Court. Even if the Court remains split, with Roberts unable to garner a majority in future cases, as here, the *Marks* doctrine will apply.²⁴³ Where a subsequent Court has to determine what a case stands for when there is no majority—only multiple plurality or concurring opinions to choose from—*Marks* instructs that the later Court adopt as precedent the opinion in the earlier case that was decided on the narrowest grounds.²⁴⁴ But this begs the question: who gets to decide what constitutes the narrowest ruling in the earlier case? As I argue with Kontorovich, “[W]hat constitutes the narrowest opinion is something determined by subsequent courts, courts that are most probably going to be dominated by the median justice.”²⁴⁵ As such, Roberts, as the swing Justice on this question, is quite likely to be the swing Justice in future cases of the same natural Court; he also seems likely to find his own reasoning persuasive, even if others do not. If instead Justice Kennedy is the median in future commerce decisions, Roberts's reasoning may still be useful—although Kennedy refused to join Roberts's opinion in the instant case, he did agree with his conclusions on commerce,²⁴⁶ and so in the future he may well soften his adamant opposition to Roberts's argumentation in this case.

242. This is illustrated by the fact that the liberal Justices have continued to reject restrictions on the Commerce Clause, whether writing in dissent, majority, or concurrence. *NFIB*, 132 S. Ct. at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“Beyond dispute, Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce.”); *Gonzales v. Raich*, 545 U.S. 1, 50 (2005); *United States v. Morrison*, 529 U.S. 598, 628 (2000) (Souter, J., dissenting); *Id.* at 655 (Breyer, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 603 (1995) (Souter, J., dissenting); *Id.* at 615 (Breyer, J., dissenting).

243. *Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds’” (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.))).

244. *Id.*

245. Tonja Jacobi & Eugene Kontorovich, *Why Judges Always Vote* (Northwestern Pub. Law Research, Paper No. 13-19, 2013), available at <http://ssrn.com/abstract=2272103>.

246. *NFIB*, 132 S. Ct. at 2643 (Scalia, Kennedy, Thomas, and Alito, J.J., dissenting).

3. Selective Textualism—Defining a “Market” Instead of “Commerce”

The fact that the Framers as “practical statesmen” saw a distinction between activity and inactivity was not the only justification Roberts gave for making that distinction, despite the fact that it lacks any economic meaning. The other core defense he provided was on textual grounds. Without such a distinction, Roberts argued, many other constitutional provisions would be superfluous.²⁴⁷ For instance, the congressional powers to coin money, to raise armies, and to provide for a Navy²⁴⁸ are all specifications of the ability of Congress to bring a subject into existence. Were it possible to bring activities into existence merely by granting the power to regulate, the creation elements of those provisions would be unnecessary. This is because each section also allows for the “regulation” of their respective topics: Congress may regulate the value of money, support armies, and maintain a Navy.²⁴⁹ Roberts concluded that the act of specifying the ability to bring certain subjects into existence implies the inability to bring commerce into existence under the Commerce Clause, absent similar specification in that clause.²⁵⁰ Roberts was, however, selective in his reliance on textualism, so such arguments should be interpreted as strategy, rather than as methodological purity.

Even accepting the in/activity distinction, it is still possible to justify the individual mandate as empowered by the Commerce Clause. The distinction does not apply adversely here, the argument goes, because the government is not regulating inactivity (the failure to purchase health insurance), but rather it is regulating activity in the form of the provision of healthcare.²⁵¹ Those who are uninsured are not outside the regulated activity but are already engaged in commerce because they are receiving healthcare; they are simply not paying for it themselves because they are not involved in the insurance market.²⁵² Roberts rejected this argument, however, because he defined the relevant market not as healthcare generally, in which the uninsured are involved, but rather as the insurance market.²⁵³ But there

247. *Id.* at 2586 (opinion of Roberts, C.J.) (“If the power to ‘regulate’ something included the power to create it, many of the provisions in the Constitution would be superfluous.”).

248. U.S. CONST. art. I, § 8, cls. 5, 12, 13.

249. *NFIB*, 132 S. Ct. at 2586 (opinion of Roberts, C.J.).

250. *Id.* (“The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated.”).

251. *See id.* at 2620 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“Health insurance is a means of paying for this [health] care, nothing more.”).

252. *Id.* at 2589–90 (opinion of Roberts, C.J.).

253. *See id.* at 2590 (“The Government repeats the phrase ‘active in the market for health care’ throughout its brief . . . but that concept has no constitutional significance.”).

is no mention of “markets” in the text of the Constitution; the only textual reference is to “commerce.”²⁵⁴

Ignoring the text in this way enabled Roberts to reject the fact that everyone will eventually be involved in healthcare as providing an adequate temporal hook. He analogized to the car market: the fact that someone purchased a car two years ago or will do so in the future does not mean that he is in the car market.²⁵⁵ But this analysis only applies if the healthcare market and the health insurance market are viewed separately in assessing whether they constitute commerce. Roberts refused to consider them together, arguing, “No matter how ‘inherently integrated’ health insurance and health care consumption may be, they are not the same thing: They involve different transactions, entered into at different times, with different providers.”²⁵⁶

Given that the Constitution refers to commerce, Roberts was asking the wrong question. The question should be: Is there a substantial effect on commerce? Even with the addition of Roberts’s activity requirement, the question should be: Is there an activity being regulated that, when aggregated, without reference to any inactivity, has a substantial effect on commerce? Roberts acknowledged that the answer to that question may well be yes; when different markets are joined together, inactivity “can readily have a substantial effect on interstate commerce,”²⁵⁷ as Ginsburg concluded it does.²⁵⁸

As Ginsburg pointed out, “[I]t is Congress’ role, not the Court’s, to delineate the boundaries of the market the Legislature seeks to regulate.”²⁵⁹ But focusing on markets and subordinating the notion of commerce made it easier to find that the ACA regulates inactivity rather than activity. Once again, Roberts was playing with levels of generality, just as he did when characterizing inactivity versus activity. By narrowing the relevant “market,” it is much easier to conclude that no activity is being regulated within that limited conception, as compared to the broad notion of “commerce” that the Constitution actually provides for.

Putting his two central Commerce Clause arguments together, Roberts acknowledged that his activity-inactivity distinction makes no economic sense, and that the markets relevant to this topic, when combined, could substantially affect commerce.²⁶⁰ Regarding the former, he nonetheless

254. See U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. I, § 9.

255. *NFIB*, 132 S. Ct. at 2590 (opinion of Roberts, C.J.).

256. *Id.* at 2591.

257. *Id.* at 2589.

258. *Id.* at 2620 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“Establishing payment terms for goods in or affecting interstate commerce is quintessential economic regulation well within Congress’ domain.”).

259. *Id.* at 2619.

260. *Id.* at 2589 (opinion of Roberts, C.J.).

adopted the distinction, largely because of a technical textual implication; regarding the latter, he ignored the text to focus on an extra-textual, subordinate concept of the relevant market. Roberts, it seems, is willing to adopt a variety of tactics to achieve his strategic goal of narrowing the Commerce Clause.

4. Avoiding Precedents—Redefining the Outer Limits of Prior Cases

Roberts's *NFIB v. Sebelius* opinion described *Wickard v. Filburn*²⁶¹ as the case that constitutes “the most far-reaching example of Commerce Clause authority over intrastate activity.”²⁶² This is not a new characterization. It is a mantra that began in the Rehnquist era, and conservative Justices have asserted and reasserted it when defining restrictions on the commerce power.²⁶³ But it is a mischaracterization. Even though conservatives use this mischaracterization strategically, to narrow the Commerce Clause, liberals do not dispute it for their own strategic reasons, which are explained in this Section.

Wickard is certainly one of the most expansive Commerce Clause cases. In that case, the Court allowed Congress to prohibit a farmer from choosing how much of his own wheat to grow for his own consumption, because, in aggregate with other similarly situated individuals, consumption of homegrown wheat could have a substantial dampening effect on the interstate market for wheat.²⁶⁴ *Wickard*, then, stands for the proposition that the definition of commerce, for constitutional purposes, can be met by aggregating even non-commercial behavior if the activity is economic in nature and has a substantial effect on commerce.²⁶⁵ However, two other cases far more strenuously test the bounds of Commerce Clause jurisprudence in the post-*Lopez* era: *Heart of Atlanta Motel v. United States*²⁶⁶ and *Katzenbach v. McClung (Ollie's BBQ)*.²⁶⁷ Together these cases compose the doctrinal elephant in the room.

Heart of Atlanta Motel rejected a segregationist challenge to the Civil Rights Act and its application to hotel accommodation.²⁶⁸ The Court held that segregation in hotels impacted commerce because such discrimination discouraged African-Americans from interstate travel.²⁶⁹ This extended

261. 317 U.S. 111 (1942).

262. *NFIB*, 132 S. Ct. at 2588 (opinion of Roberts, C.J.) (quoting *United States v. Lopez*, 514 U.S. 549, 560 (1995)).

263. *Gonzales v. Raich*, 545 U.S. 1, 50 (2005) (quoting *Lopez*, 514 U.S. at 560).

264. *Wickard*, 317 U.S. at 127–28.

265. See *Lopez*, 514 U.S. at 559–60 (citing *Wickard*, 317 U.S. 111).

266. 379 U.S. 241 (1964).

267. 379 U.S. 294 (1964).

268. See *Heart of Atlanta Motel*, 379 U.S. at 261–62.

269. *Id.*

even to local incidents of interstate commerce, which Congress could regulate if “interstate commerce feels the pinch.”²⁷⁰ While a large motel near an interstate highway may affect interstate travel, *Ollie’s BBQ* went even further, upholding application of the Civil Rights Act to a local restaurant operating purely intrastate.²⁷¹ Although there was no evidence that Ollie’s BBQ served interstate customers—in fact, its trade was expected to decrease if it was desegregated²⁷²—the Court relied on the rational relationship test and held that it was reasonable for Congress to conclude that racial discrimination deters people from moving into an area, and so affects industry in a cumulative way.²⁷³

These cases posit a stark contrast to the temporal proximity that Roberts found lacking in *NFIB v. Sebelius*, because for some individuals the need for health care could arise years after being forced to buy health insurance.²⁷⁴ Dealing with this actuarial reality is vital to health insurance as an industry, given that the ACA prohibits the use of “[t]raditional insurance industry tools for managing risk—such as charging sick customers higher prices.”²⁷⁵ Consequently, offering health insurance is only viable if the costs of most people’s healthcare are incurred significantly later than their purchase of health insurance.²⁷⁶ Roberts’s reasoning, then, makes it impossible for a sufficient nexus between healthcare and health insurance to occur while the industry maintains viability. The point is not to reargue the activity-inactivity distinction, but to observe that Roberts’s construction of the nexus in *NFIB v. Sebelius* is considerably less generous than that adopted by the Court in the desegregation cases. *Heart of Atlanta Motel* and *Ollie’s BBQ*, not *Wickard*, present the most difficult hurdles with which Roberts must reconcile his conclusion. Nonetheless, Roberts refused to address these cases.

270. *Id.* at 258.

271. *Katzenbach*, 379 U.S. at 296. The restaurant did serve food made from meat primarily obtained from out of state, albeit purchased indirectly through an interstate intermediary. *Id.*

272. *Id.* at 299.

273. *Id.* at 300.

274. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2591 (2012) (opinion of Roberts, C.J.) (“The proximity and degree of connection between the mandate and the subsequent commercial activity is too lacking to justify an exception of the sort urged by the Government.”).

275. Christopher Weaver and Louise Radnofsky, *New Health-Care Law’s Success Rests on the Young: Will Young and Healthy Give Up Disposable Income to Pay for Insurance?*, WSJ.COM (July 25, 2013, 12:01 AM), <http://stream.wsj.com/story/latest-headlines/SS-2-63399/SS-2-286010/>.

276. Michelle Smith, *Obamacare’s Success Depends on Young Buyers*, MONEYNEWS (July 26, 2013, 8:08 AM), <http://www.moneynews.com/Economy/Obamacare-young-health-care-insurance/2013/07/26/id/517196> (“Young people are not expected to rack up a lot of medical bills. Therefore, if they readily purchase coverage, their premiums should offset the costs for older Americans and for sicker people.”).

Heart of Atlanta Motel and *Ollie's BBQ* arguably raise the question of whether anything at all exceeded the scope of the Commerce Power, a question not answered until *Lopez*²⁷⁷ and *Morrison*²⁷⁸ more than thirty years later. In those cases, Rehnquist, like Roberts after him, characterized *Wickard* as the outer limit of commerce jurisprudence.²⁷⁹ However, given that *Lopez* stands for the proposition that any effect on commerce must be substantial to satisfy the head of power,²⁸⁰ *Heart of Atlanta Motel* and *Ollie's BBQ* present a far bigger challenge than *Wickard*.

But neither the conservative nor the liberal Justices seem inclined to discuss how these desegregation cases stretch the notion of commerce under the Constitution. The conservatives do not want to acknowledge the breadth of *Heart of Atlanta Motel* and *Ollie's BBQ*, quite simply, because if they do so they would either have to limit the new constraints that *Lopez* created, or acknowledge that those constraints were inconsistent with prior precedent. The liberals do not want to point out the potential inconsistency between the *Lopez–Morrison* branch of Commerce Clause jurisprudence and the *Heart of Atlanta Motel–Ollie's BBQ* branch because they do not want to raise the specter of racial discrimination *not* being within Commerce Clause power.²⁸¹

Heart of Atlanta Motel and *Ollie's BBQ* were ultimately about allowing Congress to finish the job it neglected after Reconstruction. Rhetorically, then, it would be prohibitively costly for the conservative Justices to have had to admit that *Lopez* and *Morrison* were inconsistent not just with prior precedent, but with the cases upholding the constitutionality of the Civil Rights Act and its proscription of racial discrimination. Accordingly, it is in the strategic interests of both camps to pretend that *Wickard* provides the outer limits of Commerce Clause jurisprudence.

277. See *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (concluding that regulatory activity must pass a “substantially affects interstate commerce” test).

