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Chief Justice John "Marshall" Roberts – How the Chief Justice's Majority Opinion Upholding the Federal Patient Protection and Affordable Care Act of 2010 Evokes Chief Justice Marshall's Decision in Marbury v. Madison

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Chief Justice John "Marshall" Roberts – How the Chief Justice's Majority Opinion upholding the Federal Patient Protection and Affordable Care Act of 2010 Evokes Chief Justice Marshall's Decision in *Marbury v. Madison*

By Professor M. Akram Faizer[1]

The United States Supreme Court sustained the Federal Patient Protection and Affordable Care Act of 2010 based on Chief Justice John G. Roberts, Jr.'s majority opinion in National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012). The Chief Justice's decision to uphold the Act obviated a potentially harmful confrontation with the Obama Administration in advance of the November 2012 general election. However, the decision accomplished more than merely avoid a confrontation with the executive branch. Rather, the Chief Justice's rationale for sustaining the Act under the Taxing and Spending Power and not the Commerce Clause is a marked departure from the Court's prior precedent and aligns the Court's jurisprudence in a direction that is conservative, federalist and activist. The Chief Justice's decision to sustain the Act reminds us of Chief Justice Marshall's decision in Marbury v. Madison, which co-opted the Jefferson Administration in a decision established the Court's judicial review power over both executive and legislative actions and adumbrated the Judiciary's present status as an equal branch of the federal government. Like his greatest predecessor, the Chief Justice issued a carefully reasoned decision that institutionally strengthens the Court, avoids a potentially damaging fight with the executive branch and furthers his own conservative and federalist jurisprudence.

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Introduction

The United States Supreme Court sustained the Federal Patient Protection and Affordable Care Act of 2010 based on Chief Justice John G. Roberts, Jr.'s majority opinion in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012). The decision was feted by President Obama, liberal politicians, activists, and citizens who feared the Supreme Court would use its judicial review powers to invalidate the signature achievement of the United States' 44th President. Unsurprisingly, the decision disappointed many conservatives, who expected the Court to exercise its judicial review power to invalidate what is arguably the most important and ambitious piece of federal social welfare legislation signed into law by any President since the Great Society era. The Act is very unpopular with conservatives and right-wing media pundits because it was signed into law by a Democratic President in a country with increasingly pronounced partisan political cleavages and because it substantially reallocates resources in an industry that already consumes nearly one-fifth of the nation's gross domestic product.[2] Opponents of the Act seized on the "individual mandate," which requires federal income tax-paying individuals to purchase a minimum of health insurance from private health insurance companies[3] or pay what the Act describes as a "shared responsibility payment" or "penalty" directly to the Internal Revenue Service of the United States Treasury Department.[4]

Although Justice Roberts has come under attack from select conservatives for upholding the Act from a constitutional challenge brought by a collection of plaintiffs that includes 26 States, I argue that his majority decision effectively hamstrings the federal government's power in a manner consistent with both conservatism and federalism because Congress will now have less power to both enact social welfare legislation and require States to comply in the implementation of federally-funded programs. Moreover, since the Chief Justice's decision to uphold the Act greatly pleased the President, liberal politicians, activists and citizens, the

[2] Center on Budget and Policy Basics, *Policy Basics: Where Do Our Federal Tax Dollars Go?*, Aug. 13, 2012, http://www.cbpp.org/cms/index.cfm?fa=view&id=1258.
[3] Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A (2010).
[4] Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A(b)(1) (2010).

decision shrewdly narrowed the federal government's powers while enhancing the Court's reputation with the center-left of the American political culture and thus safeguarded the Court's institutional prestige. In short, the Chief Justice's decision is reminiscent of our greatest chief justice's decision in *Marbury v. Madison*, 5. U.S. (1 Cranch) 137 (1803). Like Chief Justice Marshall, who earned the Jefferson Administration's acquiescence in a decision that established the Court's judicial review power and presaged the judiciary's current status as an equal branch of government, Chief Justice Roberts avoided a confrontation with the Obama Administration, enhanced the Court's institutional prestige and articulated a decision that greatly narrows the national government's power under both the Commerce Clause and the Tenth Amendment. He did this by shrewdly finding a means of sustaining the Act while articulating a jurisprudence that is activist, conservative and federalist.