278. See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that the Commerce Clause may not be used to create a federal civil remedy against gender-motivated violence).

279. *Morrison*, 529 U.S. at 610; *Lopez*, 514 U.S. at 560.

280. *Lopez*, 514 U.S. at 559–60 (“Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.”) (citation omitted).

281. Consequently, despite writing a lengthy dissent overwhelmingly devoted to rebutting Roberts’s conservative doctrinal developments, Ginsburg did not rebut Roberts’s mischaracterization of the outer limits of prior Commerce Clause cases.

B. Inverting the Necessary and Proper Clause

1. Interchanging Powers with Restraints

Since *McCulloch v. Maryland*,²⁸² the Necessary and Proper Clause has been given broad range, incorporating anything that is “convenient” or “useful” within the notion of necessary.²⁸³ The mandate was seemingly on safe grounds on this front.²⁸⁴ As Ginsburg described, the mandate was not only convenient but in fact essential for one of the core goals of the legislation to work: preventing discrimination against those with prior conditions.²⁸⁵ As discussed, the entire insurance market would fail without the mandate; consequently, the mandate is clearly necessary.²⁸⁶ As the majority in *United States v. Comstock*,²⁸⁷ of which Roberts was a part, reaffirmed in 2010, the Necessary and Proper Clause allows Congress to use any “means that is rationally related to the implementation of a constitutionally enumerated power.”²⁸⁸ Therefore, as long as healthcare generally is within its ambit, Congress has choice over the mechanism used to regulate that topic if that mechanism does not violate any other provision of the Constitution.

Roberts acknowledged this broad definition,²⁸⁹ but differentiated “proper” as a separate requirement from “necessary” under the clause.²⁹⁰ Even those who support Roberts’s view²⁹¹ acknowledge that this approach is novel: the opinion was arguably “the first in Supreme Court history to find that a law which is ‘necessary’ is *not* proper.”²⁹² This is because the

282. 17 U.S. 316 (1819).

283. *Id.* at 413.

284. *See, e.g.*, Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 2 (2011), <http://yalelawjournal.org/2011/04/26/koppelman.html> (describing positions to the contrary as “silly”).

285. *See NFIB v. Sebelius*, 132 S. Ct. 2556, 2613 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

286. *Id.* at 2626.

287. 130 S. Ct. 1949 (2010).

288. *Id.* at 1956.

289. *NFIB*, 132 S. Ct. at 2591–92 (opinion of Roberts, C.J.).

290. *Id.* at 2592.

291. *See, e.g.*, Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267, 283 (2011), <http://yalelawjournal.org/2011/11/08/lawson&kopel.html> (arguing the mandate is not subordinate to Congress’s principal powers, and thus not within the Necessary and Proper Clause).

292. David Kopel, *Necessary and Proper Clause Returned to the Original Understanding*, VOLOKH CONSPIRACY (June 29, 2012, 5:46 PM), <http://www.volokh.com/2012/06/29/necessary-and-proper-clause-returned-to-the-original-understanding-podcast-with-ilya-somin-and-more/> (also noting that it is “the first opinion to hold that a particular law is

concept of a separate requirement of propriety was rejected in 1819.²⁹³ As Marshall noted in *McCulloch*: “the word ‘*necessary*,’ is considered as controlling the whole sentence”²⁹⁴ There is good reason for this treatment of the term necessary as the key to the Necessary and Proper Clause. It has been understood that as long as Congress has used a necessary means, it generally is not for courts to assess whether the legislative mechanism is also proper;²⁹⁵ doing so looks like a judgment about the policy choice involved in legislating, something that Roberts insisted the Court should not do.²⁹⁶

The Necessary and Proper Clause is not meant to be a separate head of power, as Roberts correctly noted.²⁹⁷ It is, however, meant to be an expansion of federal power, a gloss on every other head of power, such that the Clause includes penumbras around the core of any other power.²⁹⁸ The *McCulloch* Court explained that “[t]he clause is placed among the powers of congress, not among the limitations on those powers. . . . Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted.”²⁹⁹ Yet Roberts attempted to convert the Necessary and Proper Clause from an additional congressional power into a restriction, requiring that the Court assess the propriety of the means chosen by Congress.

What, then, did Roberts encompass within this new inquiry as to the propriety of Congress’s chosen means? A law is not proper if it would “undermine the structure of government established by the Constitution.”³⁰⁰ Then, empowerment under the Necessary and Proper Clause would be a

not valid because it is not an incident of an enumerated power”). However, in *Printz v. United States*, the Court, in rebutting the dissent, concluded that if a law “‘carrying into Execution’ the Commerce Clause violates the principle of state sovereignty . . . it is not a ‘Law . . . proper for carrying into Execution the Commerce Clause’” 521 U.S. 898, 923–24 (1997) (quoting THE FEDERALIST NO. 33, at 204 (Alexander Hamilton) (Heirloom ed., Arlington House 1966) (1788)).

293. *McCulloch v. Maryland*, 17 U.S. 316, 413 (1819).

294. *Id.*

295. Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825, 1852–53 (2011) (explaining that prior Supreme Court decisions “give significance to ‘proper’ only when legislative measures violate a distinct constitutional norm”).

296. *NFIB v. Sebelius*, 132 S. Ct. 2556, 2577 (opinion of Roberts, C.J.) (“We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation’s elected leaders.”).

297. *Id.* at 2592 (“Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power.”).

298. *See McCulloch*, 17 U.S. at 419–20.

299. *Id.*

300. *NFIB*, 132 S. Ct. at 2592 (opinion of Roberts, C.J.).

“usurpation.”³⁰¹ Roberts did not specify which element of the Constitution the mandate would undermine, but he did cite two modern federalism cases, *Printz v. United States*³⁰² and *New York v. United States*.³⁰³ These cases can be criticized for overly restricting Congress’s power; *New York* in particular inverts the process by which federal power is broadly interpreted under the Necessary and Proper Clause. *McCulloch v. Maryland* and *Gibbons v. Ogden*³⁰⁴ state that in analyzing an exercise of congressional power, the Court should always begin by looking to the enumerated legislative powers, then encompass all incidental aspects of those powers; all that remains is left to the states.³⁰⁵ In contrast, in *New York v. United States*, Justice O’Connor began with the enumerated powers but then defined the states’ powers positively and asserted dual sovereignty.³⁰⁶ That approach ignores Congress’s incidental powers, and so is arguably contrary to *McCulloch* and *Ogden*. But Roberts’s opinion goes even further: *New York* and *Printz* concerned arguable usurpations by Congress of powers belonging to the states, since Congress was commandeering the states to act on its behalf.³⁰⁷ Here, however, there is no issue of commandeering; Roberts seems to be incorporating Tenth Amendment analysis where none applies.³⁰⁸

What, then, would Congress be usurping here, and from whom? Roberts did not say from whom Congress would be usurping, but he insisted that to hold otherwise and to uphold the mandate under the Commerce Clause would mean that Congress would not be restricted to exercising regulation over pre-existing activities.³⁰⁹ Roberts was using his freshly minted activities requirement not only to restrict the Commerce Clause, then, but also to restrict the Necessary and Proper Clause. So Roberts was asserting a new limitation on the Necessary and Proper Clause, but when we look beyond the citations and the phrases like “usurpation,” the argument collapses down to the same invention he applied to restrict the

301. *Id.*

302. 521 U.S. 898 (1997).

303. 505 U.S. 144 (1992).

304. 22 U.S. 1 (1824).

305. *Gibbons*, 22 U.S. at 33–34; *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

306. *New York*, 505 U.S. 144.

307. *Id.* at 149–54; *Printz v. United States*, 521 U.S. 898, 902–04 (1997).

308. An argument can be made that the individual mandate amounts to the commandeering of individuals, which is analogous to the commandeering of states that these cases forbid. See Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 623–24 (2010). This is not an argument that Roberts claimed to be making, but arguably, by applying his new propriety analysis for the Necessary and Proper Clause, Roberts is adopting Barnett’s novel argument without acknowledging it.

309. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2592 (2012) (opinion of Roberts, C.J.).

Commerce Clause. As discussed, the term “activities” is mentioned in many cases, but Roberts was attempting to wring a lot from very little.

2. Glossing over Unattractive Precedent—Forgetting *Raich*

Despite its status as the most recent Supreme Court Commerce Clause precedent, Roberts referred to *Raich* only twice in his discussion of the Commerce Clause.³¹⁰ In both instances he cited the case as a *constraint* on Congress’s commerce power.³¹¹ However, like *Heart of Atlanta Motel* and *Ollie’s BBQ*, *Raich* is a contender for the title of most expansive Commerce Clause case. *Raich* is the case that looks most like *Wickard*, but there are many reasons to argue that *Raich* actually went further than *Wickard* in recognizing the breadth of congressional power. As such, the case once again belies Roberts’s claim that *Wickard* is the outer limit of the Commerce Clause and thus, by implication, that he need only reconcile his ruling in *NFIB v. Sebelius* with *Wickard* in order to comply with prior precedent. Ignoring *Raich* was a way of avoiding unattractive precedent.

Justice Stevens’s opinion for the Court in *Raich* relied on *Wickard*’s precedent that purely local activities can have a substantial effect on interstate commerce, but acknowledged three differences between the two cases.³¹² First, the Act in *Wickard* exempted small farming operations;³¹³ as such, *Wickard* presented a weaker as-applied challenge than did *Raich*. Second, *Wickard* involved an economic activity—a commercial farm—whereas in *Raich* there was no selling of marijuana.³¹⁴ As such, *Raich* met a lower commerciality threshold. Third, there was evidence that the production in *Wickard* had a significant effect on market prices, which was not true in *Raich*;³¹⁵ thus, *Raich* also met a lower threshold for showing evidence of a substantial effect. Since the legislation was nonetheless upheld in *Raich*, that ruling constitutes a broader application than *Wickard*, and thus a higher hurdle for striking down the mandate.

It is not simply in Commerce Clause application that *Raich* goes further than *Wickard*; this is also true in terms of doctrinal development of the Necessary and Proper Clause. In terms of *Lopez*’s commerciality criterion, *Raich* proposed a new qualification on the requirement: if the

310. *See id.* at 2590–93.

311. *Id.* at 2590–92. Roberts cited it once as authority for the requirement that an activity is regulated, and once as authority that commerce must include a pre-existing economic activity. *Id.* However, in these quotes, reference is made to “activities,” but the *Raich* opinion was not explicitly making this distinction, simply using the term, and so this quote cannot be fairly taken as support for excluding non-activities.

312. *Gonzales v. Raich*, 545 U.S. 1, 17–20 (2005).

313. Agricultural Adjustment Act of 1938 § 335(d), 7 U.S.C. § 1281 (1938).

314. *Raich*, 545 U.S. at 20.

315. *Id.*

overall scheme would fail without including the class of non-commercial activity within the bounds of the regulation, it was nonetheless legitimate.³¹⁶ The test Stevens developed was whether Congress was providing a comprehensive regulatory scheme, of which the provision under challenge was one small part.³¹⁷ He concluded that Congress's ability to regulate the interstate market for marijuana would be substantially undercut if it could not also regulate intrastate possession and consumption of marijuana.³¹⁸

O'Connor argued in dissent in *Raich* that medical use of marijuana *could* be separately regulated, and thus did not constitute an inseparable part of a broader regulatory scheme.³¹⁹ In *Raich*, then, the disagreement between the majority and dissent on this point was essentially a factual dispute about whether the challenged element of the legislation was separable. In contrast, no one disputed that the very reason for the ACA's individual mandate was to make the broader legislation work without bankrupting the insurance companies:

Without the individual mandate, Congress learned, guaranteed-issue and community rating requirements would trigger an adverse-selection death-spiral in the health-insurance market: Insurance premiums would skyrocket, the number of uninsured would increase, and insurance companies would exit the market. . . . The minimum coverage provision is thus an "essential par[t] of a larger regulation of economic activity"; without the provision, "the regulatory scheme [w]ould be undercut."³²⁰

An entire extended session of Supreme Court oral argument was devoted to the question of severability,³²¹ presumably because of the logical necessity of the individual mandate to other provisions of the legislation. Roberts did devote a paragraph to *Raich*'s broader regulatory scheme precedent under his Necessary and Proper Clause analysis, but he avoided dealing with the heart of the argument.³²² He did not dispute Ginsburg's characterization of the purpose for the mandate,³²³ but instead drew a

316. *Id.* at 38.

317. *Id.* at 27–28.

318. *Id.* at 28. Scalia went even further, suggesting that non-economic activities can be aggregated and Congress can regulate activities that do not substantially affect commerce if they are part of a comprehensive regulatory scheme. *Id.* at 36 (Scalia, J., concurring).

319. *Id.* at 51 (O'Connor, J., dissenting).

320. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2625 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting *Raich*, 545 U.S. at 37 (Scalia, J., concurring)).

321. Mike Sacks, *Health Care Case Reaches Supreme Court: The Constitutional Challenge*, HUFFINGTON POST (Mar. 20, 2012, 8:09 AM), http://www.huffingtonpost.com/2012/03/20/health-care-case-supreme-court-constitutional-challenge_n_1365743.html.

322. *NFIB*, 132 S. Ct. at 2592 (opinion of Roberts, C.J.).

323. *Id.* at 2585 ("The individual mandate was Congress's solution to these problems.

distinction between as-applied and facial challenges, suggesting that the broader regulatory scheme justification could only be applied to “individual applications of a concededly valid statutory scheme.”³²⁴

But Roberts’s use of this *Raich* quote grossly misrepresents the point Stevens was making. Stevens was not discussing the application of the legislation to an individual or area; he was referring to the inclusion of the schedule specifying that the Drug Abuse Prevention and Control Act apply to *marijuana*.³²⁵ As such, this was equivalent to whether a provision—or perhaps, more accurately, an entire section of the legislation—was legitimate, rather than an individual application. Stevens was drawing a distinction between single subject legislation such as *Lopez* (guns near schools) or *Morrison* (violence against women) and comprehensive regulation such as the Drug Abuse Prevention and Control Act, and explaining why the latter was so complex that individual aspects of the legislation could not realistically be severed, even if they were sometimes intrastate in their application.³²⁶

Roberts surely knew that he was mischaracterizing *Raich*. It was convenient for him to largely ignore (in the case of his Commerce Clause analysis) or to trivialize (in the case of his Necessary and Proper Clause analysis) the significance of *Raich*. In doing so, Roberts was sidestepping the difficulty that the only previous Commerce Clause challenge the Court had faced in the twenty-first century raised for his argument.