The Patient Protection and Affordable Care Act of 2010

The Act was passed by both Houses of Congress and signed into law by President Obama in 2010 after a highly bruising debate that many pundits believe cost Democratic Party control of the House of Representatives and Nancy Pelosi her position as House Speaker after the November 2010 mid-term elections.[5] Justice Roberts, in describing the Act, writes:

> The Act aims to increase the number of Americans covered by health insurance and decrease the cost of health care. The Act's 10 titles stretch over 900 pages and contain hundreds of provisions. This case concerns constitutional challenges to two key provisions, commonly referred to as the individual mandate and the Medicaid expansion.[6]

THE INDIVIDUAL'S ROLE

In describing the individual mandate, the Chief Justice writes:

> The individual mandate requires most Americans to maintain "minimum essential" health insurance coverage. The mandate does not apply to some individuals, such as prisoners and undocumented aliens. Many individuals will receive the required coverage through their employer, or from a government program such as Medicaid or Medicare. But for individuals who are not

[5] Jay Cost, *Health Care Reform has Endangered the Democratic Majority*, REALCLEARPOLITICS:RACEHORSE BLOG (Aug. 31, 2010, 12:00 AM), http://www.realclearpolitics.com/horseraceblog/2010/08/health_care_reform_has_endange_1.html.
[6] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2580 (2012).

> exempt and do not receive health insurance through a third party, the means of satisfying the requirement is to purchase insurance from a private company.[7]

According to the Act, those who fail to comply by purchasing insurance must make a "shared responsibility payment" or "penalty" to the IRS that is calculated as a percentage of household income.[8] Justice Roberts writes that the "shared responsibility payment is:

> [S]ubject to a floor based on a specified dollar amount and a ceiling based on the average annual premium the individual would have to pay for qualifying private health insurance. In 2016, for example, the penalty will be 2.5 percent of an individual's household income, but no less than $695 and no more than the average yearly premium for insurance that covers 60 percent of the cost of 10 specified services (*e.g.,* prescription drugs and hospitalization). The Act provides that the penalty will be paid to the Internal Revenue Service with an individual's taxes, and "shall be assessed and collected in the same manner" as tax penalties, such as the penalty for claiming too large an income tax refund. The Act, however, bars the IRS from using several of its normal enforcement tools, such as criminal prosecutions and levies. And some individuals who are subject to the mandate are nonetheless exempt from the penalty—for example, those with income below a certain threshold and members of Indian tribes.[9]

In short, the Act's individual mandate requires those with incomes that subject them to the federal income tax, to either purchase basic health insurance, or make a payment to the IRS when filing their tax returns. The individual mandate was initially resisted by the Obama Administration, but eventually included because the Act prevents insurers from either denying insurance coverage or charging higher insurance premiums to individuals with pre-existing conditions and this would, absent the individual mandate, incentivize individuals to delay health insurance purchases until absolutely necessary.[10] Justice Ginsburg, in dissent, writes:

> The minimum coverage provision is thus 'an essential par[t] of a larger regulation of economic activity'; without the provision, 'the

[7] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2580 (2012) (internal citations omitted).
[8] Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A(b)(1) & (c) (2010).
[9] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2580 (2012) (internal citations omitted).
[10] Ezra Klein, *There was a reason conservatives once supported the individual mandate*, WONKBLOG (Mar. 12, 2012, 9:00 AM), http://www.washingtonpost.com/blogs/ezra-klein/post/there-was-a-reason-conservatives-once-supported-the-individual-mandate/2012/03/31/gIQAiddnlS_blog.html.

> regulatory scheme would be undercut.' Put differently, the minimum coverage provision, together with the guaranteed-issue and community-rating requirements, is "'reasonably adapted' to the attainment of a legitimate end under the commerce power": the elimination of pricing and sales practices that take an applicant's medical history into account.[11]

In effect, the Act's most popular requirement – that insurance companies will no longer either deny coverage or charge higher insurance premiums to those with pre-existing conditions – necessitated its least popular and most controversial provision, the individual mandate.

The Several States' Role

The Act's Medicaid expansion requires States to increase their Medicaid rolls to cover all individuals under 65 years of age whose incomes are below 133 % of federal poverty levels by the year 2014.[12] The federal government is to cover 100% of the cost of this Medicaid expansion through the year 2016 and gradually reduce the subsidy until it is no less than 90% of the program cost.[13] Under the Act, States refusing to participate in the Medicaid expansion may lose the entirety of their existing federal Medicaid subsidies, a provision that may leave the States with no alternative but to participate.

In short, the Act seeks to approximate universal health insurance in the United States by greatly expanding Medicaid eligibility at the State level, providing federal insurance subsidies to individuals (not discussed in the decision), disallowing insurance companies from either refusing to cover or charging higher premiums to individuals with pre-existing medical conditions and facilitating this regulation's implementation while ostensibly reducing the cost of health insurance for the rest of the American population by way of the individual mandate.

Reactions to the Oral Argument

Oral Argument on the Act's constitutionality was held from March 26-28, 2012 at the Supreme Court. Court "watchers" immediately forecast a negative outcome for the United States and Solicitor General Donald B. Verrilli, Jr. The CNN and New Yorker Magazine Supreme Court analyst, Jeffrey Toobin, called Mr. Verrilli's oral argument before the Court "a train wreck for the Obama Administration" and predicted the individual mandate would be stricken as

[11] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2626 (2012) (quoting Gonzalez v. Raich, 545 U.S. 1, 24-25 & 37 (2005) (Justice Scalia concurring) (internal citations omitted).
[12] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2601 (2012). Presently, States on average cover employed parents who earn up to 63% of federal poverty guidelines.
[13] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2601 (2012).

unconstitutional.[14] In an article that appeared in the May 10, 2012 New York Review of Books, the very highly regarded American philosopher and legal scholar, Ronald Dworkin, writes:

> Analysts at first predicted a 7-2 decision rejecting the challenge. But they apparently misjudged the dedication of the ultraconservative justices, whose questions in the oral argument have now convinced many commentators that on the contrary, in spite of the text precedent, and principle, the Court will declare the act unconstitutional in June, by a 5-4 vote.[15]

These early predictions were based on both the overall tenor of the oral argument and by the questions posed by Associate Justice Anthony Kennedy, seen by many as the Court's only "swing vote" since the resignation of former Associate Justice Sandra Day O'Connor and her replacement by the more conservative Samuel A. Alito, Jr. Professor Dworkin writes:

> There is still reason to hope, as I discuss later, that Justice Anthony Kennedy, often the swing vote between liberals and ultraconservatives, will have sufficient respect for congressional authority to save the act.[16]

Following the oral argument, President Obama, at an April 1, 2012 joint White House press conference with both the Mexican President Felipe Calderon and the Canadian Prime Minister Stephen Harper, stated:

> Ultimately, I am confident that the Supreme Court will not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress…
>
> And I'd just remind conservative commentators that, for years, what we have heard is, the biggest problem on the bench was judicial activism, or a lack of judicial restraint, that an unelected group of people would somehow overturn a duly constituted and

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[14] *CNN's Jeffrey Toobin Calls David Verilli's Oral Argument Before The Supreme Court Tuesday A Train Wreck For The Obama Administration*, STROKES OF CANDOR (Mar. 12, 2012), http://strokesofcandor.com/us-politics/cnns-jeffrey-toobin-calls-verilli-oral-argument-before-supreme-court-a-train-wreck-for-obama/

[15] Ronald Dworkin, *Why the Mandate is Constitutional: The Real Argument*, THE N.Y. REV. OF BOOKS, May 10, 2012, at 4, *available at* http://www.nybooks.com/articles/archives/2012/may/10/why-mandate-constitutional-real-argument/?pagination=false.