C. Striking down the Medicaid Penalty

While the fate of the individual mandate distracted the country, Roberts achieved a significant conservative policy goal: preventing the forced expansion of Medicaid. Simultaneously, Roberts realized a conservative doctrinal achievement: restricting Congress’s power to control activities of the states by withholding federal grants.

1. Achieving a Big Conservative Win While Everyone Is Distracted

Immediately following the *NFIB* ruling, the media heralded the Court’s decision on the ACA as a substantial victory for the Obama administration, overwhelmingly focusing on the fact that the Court upheld the individual mandate.³²⁷ The President likewise emphasized the aspect of the law that

By requiring that individuals purchase health insurance, the mandate prevents cost-shifting by those who would otherwise go without it.”)

324. *Id.* at 2593 (quoting *Raich*, 545 U.S. at 23) (emphasis added).

325. *See Raich*, 545 U.S. at 15.

326. *See id.* at 22.

327. The headlines involving “Obama healthcare win” or “Obama healthcare victory” are too numerous to count. Typical examples include the following: Frank James, *Obama’s*

was upheld, saying, “Today’s decision was a victory for people all over this country whose lives will be more secure because of this law and the Supreme Court’s decision to uphold it.”³²⁸ Governor Romney seemed to agree with the President’s assessment of the case as a purely liberal victory, stating, “What the Court did today was say that ObamaCare does not violate the Constitution.”³²⁹ However, the Court did not say that the ACA “does not violate the Constitution”; rather, seven Justices voted to strike down the part of the act that expanded the Medicaid scheme.³³⁰ Roberts’s opinion, joined by Justices Breyer and Kagan, concluded that “Congress has no authority” to force the states to expand the applicability of the program by threatening the loss of all Medicaid funds, and struck down the portion of the act imposing that sanction.³³¹ The four dissenting Justices reached the same result.³³² Only later did the significance of this part of the ruling gain widespread attention, as Republican governors refused to adopt the Medicaid expansion, leading to a significant decrease in the health services offered to the poor in almost half of the states.³³³

As discussed in detail in the next section, Roberts concluded that the conditional grant to the states for expanding Medicaid was unconstitutionally coercive because it withdrew all Medicaid funds for noncompliance, not only those funds provided for the expansion itself.³³⁴ The remedy he provided was to strike down the part of the law that withdrew Medicaid funds to states that failed to comply with the condition.³³⁵

Supreme Court Health Care Victory Hard to Overstate, NPR (Aug. 2, 2012, 12:18 PM) <http://www.npr.org/blogs/itsallpolitics/2012/06/28/155914563/obamas-supreme-court-health-care-victory-hard-to-overstate> (stating that it seemed “difficult to overstate how big a win the Supreme Court’s decision on President Obama’s signature piece of domestic legislation is for the man in the Oval Office”); Jan & Rowland, *supra* note 114.

328. David Jackson, *Obama: Health Care Ruling a Victory for All Americans*, USA TODAY (June 28, 2012, 2:15 PM), http://content.usatoday.com/communities/theoval/post/2012/06/Supreme-Court-rules-on-Obama-health-care-plan-718037/1#.UBrSjKjw_w4.

329. Jan & Rowland, *supra* note 114.

330. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2608 (2012) (opinion of Roberts, C.J.).

331. *Id.*

332. *Id.* at 2643 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (“The Act before us here exceeds federal power both in mandating the purchase of health insurance and in denying nonconsenting States all Medicaid funding.”).

333. Tyler Cowen, *Obamacare, Retooled*, N.Y. TIMES, Oct. 19, 2013, at BU6 (“many people will [lack] health insurance coverage, including two-thirds of poor blacks and single mothers and more than half the low-wage workers who lacked coverage before the [ACA’s enactment]. That is largely because of the unwillingness of 26 governors to expand Medicaid coverage as the original bill had intended.”).

334. *Id.* at 2607 (opinion of Roberts, C.J.).

335. *Id.*

The dissent wanted to go further. It proposed that simply striking down the compulsory nature of the Medicaid expansion was inadequate, as this still allowed Congress to make grants to states that chose to adopt the new system expanding Medicaid.³³⁶ The dissent argued that effectively making the Medicaid expansion optional was contrary to the ACA's structure and design, amounting to the Court writing a new law.³³⁷ Consequently, it argued, the Court should strike down the entire part of the act expanding Medicaid.³³⁸

Roberts had legal justifications for not doing so. First, Congress provided explicit textual severability instructions regarding the rest of the Medicaid part.³³⁹ Second, Roberts had a different view of the legislative intent behind the whole of the act, reasoning that Congress presumably would want some states to participate in the expanded Medicaid program, even if it could not force all to do so.³⁴⁰ But Roberts had strategic reasons for not striking down the whole provision. First, doing so may have had considerable costs in terms of the legitimacy of the Court, something Roberts was keen to avoid, as developed in detail in Part IV. Second, in terms of benefits, Roberts was able to achieve an important policy goal, despite both upholding the mandate and the rest of the Medicaid provisions, and was also able to hand conservatives a subtle, yet highly effective, political weapon.

If past experience is any indication, even without the stick of losing additional funding, the carrot of supplementary federal money to fund state Medicaid programs will likely prove irresistible.³⁴¹ Every state eventually adopted the original Medicaid program; none have ever withdrawn from it; and eligibility has only ever increased in each state.³⁴² But even if this occurs, Roberts has given those conservative politicians a rhetorical armament. First, the Medicaid ruling provides a mechanism for continuing critique and opposition to the health care legislation. This allows the Republican governors to continue to raise the divisive issue of the ACA and to pose a challenge to its legitimacy. Second, refusing the Medicaid expansion and its funding brings to light that aspect of *NFIB v. Sebelius* that

336. *See id.* at 2667 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

337. *Id.*

338. *Id.* Since the dissent also found that the mandate violated both the Tax Power and the Commerce Clause, it wanted to strike down the rest of the ACA, as well. *See generally id.* at 2668–77.

339. *Id.* at 2607 (opinion of Roberts, C.J.).

340. *Id.* at 2608.

341. For a contrary view, see Cowen, *supra* note 333.

342. Phillip B. Levine & Diane Schanzenbach, *The Impact of Children's Public Health Insurance Expansions on Educational Outcomes*, 12 FORUM FOR HEALTH ECON. & POL. 11 (2009).

went largely ignored initially: the decision did not find the act to be fully legitimate, but actually struck down part of it.

Whether or not Roberts was swayed by partisan interest in Republican governors' political advantages arising from his position in *NFIB v. Sebelius*, the potential advantages that were available in relation to the Medicaid ruling were not limited to the substantive outcome or the associated political rhetoric. It also offered the opportunity to advance a more conservative doctrinal agenda in relation to Congress's Spending Power, as the next section details.

2. Creating Future Opportunities by Developing Ambiguous Doctrine

The Spending Power allows Congress to impose conditions when providing grants to the states, including conditions that require the states to take actions that Congress could not force them to take directly.³⁴³ However, in *NFIB v. Sebelius*, Roberts struck down the conditions on the Medicaid grant on the basis of a qualification that has previously only been theoretical: to be legitimate, the states must "knowingly and voluntarily" consent to those conditions.³⁴⁴ This caveat draws on the same political theory contained in the anti-commandeering cases *New York v. United States*³⁴⁵ and *Printz v. United States*,³⁴⁶ wherein otherwise legitimate exercises of the Commerce Clause were struck down. There, the Court reasoned that Congress was attempting to govern through the states; without knowing and voluntary consent, the states would not truly be governing, rendering political accountability for a given policy impossible.³⁴⁷

Roberts applied the same logic to grants to the states under the Spending Clause: conditions on those funds are coercive if they compel the states to accept the condition with the grant.³⁴⁸ Then, the states would effectively be implementing a federal program, not exercising a real choice

343. *NFIB*, 132 S. Ct. 2601–02 (opinion of Roberts, C.J.); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 585 (1937) ("Even if they were collected in the hope or expectation that some other and collateral good would be furthered as an incident, that without more would not make the act invalid.").

344. *NFIB*, 132 S. Ct. at 2602 (opinion of Roberts, C.J.) ("The legitimacy of Congress's exercise of the Spending Power 'thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'") (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)); *Dole*, 483 U.S. at 211; *Steward*, 301 U.S. at 586 (contemplating the line "between duress and inducement").

345. 505 U.S. 144 (1992).

346. 521 U.S. 898 (1997).

347. *NFIB*, 132 S. Ct. 2602 (opinion of Roberts, C.J.); *Printz*, 521 U.S. at 933; *New York*, 505 U.S. at 174–75.

348. *NFIB*, 132 S. Ct. at 2602–03. (opinion of Roberts, C.J.).

about whether to adopt the program.³⁴⁹ Roberts distinguished between the states' meaningful consent to the previous terms of the existing Medicaid program, where they exercised a legitimate choice to adopt its terms, and the new expansion, which was coercive.³⁵⁰ But much like the in/activity distinction in the Commerce Clause, Roberts's analysis of why the new program is coercive when the old was not—and, consequently, how governments and lower courts are to know when future conditions are coercive—is highly ambiguous and seemingly, once again, quite malleable.

Roberts presented two arguments for why the Medicaid expansion is coercive.³⁵¹ First, whereas previous grants were conditioned upon adoption of a new policy, under the ACA, the original funds as well as the additional funds would be withheld if the new qualifications were not adopted.³⁵² Thus, Congress was threatening to terminate “independent grants” and was therefore pressuring the states to adopt policy changes.³⁵³

Seemingly in support of this concept, Roberts cited *South Dakota v. Dole*,³⁵⁴ the major modern case to consider whether conditions on grants can become coercive.³⁵⁵ Yet *Dole* is not precedent for the notion that a condition's independence from a grant makes it illegitimate.³⁵⁶ Instead, *Dole* allowed highway funding to be conditioned on state adoption of a set drinking age of twenty-one.³⁵⁷ Roberts's independence distinction here looks much like O'Connor's position in *Dole* that there must be a “genuine” and not an “attenuated or tangential” relationship between the condition and legitimate congressional action.³⁵⁸ However, this argument was made only in dissent in *Dole*.³⁵⁹ The *Dole* majority held conversely that highway fund expenditure and drinking ages are adequately linked since both have somewhat of a relationship to road safety.³⁶⁰ Undoubtedly, Medicaid

349. *Id.*

350. *Id.* at 2604–05.

351. *Id.* at 2603–07.

352. *Id.* at 2605–06.

353. *Id.* at 2603–04.

354. 483 U.S. 203 (1987).

355. *NFIB*, 132 S. Ct. at 2604 (opinion of Roberts, C.J.).

356. *Dole*, 483 U.S. at 210.

357. *Id.* at 211–12. Nor does *Steward* adopt this distinction:

We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power.

Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937).

358. *See Dole*, 483 U.S. at 215 (O'Connor, J., dissenting).

359. *Id.*

360. *Id.* at 208 (majority opinion).

expenditure and Medicaid funding are at least as equally related as *Dole*'s rather loose connection. Instead of addressing this, Roberts ignored the fact that *Dole* actually contradicts his independence distinction.

The second reason that the Medicaid condition was deemed to be coercive seems to be primary for Roberts, since he slipped past the independence distinction as soon as he made it. His key complaint was that the extent of the withdrawn funds makes the condition coercive.³⁶¹ The condition amounts to a “gun to the head,” according to Roberts, because the states would lose *all* of the Medicaid funding given to them by Congress if they refused to comply, rather than just the new funding.³⁶²

There are actually two elements to this part of Roberts's analysis. First, the condition is coercive because it threatens to terminate *prior* grants³⁶³ As such, the Medicaid expansion amounts to a new program that the states did not truly consent to, as the states could not have foreseen its enlargement to address poverty more generally, rather than specific categories like children and pregnant women.³⁶⁴ Second, the amount itself is simply too high. While in *Dole* it was acceptable to threaten to take away 5% of states' highway funds, 100% of Medicaid funds is too much—particularly since this amounts to 10% of the average state budget, whereas South Dakota only faced losing half of 1% of its budget in *Dole*.³⁶⁵

Ginsburg raised a number of problems with this analysis on both factual and legal grounds. In her factual argument, she described numerous prior amendments to Medicaid that amounted to millions of dollars in expansions, challenging the notion that this expansion creates a new program.³⁶⁶ She also pointed out that Congress reserved the right to alter or amend the terms of the original Medicare grant.³⁶⁷ Roberts's response to both of these points was that the Medicaid expansion amounted to “a shift in kind, not degree” such that it was truly “transformative,” whereas requiring states to cover pregnant women and increasing the number of eligible children was not transformative in the same way.³⁶⁸ But he did not spell out how governments or even lower courts are to know when something is transformative or not. Consequently, not only will states have to challenge every Medicaid change before they can find out which is

361. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2604 (2012) (opinion of Roberts, C.J.).

362. *Id.*

363. *Id.* at 2606.

364. *Id.* at 2605–06.

365. *Id.* at 2604–05.

366. *Id.* at 2631 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“Expansion has been characteristic of the Medicaid program.”).

367. *Id.* at 2638.