[16] Ronald Dworkin, *Why the Mandate is Constitutional: The Real Argument*, THE N.Y. REV. OF BOOKS, May 10, 2012, at 4 *available at* http://www.nybooks.com/articles/archives/2012/may/10/why-mandate-constitutional-real-argument/?pagination=false.

> passed law…Well, this is a good example, and I'm pretty confident that this court will recognize that and not take that step.[17]

He made these comments despairing the Act may not survive judicial review. Some conservatives interpreted the President's remarks as intimidation, a veiled threat to attack the Supreme Court in the forthcoming election should the Act be overturned.[18] In fact, since the Court's recent decisions of *Bush v. Gore*[19] and *Citizens United v. Federal Election Commission*[20], many on the American left, including the President, bemoaned what they perceived to be the Court's partisan use of judicial activism to move the country in a rightward political direction.[21]

These liberal sentiments were heightened after oral argument because the use of judicial review to invalidate the Act would have been the first use of this power since the New Deal era to invalidate a President's signature piece of domestic legislation. Unlike other statutes previously invalidated by the Court's judicial review, the Act consumed the entire political culture for nearly two years at great political cost. In effect, had the Act been stricken, it risked further delegitimizing the Court in the eyes of progressives and liberals and politicizing the Court's legitimacy in advance of the November 2012 general election.

An immediate dilemma confronted the Chief Justice: sustain the Act in a manner that endorsed the Obama Administration's position or assert his constitutional jurisprudence at the risk of politically damaging the Court. As set forth more fully below, he did neither.

The Chief Justice's adept maneuvering around the problem brings to mind the country's greatest chief justice, who, with the acquiescence of the national government's political branches, created the Court's judicial review power.

The Creation of the Court's Judicial Review Power

When the Federalist Virginian John Marshall was appointed Chief Justice by President John Adams, the Court was seen as the weakest of the three branches of government and lacked the authority to invalidate unconstitutional acts of Congress. The Constitution's text evidenced the Founders' relatively low opinion of the Court. For example, Article III, Section 1 allows the Congress to disestablish all inferior federal courts if it so chooses and Article III,

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[17] Jeff Mason, *Obama takes a shot at Supreme Court over healthcare*, REUTERS (Apr. 2, 2012), http://www.reuters.com/article/2012/04/02/us-obama-healthcare-idUSBRE8310WP20120402.
[18] Ruth Marcus, *Obama's unsettling attack on the Supreme Court*, WP OPINIONS (Apr. 2, 2012), http://www.washingtonpost.com/blogs/post-partisan/post/obamas-unsettling-attack-on-the-supreme-court/2012/04/02/gIQA4BXYrS_blog.html.
[19] 531 U.S. 98 (2000).
[20] 558 U.S. 50 (2010).
[21] William Galston, *Don't Campaign Against the Supreme Court, Mr. President*, THE NEW REPUBLIC (Apr. 5, 2012, 12:00 AM), http://www.tnr.com/article/the-vital-center/102372/obama-supreme-court-campaign-issue-scotus.

Section 2 allows the Congress to pass legislation limiting the Supreme Court's appellate jurisdiction.

Marshall's genius in *Marbury v. Madison*[22] was to earn the Jefferson Administration's acquiescence in a decision that established the Court's judicial review power and adumbrated the judiciary's eventual status as an equal branch of the national government.

Marbury v. Madison

The fiercely contests 1800 Presidential election resulted in Thomas Jefferson defeating the incumbent Federalist John Adams.[23] Notwithstanding this result, the defeated incumbent, Adams, in January 1801, nominated his Secretary of State, John Marshall, to serve as United States Chief Justice.[24] Marshall, a federalist like Adams, sought to strengthen the federalist position as much as possible before the Republican Jefferson Administration took office in March 1801.[25]

On February 13, 1801, Congress passed and President Adams signed the Circuit Judge Act that reduced the number of Supreme Court justices from 6 to 5, thereby decreasing the opportunity for Republican control of the Court because the retirement of two Court justices was now required before President-elect Jefferson could make any Court appointments.[26]

On February 27, 1801, less than a week before Adams' Presidential term ended, Congress adopted the organic act of the District of Columbia that authorized President Adams to appoint 42 justices of the peace.[27] Adams announced and the Senate confirmed his nominations in the days preceding Jefferson's March 1801 inauguration as President.[28]

Justice Marshall, acting as Secretary of State, signed the commissions and dispatched his brother, James Marshall, to effectuate delivery.[29] A few commissions, including one for William Marbury, were not delivered before Jefferson's inauguration and when President Jefferson took office, he instructed the incoming Secretary of State, James Madison, to withhold the remaining commissions.[30]

Marbury, feeling wronged, filed suit in the United States Supreme Court under the Judiciary Act of 1798, seeking a *writ of mandamus* to compel Madison to complete delivery of his commission.[31] The Court heard the case in 1803.[32]

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[22] 5 U.S. 137 (1803).
[23] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 37-45 (4th ed. 2011).
[24] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 37-45 (4th ed. 2011).
[25] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 37-45 (4th ed. 2011).
[26] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 37-45 (4th ed. 2011).
[27] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 37-45 (4th ed. 2011).
[28] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 37-45 (4th ed. 2011).
[29] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 37-45 (4th ed. 2011).
[30] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 37-45 (4th ed. 2011).
[31] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 37-45 (4th ed. 2011).
[32] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 37-45 (4th ed. 2011).

If Chief Justice Marshall's goal was to merely adjudicate the case, he could, on legality principal grounds, have denied Marbury's request because the Judiciary Act unconstitutionally gave him standing to commence suit in the Supreme Court. Instead, in an ingenious decision that created the Court's judicial review power, Chief Justice Marshall concluded that Marbury was entitled to the commission and that President Jefferson was wrong to deny it him, but refused Marbury's request for the commission because he concluded the Judiciary Act unconstitutionally gave the Court original jurisdiction to hear a *mandamus* proceeding when such authority is nowhere found in the Constitution's Article III, i.e. he concluded the Court can only hear original cases enumerated in the Constitution's text and this original jurisdiction could not be expanded by a statute such as the Judiciary Act.[33] Is this a correct interpretation of Article III? Probably not, except Chief Justice Marshall's genius was to know the Jefferson Administration would disregard any decision in Marbury's favor and this would permanently undermine the Court's prestige.[34]

By concluding that Marbury was entitled to the commission yet had no means of redress before the Court, Justice Marshall ingeniously established the Court's judicial review power over both executive and legislative actions in a manner acceptable to the Jefferson Administration. [35]

Chief Justice Marshall, however, knew that an extensive use of judicial review would risk undermining the Court's authority.[36] Indeed, *Marbury* was the only case in which Chief Justice Marshall invoked the Court's judicial review power to invalidate a Congressional statute until Chief Justice Taney invalidated the Missouri Compromise in *Dred Scott*.[37]

Chief Justice Roberts' Decision

The Court heard oral argument on the Act's constitutionality in a politically charged and polarized environment that has characterized post-Cold War America. Problems related to the partisan environment were compounded by an overall drop in the Court's approval ratings with the American public, from 66% in the late 1980s to 44% in June 2012.[38] The Chief Justice might have attributed this drop in popularity, in part, to a perception among progressives that it had actively used its judicial review powers in a manner favoring the Republican Party, i.e. both the Court's *Bush v. Gore*[39] decision to end the Florida vote recount and thereby decide the 2000