368. *Id.* at 2606 (opinion of Roberts, C.J.) (“Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level.”).

transformative, and so illegitimate, and which is not, but Congress has very little guidance as to the legitimacy of changes it may want to make to any other programs that are funded by federal grants to the states.³⁶⁹

The same ambiguity applies to the numerical aspect of coercion—whether the amount of funding involved in the condition is simply too high. In response to this argument, Ginsburg observed that the actual increase in burden on states was only 0.8%.³⁷⁰ Roberts responded by saying:

[T]he size of the new financial burden imposed on a State is irrelevant in analyzing whether the State has been coerced into accepting that burden. “Your money or your life” is a coercive proposition, whether you have a single dollar in your pocket or \$500.³⁷¹

This response seems to suggest that some conditions are inherently coercive. Yet Roberts stressed that 100% of Medicaid funding was at stake, amounting to an average of 10% of annual state budgets.³⁷²

Roberts appears to be quite selective in whether the numerical size of the burden the condition threatens is relevant. The proportion of funding of a particular program is persuasive, and the percentage of the state budget is compelling, but the actual financial burden placed on the state is irrelevant. At the same time, Roberts was unwilling to specify at what point the subset of relevant numbers becomes coercive: “We have no need to fix a line [where persuasion gives way to coercion]. It is enough for today that wherever that line may be, this statute is surely beyond it.”³⁷³ Thus, once again, Roberts provided barely any guidance for Congress, lower courts, or state governments as to what will qualify as coercive conditions.

To justify this lack of guidance, Roberts pointed to the fact that *Steward* did not fix such a line either when that case raised the possibility of

369. Noah, *supra* note 2, at 2 (describing the distinction between legitimate federal mandates and illegitimate ones as based on a “capricious” distinction).

370. *NFIB*, 132 S. Ct. at 2632 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

371. *Id.* at 2605 n.12 (opinion of Roberts, C.J.). In addition, Roberts observed:

[The 0.8% figure] not only ignores increased state administrative expenses, but also assumes that the Federal Government will continue to fund the expansion at the current statutorily specified levels. It is not unheard of, however, for the Federal Government to increase requirements in such a manner as to impose unfunded mandates on the States.

Id. It is strange for the Court to protect the states from one possible hypothetical future action by Congress—Roberts seems not to mind the Court acting on future hypotheticals, even if he does not allow Congress to do so.

372. *See id.* at 2605–06.

373. *Id.* at 2604–05.

“inducement turning to duress.”³⁷⁴ But there is a big difference between fudging the question then and now. In *Steward*, the Court was upholding the law, and merely theorizing about whether a condition *could* ever become coercive and thus illegitimate.³⁷⁵ In *NFIB v. Sebelius*, however, Roberts was making that condition an actuality, and striking down a congressional monetary grant for the first time in the Court’s history.³⁷⁶

Roberts offered two elements of coerciveness—transformation and numerical size—but refused to give courts or governments guidance about how to apply either element. The dissent also acknowledged that identifying the line at which the condition becomes coercive is difficult, and offered the equally unhelpful standard that the coercive nature of a condition must be “unmistakably clear.”³⁷⁷ However, the dissent did flesh out a number of factors which have more traction than any offered by Roberts. For instance, as evidence of coercion, the dissent pointed to the fact that a state not in the Medicaid program would be ineligible not only for Medicaid funds but also for “other major federal funding sources, such as Temporary Assistance for Needy Families (TANF), which is premised on the expectation that States will participate in Medicaid.”³⁷⁸ Second, and seemingly decisive, was the dissent’s conclusion that “Congress unambiguously signaled its belief that every State would have no real choice but to go along with the Medicaid Expansion.”³⁷⁹ Otherwise, the dissent expected that Congress would have provided a backup scheme to cover those most vulnerable—those previously covered by Medicaid who would no longer be covered if all state funding was cut.³⁸⁰ Whereas Congress provided backup schemes for other provisions that it made voluntary for the states, such as the health benefit exchanges, it did not do so for the non-coverage of Medicaid.³⁸¹ The ability of the dissent to send out guidance for

374. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 591–92 (1937) (“We do not fix the outermost line. Enough for present purposes that wherever the line may be, this statute is within it. Definition more precise must abide the wisdom of the future.”).

375. *Id.*

376. *NFIB*, 132 S. Ct. at 2607 (opinion of Roberts, C.J.).

377. *Id.* at 2662 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

378. *Id.* at 2664.

379. *Id.* at 2662.

380. *Id.* at 2665.

381. *Id.* However, another factor that the Court articulates to give detail to its “unmistakably clear” standard is quite odd. First, it points to the fact that in many federal programs, if a state were to withdraw from the federal scheme and enact its own scheme, doing so “would likely force the State to impose a huge tax increase on its residents, and this new state tax would come on top of the federal taxes already paid by residents to support subsidies to participating States.” *Id.* at 2661–62. Although it then acknowledges in a footnote Ginsburg’s response that states have no claim on money paid by their residents in federal taxes, it nevertheless maintains that unless “there is no limit to the amount of money that can be squeezed out of taxpayers, heavy federal taxation diminishes the practical ability

how its own test would apply illustrates that the complete lack of guidance offered by Roberts was not inevitable, which suggests that it may have been a deliberate strategy.

As described in greater detail in Part IV below, not articulating with greater specificity what constitutes coercion can be advantageous for a strategic justice. The effect is a massive expansion of judicial power and discretion. Every question will need to be litigated, and every question could come out either way depending on the preferences of the median judge, which Roberts may be on similar future issues. As such, by withholding greater detail as to what constitutes coercion—and, similarly, relying on the mutable in/activity distinction—Roberts was leaving the development of future doctrine wide open. In relation to both the Spending Power and the Commerce Power, then, Roberts displayed a consistent strategy: crafting new conservative doctrine, and giving himself many future opportunities to further shape the law.

This Part has established that Roberts was able to craft large tracts of new doctrine, which may have outweighed the policy cost of upholding the individual mandate. However, two ambiguities arise if this was Roberts's strategy. First, as shown above, one option he had was to strike down the mandate and develop new doctrine, as the dissenting Justices proposed, which would have avoided the policy cost altogether. Second, exactly what doctrinal benefit he gained remains uncertain, because he was unable to lock in his doctrinal innovations with a solid majority opinion. Despite this failure, Roberts went to great length to decide the case. These two factors suggest that his main motivation may not have been doctrinal, but more institutional in nature, as the next Part explores.

IV. BEYOND DOCTRINE—INSTITUTIONAL AND REPUTATIONAL VALUES

A. *Tactics Versus Strategy: Failing to Build a Coalition*

In the immediate aftermath of *NFIB v. Sebelius*, numerous commentators³⁸² likened it to *Marbury v. Madison*,³⁸³ the case in which

of States to collect their own taxes.” *Id.* at 2661–62 n.13. This analysis reads more like anti-tax political advocacy than legal reasoning. Whether and how a state chooses to establish its own policy similar to a federal scheme that it refuses to adopt cannot be legally relevant.

382. See, e.g., Epps, *supra* note 162; John Yoo, *Chief Justice Roberts and His Apologists*, WALL ST. J., June 30, 2012, at A15; Campos, *supra* note 59 (arguing that the case mirrors *Marbury* and that in future decades, legal observers will think of it in the same terms); Chris Geidner, *Did Chief Justice Roberts Take a Cue from Two Centuries Ago?*, DAILY BEAST (June 28, 2012, 5:11 PM), <http://www.thedailybeast.com/articles/2012/06/28/did-chief-justice-roberts-take-a-cue-from-two-centuries-ago.html> (describing the similarities as striking).

383. 5 U.S. 137 (1803).

Chief Justice Marshall displayed his own strategic mastery in protecting the Supreme Court from further attack by the Democratic-Republicans. *Marbury* seems a natural comparison, for in that case Marshall found in favor of his political opponents in the immediate battle about whether to install his compatriot Federalist nominees.³⁸⁴ This allowed Marshall to win the larger war for the Federalists by laying the groundwork for judicial power³⁸⁵—just as Roberts upheld the individual mandate while laying the groundwork for multiple conservative doctrinal turns. In addition, again like Roberts, Marshall set out vast swathes of new doctrine that are arguably dicta. Finally, because Marshall found that the Court had no jurisdiction in the case,³⁸⁶ he also need not have addressed the three substantive questions that established the basics of constitutional law: the power of judicial review, the power to review executive actions, and constitutional supremacy.³⁸⁷

The analogy to *Marbury* is convenient and obvious, but also misleading. First, pointing to *Marbury* as if it were exceptional disguises the fact that Marshall himself regularly engaged in such strategic behavior. Marshall was expert at accruing judicial power while simultaneously appearing to be exercising self-restraint.³⁸⁸ Second, Marshall had no monopoly on this kind of strategic maneuvering to promote the Court's own power: the Court used such devices even before Marshall joined it. For instance, in *Hayburn's Case* in 1792, by refusing to include certain functions in the judicial realm,³⁸⁹ the Court was denying itself power; but, in preserving its differences from the other branches, it was laying the groundwork for power by indicating that what *are* judicial functions are so exclusively.³⁹⁰ In *NFIB v. Sebelius*, Roberts similarly paved the way for greater Court power by developing ambiguous doctrines.

Pointing to the tired analogy of *Marbury* ignores, and so downplays, the deep history of similar judicial strategy and the fact that strategic judicial

384. *Id.* at 178–79 (“The judicial power of the United States is extended to all cases arising under the constitution.”).

385. *Id.* (“[T]he constitution must be looked into by the judges.”).

386. *Id.* at 175–76.

387. *Id.* at 146–80.

388. *See, e.g., Gibbons v. Ogden*, 22 U.S. 1 (1824) (expanding the concept of interstate commerce to include all forms of commercial intercourse, consistent with Marshall's expansive view of congressional power, while sidestepping the other pressing question in the case—whether that broad definition of congressional power limited state power in the field.); McCLOSKEY, *supra* note 13, at 45–46 (“Once again, as so often in the past, Marshall had managed to achieve imperishable results while sidestepping the area of greatest controversy.”).

389. *Hayburn's Case*, 2 U.S. 409 (1792) (refusing to rule on whether non-judicial duties could be assigned by Congress to the courts).

390. McCLOSKEY, *supra* note 13, at 20–21.

behavior is far more widespread on the Supreme Court generally—strategic judicial behavior is not limited to a master like Marshall.³⁹¹ But more importantly, it also underrates Marshall’s tactical brilliance in coalition formation throughout his tenure as Chief Justice—a skill that Roberts lacked in *NFIB*. Understanding the difference in the effectiveness of the coalition-building tactics of Marshall versus Roberts provides the key to understanding Roberts’s strategy in that case.

NFIB v. Sebelius contains an Opinion of the Court, but only two Justices besides Roberts signed on to the part of the opinion that struck down the penalty provision of the Medicaid clause.³⁹² None signed on to Roberts’s Commerce Clause or Necessary and Proper Clause analysis.³⁹³ In *Marbury*, Marshall had only to corral four Justices, all appointed by President Washington, to form a unanimous majority,³⁹⁴ but, more strikingly, throughout his tenure as Chief Justice, he forged a strong unwritten rule of joint opinion writing more generally, abolishing the practice inherited from England of seriatim opinions and fractured coalitions.³⁹⁵ That norm of unanimous opinion writing governed until the modern era, and was essential to developing the institutional strength of the Supreme Court.³⁹⁶ Not only did it make individual judgments more powerful due to their large and unopposed coalitions,³⁹⁷ but it strengthened

391. Strategic judicial behavior has been shown to exist in many forms: granting certiorari, writing majority opinions, writing dissents, emphasizing issues, building coalitions, and more. See Lee Epstein & Tonja Jacobi, *The Strategic Analysis of Judicial Decisions*, 6 ANN. REV. L. & SOC. SCI., 341, 347–48 (2010) (summarizing the strategic judicial literature).

392. See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2577 (2012) (opinion of Roberts, C.J.).

393. *Id.*

394. Justices Moore and Cushing did not take part.

395. See, e.g., Adam S. Hochschild, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J.L. & POL’Y 261, 270 (2000) (“Consolidated opinions of the Court would not exist without Chief Justice Marshall’s innovations. By eliminating the seriatim practice, Chief Justice Marshall laid the groundwork for . . . the ‘Marshall law’ of consolidated opinions. . . . abolishing fractured, seriatim decisions and maintaining straightforward precedents.” (footnotes omitted)).

396. Although periods of strong dissent followed, such as during the 1930s, the Court never returned to the British tradition of seriatum opinions. See David O’Brien, *Norms and Opinions: On Reconsidering the Rise of Individual Opinion*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 91, 111 (Cornell Clayton & Howard Gillman eds., 1999) (explaining that “agreement on an institutional opinion for the Court’s decisions was once deemed central to the Court’s prestige and legitimacy” whereas “when individual opinions are more highly prized than opinions for the Court, consensus not only declines but the Court’s rulings appear more fragmented, uncertain, less stable, and less predictable”).

397. Generally, on the effect of coalition size on strengthening the power of precedent, see Tonja Jacobi, *Competing Models of Judicial Coalition Formation and Case Outcome Determination*, 1 J. LEGAL ANALYSIS 411 (2009); Joshua B. Fischman, 1st Annual

the power of the Supreme Court itself, making it appear less political and more judicial.³⁹⁸

The point is not simply that there is much more to understanding Marshall's strategic skill than that displayed most famously in *Marbury*; nor is it that comparing *Marbury* to Roberts's at times one, three, and five-person opinion in *NFIB v. Sebelius* fails to appreciate the tactical skill that Marshall displayed in consistently garnering unanimous opinions. Rather, such superficial analysis creates two greater problems. First, it fails to appreciate the variety of Roberts's strategy in *NFIB v. Sebelius*—as seen in his many doctrinal innovations described in Parts II and III—and thus the breadth of its significance. Second, equating *NFIB* to *Marbury* ignores the possibly transformative fact that Roberts failed to form a coalition, and so it tells us little of what the effect of Roberts's strategizing will actually be.