[33] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 37-45 (4th ed. 2011).
[34] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 37-45 (4th ed. 2011) (I recognize the Kansas Nebraska Act of 1854 had the effect of repealing the Missouri Compromise notwithstanding Chief Justice Taney's decision).
[35] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 37-45 (4th ed. 2011).
[36] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 37-45 (4th ed. 2011).
[37] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 37-45 (4th ed. 2011).
[38] Adam Liptak & Allison Kopocki, *Approval Rating for Justices Hits Just 44% in New Poll*, N.Y. TIMES, June 7, 2012, http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-supreme-court-in-new-poll.html?pagewanted=all.
[39] 531 U.S. 98 (2000).

Presidential election and the 2010 *Citizens United v. Federal Election Commission*[40] decision that invalidated much of the McCain-Feingold campaign finance law favored the Republican Party. Indeed, during his 2010 State of the Union Address to both Houses of Congress, President Obama, expressing his disagreement with the *Citizens United*, said the decision will, "open the floodgates for special interests — including foreign companies — to spend without limit in our elections … I don't think American elections should be bankrolled by America's most powerful interests…pass a bill that helps correct some of these problems." [41]

Recognizing the risk of an election campaign that attacked the Court's legitimacy, the Chief Justice, like Chief Justice Marshall before him, found an ingenious means of both strengthening the Court's institutional prestige and furthering his jurisprudential goals. This was not necessarily the Chief Justice's position from the inception. Might his decision have been different if the President himself did not signal his intention to politicize the Court's jurisprudence in the forthcoming Presidential election? Also, to what degree was his decision to uphold the Act prompted by the relative extremism of the Court's four remaining conservative justices, whose joint dissent would have invalidated the entire Act?[42] CBS News' Jan Crawford reported the Chief Justice initially voted in chambers to strike down the individual mandate but then changed his mind and refused the conservative bloc of associate justices' repeated overtures to join their decision and invalidate the entire Act. [43]

Indeed, if the Chief Justice's goal was to merely uphold the Act, he need only, on legality principal grounds, have discussed the constitutionality of the individual mandate under Congress's Taxing and Spending Power and avoided mention of Congress's power to pass the Act under the Commerce Clause. By issuing a decision invalidating the Act under the Commerce Clause, upholding the Act under the Taxing and Spending Clause and then narrowing the national government's powers *vis a vis* the several States by enlarging the meaning of Tenth Amendment, the Chief Justice avoided a direct confrontation with the Obama Administration, solidified the Court's prestige with the American public and articulated a jurisprudence that is activist, conservative and federalist. Like his greatest predecessor in *Marbury*, the Chief Justice co-opted the executive in a decision that both enhances the Court's institutional prestige and furthers his jurisprudential objectives.

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[40] 558 U.S. 50 (2010).
[41] Linda Greenhouse, *Justice Alito's Reaction*, OPINIONATOR (Jan. 27, 2010, 11:18 PM), http://opinionator.blogs.nytimes.com/2010/01/27/justice-alitos-reaction/.
[42] Linda Greenhouse, *The Mystery of John Roberts*, OPINIONATOR (Jul. 11, 2010, 9:00 PM), http://opinionator.blogs.nytimes.com/2012/07/11/the-mystery-of-john-roberts/?hp
[43] Jan Crawford, Roberts switched views to uphold health care law, FACE THE NATION (July 1, 2012 1:29 PM), http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/.

The Decision Concludes the Individual Mandate is Unconstitutional under the Commerce Clause

The Chief Justice's decision commenced with a detailed explanation as to why the Act did not pass the Commerce Clause test. This explains why many news organizations such as CNN and Fox News initially incorrectly reported that the Act was invalidated by Justice Roberts' majority decision. In particular, the decision reads as follows:

> The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and—under the Government's theory—empower Congress to make those decisions for him.[44]