Roberts well understands the importance of building broad coalitions. In fact, according to Roberts, the success or failure of a Chief Justice largely depends upon his ability to maintain consensus.³⁹⁹ One reason for this, as discussed, is the fact that unanimous or near-unanimous decisions appear far less ideological than closely divided ones: "5-4 decisions make it harder for the public to respect the Court as an impartial institution that transcends partisan politics."⁴⁰⁰ The Court issuing many closely divided and intensely divisive cases—or even the perception of its doing so—creates a "steady wasting away of the notion of the rule of law, a personalization of it."⁴⁰¹ Another reason is purely consequentialist, in terms of maximizing the impact of any decision; broad majorities strengthen the power of an opinion, in terms of public, legislative, or presidential acceptance.⁴⁰² Coalition building involves often unavoidable trade-offs with each justice's

Conference on Empirical Legal Studies: Decision-Making Under a Norm of Consensus: A Structural Analysis of Three-Judge Panels (Jan. 4, 2008), available at <http://ssrn.com/abstract=912299> or <http://dx.doi.org/10.2139/ssrn.912299>.

398. See, e.g., R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 151–52 (2001); Donald M. Roper, *Judicial Unanimity and the Marshall Court—A Road to Reappraisal*, 9 AM. J. LEGAL HIST. 118 (1965). In Robert's words: "If the Court in Marshall's era had issued decisions in important cases the [divided] way this Court has over the past thirty years, we would not have a Supreme Court today of the sort that we have." Jeffrey Rosen, *Roberts's Rules*, ATLANTIC, Jan./Feb. 2007, at 105.

399. Rosen, *supra* note 398, at 105 ("I think that every Justice should be worried about the Court acting as a Court and functioning as a Court, and they should all be worried, when they're writing separately, about the effect on the Court as an institution." (quoting Roberts)).

400. *Id.* (quoting Roberts).

401. *Id.* (quoting Roberts).

402. See, e.g., WILLIAM H. REHNQUIST, THE SUPREME COURT 264–65 (2002) (explaining that potential dissenters who want to see substantial changes to the majority opinion before they sign on have far less leverage if the Court has already achieved a unanimous lopsided vote).

ideal outcome in a case,⁴⁰³ so coalition formation is a difficult skill to master. But it is an important one.

Marshall knew this well. Jefferson thought Marshall completely dominated the Republicans on the Court, but Marshall actually compromised when necessary, delivering Opinions of the Court contrary to his preferences, so as to maintain the strength of the Court through unanimity.⁴⁰⁴ He did so because the power of the Court was as fundamental to his core notion of federalism as any substantial policy preference, and unanimity was key to that power.⁴⁰⁵ Many other justices have also learned this lesson: when the Court was deciding *Brown v. Board of Education*,⁴⁰⁶ Chief Justice Warren went to great lengths to ensure that the decision was unanimous, as he understood that its power and influence rested on appearing not to be an open judicial question.⁴⁰⁷

Judicial strategizing occurs in cases generally, but is far more important in cases like *NFIB v. Sebelius*, where the Supreme Court makes a decision that may well determine the fate of a political administration. In similarly high-stakes, electorally salient cases, with the striking exception of *Bush v. Gore*,⁴⁰⁸ the Court has tended to manage to craft a unanimous ruling, even in the face of strong ideological heterogeneity, because of the delicacy of the Court effectively deciding the fate of a sitting president. For instance, the Court forged a unanimous front when deciding that President Nixon could not withhold the Watergate tapes under executive privilege, despite Chief Justice Burger's close friendship with Nixon.⁴⁰⁹ And it unanimously held that Paula Jones could sue President Clinton while he served as president,⁴¹⁰ despite Justice Breyer's strong reservations.⁴¹¹ Yet in this most

403. For academic work on the inherent trade-off between the ideological positioning of case outcomes and maximizing the size of a majority coalition, see FORREST MALTZMAN, JAMES F. SPRIGGS & PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (2000); Jacobi, *supra* note 397; Jacobi & Sag, *supra* note 30; Forrest Maltzman & Paul J. Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 AM. POL. SCI. REV. 581, 583 (1996).

404. Roper, *supra* note 398, at 118–19.

405. *Id.* at 119.

406. 347 U.S. 483 (1954).

407. To maintain unanimity, he had to avoid the most difficult questions, how and when the opinion would be enforced, leaving resolution of those issues to subsequent cases. *Brown v. Bd. of Educ. of Topeka* (Brown II), 349 U.S. 294 (1955) (establishing the “with all deliberate speed” concept). He also had to avoid overruling *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896) (endorsing the “separate but equal” doctrine for schools).

408. 531 U.S. 98 (2000). The significance of this case being an exception is discussed *infra* text accompanying note 324.

409. *United States v. Nixon*, 418 U.S. 683, 713 (1974).

410. *Clinton v. Jones*, 520 U.S. 681, 705 (1997).

411. Breyer's concurring opinion reads a lot more like a dissent, laying out many of the arguments as to why a sitting president should not face suit. See *id.* at 710 (Breyer, J.,

politically sensitive case, Roberts, who has been so explicitly concerned with the legitimacy effect of consensus on the Court,⁴¹² failed to form a large—and in parts even a majority—coalition.

Only two Justices joined Roberts in striking down the penalty provision of the Medicaid clause, and no one joined those parts of his opinion relating to the Commerce Clause or the Necessary and Proper Clause.⁴¹³ The dissenting Justices refused to sign on to Roberts's development of newly restrictive notions of congressional power in those two topics, or his attempts to raise the possibility of future limits on both taxing and spending, despite the fact that they supported all of what Roberts actually decided, except upholding the mandate as a tax.⁴¹⁴ The motivation of the conservative Justices for this seemingly self-defeating action was rumored to have been driven by spite towards Roberts for switching sides on the constitutionality of the mandate as a tax.⁴¹⁵ Although Scalia has denied that animus drove his actions,⁴¹⁶ his unflattering analogy of Roberts's analysis suggests otherwise: "There is no way to regard this penalty as a tax. . . . In order to save the constitutionality, you cannot give the text a meaning it will not bear You don't interpret a penalty to be a pig. It can't be a pig."⁴¹⁷ Most significantly, neither Scalia nor any of the other dissenting Justices have provided any other explanation for why they took the unusual position of refusing to join the many parts of Roberts's opinions with which they agreed, leaving the strong impression that the only reason was pique. This suggests that Roberts's tactical capacity fell short of his strategic vision.

Moreover, despite siding with the liberal Justices on the most important issue in the case, Roberts appeared to fail to garner much cooperation from

concurring).

412. See *infra* text accompanying note 331.

413. See *NFIB v. Sebelius*, 132 S. Ct. 2556, 2576 (2012).

414. See Crawford, *supra* note 58.

415. Crawford, *supra* note 58. *But see* Campos, *supra* note 59. If so, this response is unusual, given that Justices commonly switch sides in cases, particularly in landmark cases. EPSTEIN & KNIGHT, *supra* note 36, at 78. 11% of general cases and 26% of landmark cases show at least one Justice transforming her opinion, for example, from a dissent into a concurrence or vice versa. *Id.* In addition, 45% of majority opinions in general cases and 55% of those in landmark cases show changes in order to accommodate potential dissents and concurrences. *Id.* at 98. This suggests an even greater occurrence of such switches, were it not for these accommodations. *Id.*

416. Mark Sherman, *Scalia: Supreme Court Disagreements Not Personal*, CNS NEWS (July 26, 2012, 7:43 PM), <http://cnsnews.com/news/article/scalia-supreme-court-disagreements-not-personal> ("I disagree with my colleagues now and then. It happens all the time. If you can't do that without taking it personally and getting sore and picking up your ball and going home, you ought to find another job.").

417. *Justice Scalia Steps up Criticism of Healthcare Ruling*, REUTERS, July 29, 2012, available at <http://www.reuters.com/article/2012/07/29/us-usa-court-scalia-idUSBRE86S00R20120729> (internal quotation marks omitted).

them in return. Ginsburg did not pull her punches—her concurring and dissenting opinion was almost entirely a dissent, in which she sharply criticized the Chief Justice at every turn.⁴¹⁸ She described his Commerce Clause analysis as “stunningly retrogressive”⁴¹⁹ and a “crabbed reading” akin to pre-1937 analysis,⁴²⁰ and argued that it created a “novel constraint.”⁴²¹

While Ginsburg refused to join any parts of his opinion with which she disagreed, Roberts did manage to persuade Breyer and Kagan to join the Medicaid part of his opinion.⁴²² However, the opinion provides no explanation for why they did so, yet failed to sign on to his other conservative developments. While it is arguable that Breyer and Kagan simply favor the restrictions Roberts put on Congress’s granting power but not the other congressional restrictions he established, some have suggested that their concurrence on Medicaid “may have been Roberts’s price for not tossing out Obamacare altogether.”⁴²³ This suggests that Roberts had at least some coalition-formation skills.

Yet even if Breyer and Kagan’s votes on the Medicaid penalty were a product of Roberts’s coalition-building skills, this outcome still poses two questions about his persuasive abilities. First, if Roberts persuaded Breyer and Kagan to join his opinion as to the Medicaid penalty, why was he unable to persuade them to join his Commerce Clause and Necessary and Proper Clause restrictions? Second, if there was a strategic bargain over Medicaid, why was that enough for Roberts? More specifically, if all of the Justices were just trading votes in an attempt to translate their preferred policy preferences into doctrine, why would Roberts have given up the most valuable part of the decision—upholding the individual mandate—in return for only partial concurrences for the less salient element of the decision, Medicaid?

B. Other Values: Institutional and Personal Credibility

If the case is seen purely as a strategic deal, then perhaps, ironically, Roberts may have been disserved by his own and others fetishizing of *Marbury* and the popular hagiography of Marshall. Roberts’s strategy was a clever one, but if his coalition-formation tactics were not up to Marshall’s

418. *NFIB v. Sebelius*, 132 S. Ct. 2556, 2609 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

419. *Id.*

420. *Id.* (“The Chief Justice’s crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress’ efforts to regulate the national economy in the interest of those who labor to sustain it.”).

421. *Id.* at 2618.

422. *Id.* at 2576 (opinion of Roberts, C.J.).

423. *See, e.g., Noah, supra* note 2, at 2.

caliber, Roberts may have made a massive error. It is all very well to give with one hand and take with another, but if what one takes is not respected in the long term because of a failure to craft a majority coalition, that giving may be ill-advised. Doctrinally, the long-term success of Roberts's strategy depended in part on the outcome of the 2012 election, given the almost inevitable appointments that President Obama will get to make in his second term.⁴²⁴ A future Court resembling the President's previous nominees, Justices Sotomayor and Kagan, could largely brush aside *NFIB v. Sebelius*, treating it as lightly as the *NFIB* Court did *Raich*. Moreover, by giving Obama a victory in the case, Roberts made an Obama 2012 victory more likely.⁴²⁵ If Romney had won, Roberts would have laid solid groundwork for future conservative judicial coalitions to cut back on congressional power. But now Roberts may become part of a permanent minority through the second Obama administration's appointments, and all *NFIB v. Sebelius* will stand for is a minor distinction between acts and omissions. The case will not look like *Marbury* because *Marbury* was unanimous. *NFIB v. Sebelius* had no majority, except for the part upholding the ACA. Ultimately, then, tactics may trump strategy; Roberts's weak tactics in coalition crafting may undermine his doctrinal goals.

However, that dire analysis only applies if doctrinal development was Roberts's primary goal. Scholars have established that judges value not only doctrine and ideology but also various institutional interests.⁴²⁶ These include promoting the legitimacy of the Court, collegiality, and consensus building, as well as more individual reputational interests—the current good opinion of the justice as a judge, as well as her personal legacy, which is of

424. See Daniel Fisher, *Obama Victory Could Spell End of Conservative Supreme Court*, FORBES (Nov. 7, 2012, 12:34 AM), <http://www.forbes.com/sites/danielfisher/2012/11/07/obama-victory-could-spell-end-of-conservative-supreme-court/>.

425. The overwhelming consensus is that the case was a huge boon to President Obama; the political impact of the decision has been described as “probably the best day for the Obama re-election campaign that hasn't required Seal Team Six.” Walter Dellinger, *Supreme Court Year in Review Entry 20: Why Obama Won More than a Battle*, SLATE (June 29, 2012), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/supreme_court_year_in_review/supreme_court_year_in_review_the_obama_administration_won_more_than_a_battle_on_health_care_.html (quoting Drew Dellinger, *On the Supreme Court Upholding the Affordable Care Act*, DREW DELLINGER (June 29, 2012), http://drewdellinger.org/pages/blog/June_2012) (internal quotation marks omitted). But see William Bennett, *Health Care Ruling Can Help Romney*, CNN.COM (July 11, 2012, 11:57 AM), <http://www.cnn.com/2012/06/29/opinion/bennett-Court-romney/index.html> (explaining that “the verdict, while a serious judicial blow to conservatives, may favor them politically” because “Mitt Romney and Republican leaders [could] now campaign relentlessly against a massive, sweeping tax increase . . .”).

426. See Fischman *supra* note 397, at 5, 13.

heightened value for chief justices due to the singular association between Court eras and the Court's leader.⁴²⁷

If pure doctrinal development was not Roberts's central aim, and his doctrinal maneuverings were simply attempts to win back some benefits for protecting the credibility of the Court, then his actions do not appear so foolish. This does not dispute the conclusion that Roberts's tactics fell short of his strategy—clearly he was unable to convince his colleagues of the wisdom and importance of protecting the Court in this way. But it does suggest that Roberts knowingly sacrificed for the good reputation of the Court, and possibly himself, because of the increase in judicial power that the case represents.

To conclude otherwise, it is necessary to assume, against all the evidence, that Roberts is not very clever, or at least that he is extremely optimistic about the prospects of being able to translate his one and three-person pluralities into solid majorities in the future. A more plausible explanation is that Roberts understood that his efforts to bend the arc of Commerce Clause, Necessary and Proper Clause, and Tax and Spending Clause doctrine may come to nothing—that he knew that the cost he was paying was certain whereas the doctrinal benefit was uncertain. Roberts decided to uphold the mandate, contrary to his policy preferences and despite his failure to garner a coalition, which he has explicitly stressed the importance of.⁴²⁸ This suggests that other concerns dominated: maintaining the credibility of the Court, maintaining his own reputation, and promoting long-term judicial power entrenchment. The nature and salience of each of these institutional benefits are addressed in the remainder of this Part.

1. Legitimacy—Protecting the Court

In the past, the Supreme Court faced threats to its very existence—President Jefferson went so far as to cancel a Term of the Court⁴²⁹—and to the willingness of the executive to enforce its decisions.⁴³⁰ However, President Eisenhower's reluctant dispatching of National Guard troops into Little Rock to enforce *Brown v. Board of Education* finally established the

427. *See id.*

428. *See Rosen, supra* note 398, at 105.

429. Jason Mazzone, *The Judicial Confirmations Process*, JURIST, <http://jurist.law.pitt.edu/forum/Symposium-jc/mazzone-printer.php> (last visited Oct. 2, 2013).

430. For instance, President Andrew Jackson is reputed to have said, in response to the Supreme Court's ruling in *Worcester v. Georgia* of the unconstitutionality of a Georgia criminal statute pertaining to Native American land, "Well: John Marshall has made his decision, now let him enforce it." *See, e.g.,* Edwin A. Miles, *After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis*, 39 J. S. HIST. 589, 589 (1973). While the story may actually be apocryphal, it illustrates the tenor of the times and the attitude towards the Supreme Court in its early days.

principle that Supreme Court decisions will be enforced. But the fact that Roberts did not face any serious threat that the Obama Administration would fail to enforce the Court's decision does not mean there are not potential costs to the Court in making extremely controversial decisions.

Because the Court is consistently the branch of government held in the highest esteem by the public,⁴³¹ it is easy to assume that today it faces no serious threat to its legitimacy. But this conclusion is weakly grounded—we do not know how political elites or the public would react if the Court did not restrain itself out of *anticipation* of any danger to its legitimacy. The Court's record of avoiding the danger of popular backlash does not necessarily mean that the danger does not exist.⁴³²

In fact, in the two most notable cases in which the Court did involve itself in the most controversial issues of the day, it suffered blows to its legitimacy. First, in deciding that slaves were property and unable to assert citizenship (thus overturning the Missouri Compromise), *Dred Scott v. Sandford*⁴³³ not only made the Civil War inevitable, but it created a lasting stain on the Court's reputation.⁴³⁴ Second, when a five-Justice bloc stymied President Roosevelt, overturning multiple pieces of legislation in which he attempted to deal with the Great Depression, Roosevelt pushed for a Court packing plan that, had it passed, would have left the Court considerably weaker as an institution.⁴³⁵ Instead, Justice Owen Roberts "switched" his vote in *West Coast Hotel v. Parrish*,⁴³⁶ and in doing so saved the Court from political retaliation.⁴³⁷ The lesson that the Court seems to have drawn

431. See, e.g., Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209, 1209 (1986) (describing the consistent core of support for the Supreme Court); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 635 (1992) (describing the Supreme Court's consistently high public evaluations compared to the other branches of government). Even with the Supreme Court's low current approval rating of 46%, "Americans still have significantly more trust in the judicial branch than in either the executive or the legislative branch." Jeffrey M. Jones, *Supreme Court Approval Rating Dips to 46%: Down 15 Percentage Points from 2009*, GALLUP (Oct. 3, 2011), <http://www.gallup.com/poll/149906/supreme-court-approval-rating-dips.aspx>.

432. See generally Rui de Figueiredo, Tonja Jacobi & Barry Weingast, *The New Separation of Powers: Integrating the Study of American Politics*, in HANDBOOK OF POLITICAL ECONOMY 199, 122 (Barry R. Weingast & Donald Wittman, eds., 2006) (discussing the danger of drawing inferences of absence of an effect from the nonoccurrence of that effect).

433. 60 U.S. 393 (1857).

434. See, e.g., BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 106 (1993) (for "more than a century the case has stood as a monument of judicial indiscretion").

435. See Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 70 (2010).

436. 300 U.S. 379 (1937).

437. See Ho & Quinn, *supra* note 435, at 70, 97 (showing a highly significant and

from these fraught episodes is that it was wrong to overreach in *Dred Scott* and right to switch to save itself in *West Coast Hotel*. The Court now seldom strays for long from deciding the majority of cases overwhelmingly in line with the preferences of the political branches—a result that cannot simply be explained by the fact that those branches select the justices.⁴³⁸

The Court is right to take note of the prevailing political winds. Verbal, public attacks on the Court affect the esteem in which it is held, which in turn determines whether actual political attacks—for example, in the form of jurisdiction stripping—are more likely to occur.⁴³⁹ This does not mean that the Court must slavishly follow popular will. Part of its role is to check the other branches, and arguably it also has a special duty to protect discrete and insular minorities from majoritarian attacks.⁴⁴⁰ But the Court has always struggled with the “counter majoritarian difficulty,” and while it is accepted as the body that enforces fundamental law, it is only “within delicately defined boundaries” of what popular opinion would tolerate.⁴⁴¹ Thus, judges must not act as politicians, making decisions according to passing political fads. Instead they must recognize that they are required to act within the constraints of public acceptance, particularly in cases with direct political significance.

Of course, public opinion solidly supported the New Deal in 1937, and the national governing coalition was united along party lines.⁴⁴² In the

sharp, though temporary, shift in voting patterns by Associate Justice Owen Roberts in 1936).

438. See, e.g., Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policy Maker*, 6 EMORY L.J. 279, 285, 295 (1957); see also Jonathan Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50, 63 (1976); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 87–98 (1993).

439. See Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POL. 697, 705 (2006) (“[W]e remain vigilant lest the public (perhaps driven by zealous politicians) lose their faith in these important institutions.”).

440. See *United States v. Carolene Prods.*, 304 U.S. 144, 153, n.4 (1938) (“Prejudice against discrete and insular minorities may be a specific condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

441. *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (“The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.”); MCCLOSKEY, *supra* note 13, at 9.

442. In the 75th Congress, while Roosevelt held the presidency, Democrats held massive majorities in both houses, with over 75% of seats in both the House and the Senate. See *Party Division in the Senate, 1789–Present*, U.S. SENATE, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited Oct. 2, 2013). For public opinion approval of President Roosevelt, see *Job Performance Ratings for President Roosevelt*, ROPER CENTER PUB. OPINION ARCHIVES, <http://www.ropercenter.uconn.edu/CFI>

context of *NFIB v. Sebelius*, however, both public opinion on the ACA and control of the government was divided. In fact, in the wake of *NFIB v. Sebelius*, the good opinion of both Roberts and the Supreme Court suffered.⁴⁴³ Unsurprisingly, 40% of Republicans shifted their views of Roberts from positive to negative, while 19% of Democrats viewed him more favorably.⁴⁴⁴ Gallup largely attributed these shifts to the ACA decision.⁴⁴⁵ Overall, favorability shifted negatively by 11–12% for all adults nationally.⁴⁴⁶

Does this mean, then, that Roberts miscalculated—that his decision in fact damaged the Court’s legitimacy? Once again, this is not a safe assumption; we do not know how negative or positive those same survey results would have been had Roberts decided the other way. It is quite plausible that the increased dim view of the Court was a product of the Supreme Court deciding such a seemingly political question at all, especially at such an electorally significant time, instead of avoiding the case entirely.⁴⁴⁷ Even after the fact, polls cannot determine whether Roberts was right in his calculation, as we will never know the counterfactual. But if we are concerned with Roberts’s strategic decision, the more interesting questions are: “What did he know when making the decision?” and, knowing what he knew then, “Can we infer what he was thinking?”

Roberts’s most salient source of information was public reaction to *Bush v. Gore*,⁴⁴⁸ where the Supreme Court was seen as giving a direct boost to its favored political party. There is ample evidence that the Supreme

DE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Roosevelt (last visited Nov. 4, 2013).

443. Frank Newport, *Republicans Turn Against John Roberts, U.S. Supreme Court*, GALLUP (July 16, 2012), http://www.gallup.com/poll/155738/Republicans-Turn-Against-John-Roberts-SupremeCourt.aspx?utm_source=google&utm_medium=rss&utm_campaign=syndication.

444. That is as compared to after his nomination in 2005. *Id.* This could of course represent a honeymoon period.

445. *Id.* However, Gallup concluded from a different poll that the “drop in Supreme Court approval . . . could be a result of the broader decline in Americans’ trust in government in general, rather than a response to anything the court has done recently, because the court has been out of session since early summer.” Jones, *supra* note 431.

446. Newport, *supra* note 443. In addition, there was a five-point shift from no opinion to unfavorable of the Supreme Court generally from 2011 to 2012, although there was no loss of favorable opinion. *Id.* The shift was 32% negative for Republicans and 22% positive for Democrats. *Id.* In a poll taken prior to the decision, “more than two-thirds of Americans hope[d] that the Court [would] overturn[] some or all” of the law. Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits Just 44% in New Poll*, N.Y. TIMES, June 8, 2012, at A1, A16.

447. See discussion *infra* Part II.

448. 531 U.S. 98 (2000).

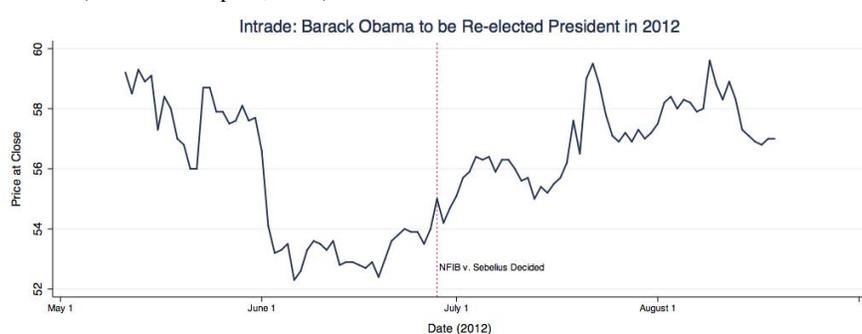
Court suffered a blow to its legitimacy in the aftermath of that case.⁴⁴⁹ Although the Court recovered,⁴⁵⁰ that does not mean that the Court could survive so easily a second time. A conservative Court deciding *NFIB v. Sebelius* in favor of the Republicans *after* it had already done so in *Bush v. Gore* may well have done exponentially more harm than the initial decision. Both the timing of *NFIB v. Sebelius* and the singular significance of healthcare to Obama's reelection prospects⁴⁵¹ could have made a decision to strike down the legislation too much for public acceptance.

Adding to this, at the time of the decision, the presidential election campaign was revealing the monetary advantage that the Roberts Court had recently bestowed upon the Republicans in the form of *Citizens United v. Federal Elections Commission*.⁴⁵² That controversial ruling allowed hundreds of millions of dollars to flow to Governor Romney from a handful of anonymous political donors.⁴⁵³ The furor over *Citizens United* added to

449. Liptak & Kopicki, *supra* note 446 (arguing that the drop in the Court's approval ratings from 66% in the 1980s to 44% in 2012 "could reflect a sense that the Court is more political, after the ideologically divided 5-to-4 decisions in *Bush v. Gore* . . . and *Citizens United*.").

450. See James L. Gibson, *The Legitimacy of the United States Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL L. STUD. 507, 515 (2007) (showing that although there was a significant negative shift in support for the Court after *Bush v. Gore*, the long-term support for the Supreme Court did not decline after the case).

451. Although by no means definitive, the following graph shows considerable improvement in President Obama's prospects for reelection after the *NFIB v. Sebelius* decision, as measured on the online prediction market Intrade. *Barack Obama to be Re-elected President in 2012*, INTRADE, <http://www.intrade.com/v4/markets/contract/?contractid=743474> (last visited Sept. 6, 2013).



452. 558 U.S. 310 (2010); see Nicholas Confessore, Michael Luo & Mike McIntire, *In G.O.P. Race, a New Breed of Superdonor*, N.Y. TIMES, Feb. 22, 2012, at A1.

453. See Confessore, Luo & McIntire, *supra* note 452, at A1, A14. By the time of the election, it became apparent that President Obama was able to match this Republican advantage through small direct donations; however, this was not apparent at the time. *Id.* At any rate, compared to prior law, *Citizens United* gave a clear financial advantage to Republicans, even though it was not ultimately determinative in the race. See *id.* ("About

the greater scrutiny and broader climate of skepticism of the Court and its most controversial decisions. For instance, popular comedian and TV host Stephen Colbert devoted much of an entire season to satirizing *Citizens United* and the changes to campaign finance law that it unleashed.⁴⁵⁴ The public may be able to forgive one partisan case deciding or influencing a presidential election, or even a second, but a third?

Roberts himself has made clear his concern for maintaining Court legitimacy and the importance of the chief justice not being seen as pursuing an ideological agenda. “If I’m sitting there telling people, ‘We should decide the case on this basis,’ and if [other justices] think, ‘That’s just Roberts trying to push some agenda again,’ they’re not likely to listen very often.”⁴⁵⁵ This is particularly true, according to Roberts, when politics are highly polarized.⁴⁵⁶

If the Court had divided along partisan lines, with only the conservatives striking down the signature legislation of a liberal administration, and the liberal Justices strongly objecting, it would be understandable for people to lose faith in the Court as a judicial instrument and to see it as simply a political body. Some did so in anticipation even before the decision.⁴⁵⁷ As constitutional scholar Akhil Reed Amar put it: if

two dozen individuals, couples or corporations gave \$1 million or more to Republican super PACs. . . . Collectively, their contributions totaled more than \$50 million, making them easily the most influential and powerful political donors in politics today.”)

454. Colbert started his own Political Action Committee, “Americans for a Better Tomorrow, Tomorrow,” and subsequently his own Super PAC, which made fun of the newly liberalized disclosure laws that *Citizens United* brought about with its title “Stephen Colbert’s Colbert Super PAC SHH!” and its motto “making a better tomorrow at a later date that’s none of your goddamn business.” *Stephen Colbert’s New Super Secret Spooky PAC and Karl Rove’s Anonymous Political Donations*, BOSTINNO (May 9, 2012, 9:23 AM), <http://bostinno.com/2012/05/09/stephen-colberts-new-super-secret-spooky-pac-and-karl-roves-anonymous-political-donations-video/>.