It is noteworthy how this statement is not supported by any legal authority. Instead, the Chief Justice tortuously tries to distinguish the constitutionality of the individual mandate under the Commerce Clause from the Court's 1942 decision in *Wickard v. Filburn*[45], which held that Congress had Commerce Clause authority to limit the quantity of wheat that farmers could grow for non-commercial consumption. The Chief Justice writes:

> *Wickard* has long been regarded as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," but the Government's theory in this case would go much further. Under *Wickard* it is within Congress's power to regulate the market for wheat by supporting its price. But price can be supported by increasing demand as well as by decreasing supply. The aggregated decisions of some consumers not to purchase wheat have a substantial effect on the price of wheat, just as decisions not to purchase health insurance have on the price of

[44] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2587 (2012).
[45] 317 U.S. 111 (1942).

> insurance. Congress can therefore command that those not buying wheat do so, just as it argues here that it may command that those not buying health insurance do so. The farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce. The Government's theory here would effectively override that limitation, by establishing that individuals may be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have them do (internal citations omitted).[46]

This statement disregards both Congressional findings as to both the incentives facing and the effect to the public, of individuals that choose not to purchase health insurance and shows insufficient awareness that all Americans, regardless of their insurance status, consume health care.

Justice Ginsburg's dissent discusses how the Chief Justice's Commerce Clause jurisprudence is both a marked departure from the Court's prior precedent and contrary to her understanding of the framers' intent, which never limited Congressional jurisdiction only to those "actively engaged in commercial transactions."[47] She notes that unlike the relevant provision of the Agricultural Adjustment Act at issue in *Wickard* and the Controlled Substances Act in *Raich v. Gonzales*[48], "Congress's actions are even more rational in this case, where the future activity (the consumption of medical care) is certain to occur, the sole uncertainty being the time the activity will take place."[49]

Unlike the Chief Justice and the four dissenting conservative associate justices, Justice Ginsburg's dissent makes a plea for judicial restraint and argues the proper check on Congressional power under the Commerce Clause should be political and not judicial.[50] Unlike many liberals who have recently "lionized" the Chief Justice's decision to uphold the Act, Justice Ginsburg correctly states the decision's jurisprudence will substantially narrow the national government's ability to effectuate social legislation.[51]

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[46] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2617 (2012) (quoting U.S. v. Lopez, 514 U.S. 549 (1995).
[47] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2621 (2012).
[48] 545 U.S. 1 (2005).
[49] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2619 (2012).
[50] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2614-15 (2012).
[51] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2609 (2012).

Rebutting the conservative justices' claim that the Act's survival under the Commerce Clause would provide the federal government with unlimited regulatory power, Justice Ginsberg writes the Act does not mandate the purchase of an unwanted product. Rather:

> Congress is merely defining the terms on which individuals pay for an interstate good they consume: Persons subject to the mandate must now pay for medical care in advance (instead of at the point of service) and through insurance (instead of out of pocket). Establishing payment terms for goods in or affecting interstate commerce is quintessential economic regulation well within Congress' domain.[52]

Justice Ginsberg's dissent, in the end, rebuts the Chief Justice's claimed distinction between economic activity and inactivity, by describing an individual's decision not to purchase insurance as a choice to remain self-insured, which, in turn, is an economic decision.[53]

Indeed, Justice Ginsburg notes the Chief Justice's interpretation of the Commerce Clause will have baneful consequences for national welfare because States cannot resolve the problem on their own because doing so would place them at a competitive disadvantage as compared with neighboring States. She writes:

> Like Social Security benefits, a universal health-care system, if adopted by an individual State, would be "bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose." An influx of unhealthy individuals into a State with universal health care would result in increased spending on medical services. To cover the increased costs, a State would have to raise taxes, and private health-insurance companies would have to increase premiums. Higher taxes and increased insurance costs would, in turn, encourage businesses and healthy individuals to leave the State.[54]

Justice Ginsburg's dissent demonstrates how Chief Justice's decision was nothing less than an activist limitation on the scope of Congressional power under the Commerce Clause.

Why did the Chief Justice choose to narrow Congressional power under the