455. Rosen, *supra* note 398, at 107 (quoting Roberts) (internal quotation marks omitted). Rosen, writing after the *NFIB v. Sebelius* decision, reiterated that the dominant theme of his previous interview with Roberts had been Roberts’s “desire to restore the bipartisan legitimacy of the Supreme Court,” and argued that this motive explained Roberts’s decision in *NFIB v. Sebelius*. Jeffrey Rosen, *Big Chief: How to Understand John Roberts*, NEW REPUBLIC, Aug. 2, 2012, at 13.

456. Rosen, *supra* note 398, at 112 (“Politics are closely divided The same with the Congress. There ought to be some sense of some stability, if the government is not going to polarize completely. It’s a high priority to keep any kind of partisan divide out of the judiciary as well.” (quoting Roberts) (internal quotation marks omitted)).

457. Elizabeth B. Wydra, *Supreme Court’s Legitimacy at Stake on Affordable Care Act*, POLITICO (June 25, 2012, 9:55 PM), <http://www.politico.com/news/stories/0612/77806.html#ixzz20oJGumCF> (“Is it illegitimate to question the Court’s legitimacy if it strikes down the reform? Is it wrong to hold Supreme Court Justices to their duty to apply the clear text and history of the Constitution as well as the Court’s precedents—including opinions of sitting

the Court had struck down the mandate in a 5-4 decision, his life as a constitutional scholar would have been a fraud.⁴⁵⁸ The decision would have meant that the law did not matter, only “politics, money, party and party loyalty.”⁴⁵⁹

2. Reputation—the “Roberts Court”

Roberts’s apparent concern for the institutional legitimacy of the Court does not mean that his actions were entirely selfless. Intrinsicly interwoven with popular respect for the Court as an institution is a more personal aspect of legitimacy: the individual reputation of each justice. Roberts’s interest, however, is far greater than that of the other eight Justices. As Chief Justice, his reputation as a jurist is far more closely associated with the long-term respect given to the Court than is the case for any other justice.

If the risks attendant in making a seemingly partisan decision in *NFIB v. Sebelius* were so clear to Roberts, why then did the other four conservative Justices not make the same judgment? Those Justices lobbied hard for Roberts to join (or rejoin) them in striking down the entire law.⁴⁶⁰ In fact, the dissenting Justices seemed entirely unfettered by institutional legitimacy constraints, not only voting to strike down the Obama Administration’s key legislative success, but making up new doctrine as they did so.⁴⁶¹ For instance, the dissent stated that since it considered an individual mandate outside the scope of congressional power under the Commerce Clause, they were not obliged to inquire further (although they did) as to whether it was valid under the Tax and Spend Power—a novel reversal of the canon which assumes the constitutionality of legislation.⁴⁶²

At least for Justices Scalia and Thomas, the answer may lie in the extremeness of their ideological views. As is apparent from Figure 1, above, Scalia and Thomas are extreme conservatives. In fact, Thomas is the most conservative Justice to have served on the Court since at least 1937, except for then-Justice Rehnquist, who became significantly more moderate

Justices just a few years ago — rather than expect their decisions to be based on tea party talking points and partisan affiliation? If it is, then I don’t want to be right.”).

458. *Id.*

459. *Id.* (quoting Amar). *But see* Pearlstein, *supra* note 238 (“We learned there is still a difference in this country between politics and law.”).

460. Crawford, *supra* note 58.

461. *See* Paul Starr, *Between the Lines*, NEW REPUBLIC, Aug. 2, 2012, at 10 (pointing out that Roberts embraced, almost in their entirety, the four conservative Justices’ arguments to overturn the ACA completely).

462. *NFIB v. Sebelius*, 132 S. Ct. 2556, 2650–51 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). Additional analysis of the arguments of the dissenting Justices is provided below.

upon his promotion to Chief Justice.⁴⁶³ Thomas is approximately two standard deviations more conservative than the historical average for the Court.⁴⁶⁴ Scalia is the next most conservative justice since 1937, approximately one and a half standard deviations right of average.⁴⁶⁵ Thus, it is fair to characterize both Justices as extremists.⁴⁶⁶ Whether justices are regarded as moderate or extreme is in large part a product of their tendencies to join the majority or dissent and, when dissenting, whether they dissent alone or with others.⁴⁶⁷ “A Justice who typically dissents alone in conservative cases is more liberal than a colleague who tends only to dissent in 7-2 conservative decisions, and so on.”⁴⁶⁸ As such, an extreme conservative (or liberal) justice is one who feels less compunction to compromise and join opinions that are more liberal (conservative) than their own preferences. It is unsurprising, then, that the two most consistently extreme conservative Justices on the Court since before World War II were less inclined to compromise for the sake of judicial legitimacy in *NFIB v. Sebelius*.

But what about the other more moderate conservatives, Justices Alito and Kennedy? Kennedy is the most moderate of the four Justices and yet was reported to be the most pushy of all those lobbying Roberts to switch to vote to strike down the ACA.⁴⁶⁹ Kennedy has been the median Justice for seven years, with a wide berth on either side; as such, he naturally falls in the majority on any issue, without need of compromise.⁴⁷⁰ Before Kennedy, Justice O’Connor was the dominant median, but that did not mean that she was moderate. As one commentator explained, in attempting to understand why the Court was seen to “lurch across the political spectrum” from case to case: it was because that was how O’Connor’s preferences lay.⁴⁷¹ Kennedy, too, is arguably not moderate in any of his views, but just appears moderate when aggregating his divergent views—a Justice who is business friendly but libertarian on many social issues.⁴⁷²

463. In 2010, Justice Thomas scored 3.99. See 2010 MQ Scores Data, *supra* note 51 (scores database). Then-Justice Rehnquist reached his highest score in 1975, at 4.41. *Id.*

464. *See id.*

465. In 2010, Justice Scalia scored 3.02; his highest score was 3.52, in 2000. *See id.*

466. This is not an ad homonym or ideological characterization; it applies equally to liberal justices, such as Justice Douglas, who was over three standard deviations left of center by the end of his tenure on the Court. See Martin & Quinn, *supra* note 49, at 1.

467. Jacobi & Sag, *supra* note 30, at 19.

468. *Id.*

469. Crawford, *supra* note 58.

470. See Epstein and Jacobi, *supra* note 54, at 55.

471. Edward P. Lazarus, *It’s All About O’Connor*, L.A. TIMES (July 9, 2000), <http://www.articles.latimes.com/2000/jul/09/opinion/op-49818>.

472. When Kennedy, the author of *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down anti-sodomy laws), was nominated to the Court, the Center for Constitutional Rights opposed him for being overly pro-business. See CTR. FOR CONSTITUTIONAL RIGHTS,

Justice Alito looks the most like Roberts. Both are moderate conservatives who look similar in terms of overall behavior—each is approximately one standard deviation from the center of the Court’s historical average—but their overall patterns vary similarly over time.⁴⁷³ Yet this does not mean that they will consistently vote together. One difference that could explain the divergence in this case is that Alito may be more willing to venture off on his own, as illustrated by his lone dissent in the important First Amendment case *Snyder v. Phelps*.⁴⁷⁴ In contrast, Roberts, like his mentor Rehnquist, is more likely to feel the moderating pull of being Chief Justice.⁴⁷⁵ Roberts himself explained Rehnquist’s move to the center once he became Chief Justice in terms of institutional legitimacy: “I think there’s no doubt that he changed, as Associate Justice and Chief; he became naturally more concerned about the function of the institution.”⁴⁷⁶

In contrast, Scalia at least was unconcerned about any threat posed to the Court’s institutional legitimacy. In response to the President’s comments on *Citizens United* and in anticipation of the healthcare ruling, Scalia said, “What can he do to me? Or to any of us? . . . We have life tenure and we have it precisely so that we will not be influenced by politics, by threats from anybody.”⁴⁷⁷ But there is more incentive for the chief justice to be an institutional player because divisions on the Court reflect more on the chief justice than any associate justice. Scalia can feel free to create controversy. As he himself put it: “It is fun to push [people’s] buttons.”⁴⁷⁸ But if the Court had suffered a serious blow to its legitimacy, it is not Scalia who would go down in history as having overseen its demise, but its titular head, Chief Justice Roberts.

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473. They both scored as moderate conservatives at 1.74 and 1.75, respectively, in their first year, and 2.56 and 2.35, respectively, in the most recent Term. See 2010 MQ Scores Data, *supra* note 51 (scores database). Given the short time frame of this variance, it seems likely that these shifts are a product of a changing Court docket, rather than shifts in actual preferences. See Bustos & Jacobi, *supra* note 3.

474. 131 S. Ct. 1207, 1222 (2011). Note also that Alito joined Breyer’s dissent in the recent Copyright Clause and First Amendment decision, *Golan v. Holder*, 132 S. Ct. 873 (2012) (Breyer, Alito, JJ., dissenting) (arguing that a statute that withdrew material from the public domain is invalid under the Copyright Clause, interpreted in the light of the First Amendment).

475. See generally, BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979).

476. Rosen, *supra* note 398, at 112.

477. *U.S. Justice Scalia Steps up Criticism of Healthcare Ruling*, REUTERS, July 29, 2012, available at <http://www.reuters.com/article/2012/07/29/usa-Court-scalia-idUSL2E8IT1BM20120729>.

478. *Id.*

The chief justice is the public face of the Court. It is his name by which the Court is known throughout the era in which he presides. Roberts had his personal legacy as a Justice at stake, like the other Justices, but also his image as leader of the Court and the image of the Court as a whole during the era in which he is Chief. The chief justice has a separate, identifiable constitutional role and special duties and powers not applicable to the other justices. He assigns opinions to the other justices whenever he is in the majority; he reports to Congress on the needs of the judiciary; and he plays the role of administrative leader of the Court.⁴⁷⁹ But with these special powers come special responsibilities: his name is identified with both the successes and failures of the Court. As Roberts lamented, a “solid majority” of the sixteen Chief Justices who came before him were, in his opinion, failures.⁴⁸⁰ And to the extent that the Court’s legitimacy would have suffered had Roberts not compromised in *NFIB v. Sebelius*, in what many would have perceived as a partisan electoral gift, it would have been the “Roberts Court” that was considered a failure.⁴⁸¹ Ultimately, it would be Roberts’s legacy that was damaged if the Court’s reputation suffered.

For this reason, Roberts strove to make it “a priority of his first term to promote unanimity and collegiality on the Court” because consensus on the Court is essential to the legitimacy of the institution.⁴⁸² Further, Roberts stated: “I think that every Justice should be worried about the Court acting as a Court and functioning as a Court, and they should all be worried, when they’re writing separately, about the effect on the Court as an institution.”⁴⁸³ For this reason, Roberts advocated that justices be willing to put the good of the Court above their own ideological agendas.⁴⁸⁴

In relation to *NFIB v. Sebelius*, public commentators on both the left⁴⁸⁵ and the right⁴⁸⁶ agreed with Roberts’s assessment of the effect of making a

479. Brenner, *supra* note 58, at 209; Todd C. Peppers & Chad M. Oldfather, *Till Death Do Us Part: Chief Justices and the United States Supreme Court*, 95 MARQUETTE L. REV. 709 (2011); *Extra! Chief Justice’s Duties*, CNN.COM (Sept. 12, 2005, 11:54 PM), http://www.cnn.com/2005/EDUCATION/09/12/extra.chief.justice.duties/index.html?_s=PM:EDUCATION.

480. Rosen, *supra* note 398, at 104.

481. See, e.g., David G. Savage, *Supreme Court Becomes Roberts Court in Year of Surprises*, L.A. TIMES (July 7, 2012), <http://www.articles.latimes.com/2012/jul/07/nation/lan-na-court-term-20120708> (“In the last week of the term, the Roberts court was truly born, even though Chief Justice John G. Roberts Jr. was finishing his seventh year. Until this year, Justice Anthony M. Kennedy always played the role of decider in the cases where the conservatives and liberals were evenly split. But in the healthcare case, Roberts split with the conservatives and joined with the court’s four liberals to uphold President Obama’s signature law.”).

482. Rosen, *supra* note 398, at 105.

483. *Id.* (quoting Roberts).

484. *Id.* at 106.

485. Linda Greenhouse, *A Justice in Chief*, N.Y. TIMES OPINIONATOR (June 28, 2012,

seemingly partisan decision, although they disagreed over its value and propriety. “A narrowly divided Supreme Court which overturned a sitting president’s signature achievement would, from Roberts’[s] perspective, cause near-irreparable damage to the Court’s reputation in the eyes of the public.”⁴⁸⁷ As a result, Roberts appears to have felt compelled to accept the constitutionality of the individual mandate in the ACA, contrary to his own policy preferences.

Roberts’s reputational concerns were arguably not limited to the amorphous concern for the Court’s general reputation’s reflection on him personally; rather, Roberts faced a more personal reputational threat. Jan Crawford gathered inside sources who insisted that Roberts, who “pays attention to media coverage,” buckled to liberal pressure not to strike down the mandate.⁴⁸⁸ This was in part due to his own reputation: “Some even suggested that if Roberts struck down the mandate, it would prove he had been deceitful during his confirmation hearings, when he explained a philosophy of judicial restraint.”⁴⁸⁹

In addition, while the Court was deciding the fate of the ACA, *The New Yorker* released a stinging article by another successful gatherer of insider sources, Jeffrey Toobin.⁴⁹⁰ The article characterized Roberts as an exceptionally “aggressive conservative judicial activis[t]” who, in *Citizens United*, manipulated Court norms to orchestrate the conservative outcome that the Chief had pre-decided.⁴⁹¹ Toobin’s article did not just paint the

5:19 PM), http://opinionator.blogs.nytimes.com/2012/06/28/a-justice-in-chief/?_r=2%5B9/5/13 (“His decision to call the mandate a tax and to provide a clearly reluctant fifth vote for upholding it as within the Congressional Taxing Power was a deeply pragmatic call that saved the Affordable Care Act. Certainly by no coincidence, it also saved the Supreme Court from the stench of extreme partisanship that has hung over the health care litigation from the moment more than two years ago that Republican state officials raced one another to the federal courts to try to erase what they had been unable to block.”).

486. Richard A. Epstein, *What Was Roberts Thinking?*, DEFINING IDEAS (June 29, 2012), <http://www.hoover.org/publications/defining-ideas/article/121426> (“[O]n the crucial issue of the individual mandate and the taxing power, he sounds like a lawyer who is too clever by half. The point here is ironic, for without question, the Chief Justice came to his decision by self-consciously marching to the beat of two drummers: judge and statesman. . . . [H]e is keenly aware of his statesman’s role as the *Chief Justice* of the United States Supreme Court. . . . The Chief Justice looks more like a batter seeking to execute a suicide squeeze than an umpire calling balls and strikes.”).

487. *Obamacare & the Chief Justice: The Would-Be 9-0 Compromise*, REDSTATE (July 1, 2012, 12:50 AM), <http://www.redstate.com/scorpio0679/2012/07/01/obamacare-the-chief-justice-the-would-be-9-0-compromise/>.

488. Crawford, *supra* note 58.

489. *Id.*

490. Jeffrey Toobin, *Money Unlimited: How Chief Justice John Roberts Orchestrated the Citizens United Decision*, NEW YORKER, May 21, 2012, at 36.

491. *See id.* “The Chief Justice wanted to make [Deputy Solicitor General Malcolm]

Chief as an activist conservative ideologue, but rather as a partisan hack protecting the interests of the Republican Party. For instance, the article alleged: “So, as the Chief Justice chose how broadly to change the law in this area, the real question for him, it seems, was how much he wanted to help the Republican Party. Roberts’s choice was: a lot.”⁴⁹² A decision to strike down the individual mandate in the ACA, then, would not only have followed on the heels of other conservative decisions by the Roberts Court, but would have also followed accusations of Roberts as a proxy Republican Party strategist who lied his way onto the Court.

This individual reputational explanation would explain the timing of Roberts’s switch; Toobin’s article was released in May, at the same time rumors emerged that the Chief Justice was under pressure by the Administration to decide in favor of the individual mandate.⁴⁹³ A switch to uphold the most salient part of the law would snuff out those rumors, and still allow Roberts to write an extremely conservative opinion for the rest of the fate of the ACA.

Yet there is reason to doubt that the reputational interest dominated for Roberts in upholding the mandate; doing so involved a considerable reputational cost. Individual reputation has two basic elements: the reputation of the Court, which reflects indirectly on the reputation of each justice and particularly on the chief justice; and the impression of consistency of the justice himself. This decisional consistency is what constitutes the justice as a jurisprudential thinker, making decisions according to an exogenous methodology or juridical vision, rather than simply making policy choices in each case. Roberts’s decision to uphold the mandate cost him greatly in the latter regard, bucking his reputation as a solid moderate conservative.⁴⁹⁴ So the reputational interest cuts in two directions.

Ultimately, reputational and institutional interests are bound together for a Supreme Court justice, particularly for a chief justice. It is difficult to

Stewart’s position look as ridiculous as possible” by “leading Stewart into a trap” and forcing the government to “take an absurd position . . . through artful questioning.” *Id.* at 40–41.

492. *Id.* at 44.

493. George F. Will, *Obamacare Lobbying of Roberts Will Fail*, HARTFORD COURANT (May 25, 2012), http://articles.courant.com/2012-05-25/news/hc-op-will-health-care-lobbying-of-roberts-will-fa-20120525-4_1_obamacare-mandate-chief-justice-john-roberts (“They are waging an embarrassingly obvious campaign, hoping he will buckle beneath the pressure of their disapproval and declare Obamacare constitutional.”).

494. Benjamin Hart, *John Roberts Criticism: Conservatives Continue to Attack Justice After Health Care Ruling*, HUFFINGTON POST (June 30, 2012, 9:33 AM), http://www.huffingtonpost.com/2012/06/29/john-roberts-criticismcontinues_n_1637410.html (describing how conservatives have been continuously attacking Roberts after the decision, “calling into question both his line of judicial reasoning and his conservative bona fides”).

differentiate between them without the ability to look inside Roberts's head; even he may not be able to distinguish between those two motivations. But together, they constitute judicial credibility, and it is possible to differentiate between these credibility factors on one hand and policy and doctrine on the other.

Roberts gained policy and doctrinal advantages while simultaneously conceding ground by both drawing the constitutional limits that justified the ACA as narrowly as possible, and getting as much in return doctrinally for the sacrifice he made. But in order to make that sacrifice worthwhile in terms of policy outputs, it was necessary to craft a broad coalition—an important element of the process that Roberts failed to achieve. The fact that he nonetheless chose to uphold the mandate, then, suggests that institutional and personal credibility concerns may have dominated for Roberts.

Ultimately, however, the two motivations need not be at odds. Once it is appreciated that the most fundamental doctrinal goal for Roberts was not any one given conservative doctrine but rather promoting the institutional power of the Court, it becomes clear that Roberts's institutional and doctrinal concerns were actually one and the same. The following section shows that the one consistent theme throughout all of Roberts's strategizing was maximizing judicial discretion and power, which will ultimately allow Roberts far greater doctrinal innovation than any substantive doctrinal outcome.

C. Maximizing Judicial Power Under the Guise of Self-Restraint

“[I]t's my job to call balls and strikes and not to pitch or bat.”⁴⁹⁵ This phrase from then Judge Roberts's confirmation hearing to become Chief Justice of the Supreme Court famously encapsulates his claim of judicial “humility,” a vision of judges as “servants of the law . . . [who] don't make the rules; they apply them.”⁴⁹⁶ However, as has been shown, in deciding the fate of the ACA, by giving his political opponents a short-run victory through partially upholding the Obama administration's central legislative platform, Roberts avoided the enormous political and institutional costs of having the Court decide a second presidential election along partisan lines. Thus, Roberts revealed himself to be not a humble law applier, but a keen politico-legal strategist. Yet even while Roberts was dramatically developing multiple areas of law in his favored conservative direction—restricting the Commerce Clause, the Necessary and Proper Clause, the Tax Power and the Spending Power—he insisted that he was exercising judicial restraint. He was respecting the judiciary's “own limited role in policing

495. *Text of John Roberts' Opening Statement*, *supra* note 148.

496. *Id.*

[congressional] boundaries.”⁴⁹⁷ This claim of restraint itself served a strategic purpose of masking, and thus actually enabling, greater strategic manipulation.

As one commentator noted of Roberts’s opinion, the result of the Medicaid ruling’s lack of clarity “is likely not only to be a flood of litigation but also uncertainty in Congress about the conditions it can attach to the funds going to a wide range of federally supported programs in the states.”⁴⁹⁸ This is true, but it understates the problem. Roberts introduced many amorphous concepts: both elements of coerciveness in relation to the granting power—transformation and numerical size—as well as the in/activity distinction under the Commerce Clause. All of these have the effect of expanding judicial power and judicial discretion. Clearly then, if Roberts is an umpire,⁴⁹⁹ the strike zone is not defined by the rules of the game, but by what he says it is on any given day.

Roberts repeatedly claimed to be exercising restraint in the opinion, in two important ways. First, he sought to make clear that he was simply attempting to objectively apply the law, not to impose his own ideology.⁵⁰⁰ He stressed the Court’s “deference in matters of policy” and that however much individual Justices may disagree with those policy choices, “[i]t is not our job to protect the people from the consequences of their political choices.”⁵⁰¹ Second, he justified the decision as a means of promoting the separation of powers. For instance, he stated, “Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments.”⁵⁰²

It is no coincidence that Roberts accreted judicial power at the expense of congressional power under the guise of self-restraint. Homage to self-restraint can readily enable activism, and Roberts was following a grand tradition. As Alexander Bickel recognized, the Court is capable of accruing power while appearing to limit itself.⁵⁰³ For instance, stating that the Court need not decide the outer limits of a concept it is creating has the dual advantages of appearing restrained, while simultaneously deciding current cases and leaving itself options in future cases.⁵⁰⁴ Unlike positive action,

497. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2577 (2012) (opinion of Roberts, C.J.).

498. *See* Starr, *supra* note 461, at 11.

499. *Text of John Roberts’ Opening Statement*, *supra* note 148 (“The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire.”).

500. *See NFIB*, 132 S. Ct. at 2579 (majority opinion).

501. *Id.*

502. *Id.*

503. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS*, 200–01 (1986).

504. *NFIB*, 132 S. Ct. at 2600 (majority opinion) (“Because the tax at hand is within even those strict limits, we need not here decide the precise point at which an exaction

inaction requires little justification. If the Court avoids taking positive action—making clear rules or providing lengthy explanations—it will not appear to threaten the status quo, and its decisions are more likely to escape criticism. This in turn encourages minimalist decisions which lack enunciated principle and increase judicial discretion.⁵⁰⁵

Some popular commentators have described the series of maneuvers that Roberts undertook to decide the case as he did as “restraint.”⁵⁰⁶ That Roberts was actually developing multiple doctrines in a conservative direction as part of his “give with one hand and take with the other” strategy has been described in detail above; but there is an even greater way in which his actions were the antithesis of restraint. The overall effect of the many new doctrinal distinctions that Roberts drew—activity versus inactivity in commerce, coercive versus non-coercive spending, and unforeseen conditions that transform taxes into penalties—was to remove restraints on the judiciary.

By their very amorphousness, all of these new doctrinal distinctions that Roberts introduced create judicial discretion and expand the judicial role. Each concept is so open-ended and ill-defined that every question must be litigated to ascertain the boundaries of its reach. This expands the range of judicial power, since every issue must come before the courts. Moreover, when those questions do come to court, each case could come out differently depending on the preferences of the judge. So the ambiguousness of the concepts not only increases judicial power in terms of judges hearing each case, the concepts also create enormous judicial discretion. Roberts’s newly coined doctrinal distinctions will give him future opportunities to craft new conservative doctrine and further shape the law. Presumably, future cases will not involve as much public attention and danger to judicial legitimacy, allowing Roberts to decide according to his own preferences without needing to constrain his choices.

Once again, the Chief Justice’s laying of groundwork for so much future judicial power could be compared to *Marbury*, but that comparison

becomes so punitive that the Taxing Power does not authorize it.”).

505. RICHARD HODDER-WILLIAMS, *THE POLITICS OF THE U.S. SUPREME COURT* 173 (1980) (“‘[S]elf-restraint’ has become a code phrase designed to lend respectability to those who would hesitate to set limits on the actions of governments.”); Martin Shapiro, *The Supreme Court from Warren to Burger*, in *THE NEW AMERICAN POLITICAL SYSTEM* 179, 206 (Anthony King ed., 1979) (noting that, “unbound even by own its rules and in receipt of a large number of appeals,” the Court is also able to increase the area of its discretion).

506. See, e.g., Noah Feldman, *Roberts Chooses Restraint over History on Obamacare*, BLOOMBERG (June 28, 2012, 11:59 AM), <http://www.bloomberg.com/news/2012-06-28/roberts-chooses-restraint-over-history-on-obamacare.html> (arguing that the case shows that Roberts “loves the Supreme Court more than he loves political conservatism” and observing that “Roberts now enters the pantheon of true judicial conservatives, judges who hold back from activist results no matter how it affects presidential politics”).

actually downplays the significance of what Roberts did. In *Marbury*, the Court was deciding the realm of judicial power, and it explicitly expanded its own reach. *NFIB*, however, was not about judicial power, but about congressional power. Roberts expanded judicial reach by restricting congressional power. Increasing judicial power by expanding its authority to check the other branches is not respecting the separation of powers at all, but rather its opposite.

CONCLUSION

The judicial fate of Obamacare had great political salience for the 2012 presidential election, as well as considerable policy significance in upholding the central pillar of health care reform. However, *NFIB v. Sebelius* is ultimately just one case, and, in terms of immediate doctrinal significance, its impact remains uncertain due to Roberts's inability to form a solid majority coalition for most of his doctrinal innovations. Nonetheless, the case deserves close scrutiny because of its enormous significance regarding the future direction of the Court.

Examined closely, Roberts's long-term conservative jurisprudential agenda becomes apparent, and so too does his methodology. Roberts has shown a willingness to manipulate doctrine, resuscitate discarded precedent, selectively apply textual and other methodologies, rely on syllogisms and selective numerical thresholds, and even sacrifice his own preferences in order to achieve his long-term goals.

Roberts set about restricting all avenues of congressional power, including the Commerce Clause, the Tax Power, the Spending Power, and the Necessary and Proper Clause. This heralds an intention to cut back federal legislative power even more actively than his mentor, Chief Justice Rehnquist. The difference is that what the Rehnquist Court did through overruling legislation,⁵⁰⁷ the Roberts Court is doing by creatively construing legislation to avoid overruling statutes, while simultaneously mitigating their impact.⁵⁰⁸

Also like Rehnquist, despite his conservative credentials, Roberts clearly intends to limit federal legislative power in a way that

507. Adam Liptak, *How Activist Is the Supreme Court?*, N.Y. TIMES, Oct. 12, 2013, at SR4 (stating that the Rehnquist Court was 6.4% more likely to strike down legislation than the Roberts Court).

508. Adam Liptak, *The Roberts Court: The Most Conservative Court in Decades*, N.Y. TIMES, Jul. 25, 2010, at 1, 18 (describing the results of four empirical studies showing that the Roberts Court does not overrule legislation at a higher rate than previous courts, but explaining that that the Court has become significantly more conservative under Roberts's leadership); see also Liptak, *supra* note 507, at SR4 ("The Roberts court may not be especially activist in the classic sense of striking down a lot of laws. But there does appear to be an element of politics in its rulings.").

simultaneously promotes judicial power. All of his new doctrinal distinctions—both elements of coerciveness in relation to the granting power, transformation and numerical size, as well as the in/activity distinction under the Commerce Clause—provide for considerable future judicial discretion in their definition and application. All have the effect of expanding judicial power. Thus, *NFIB v. Sebelius* constitutes an announcement by Roberts of his intent to use his power as Chief Justice to carve out a new vision of a constricted Congress and an empowered Supreme Court.

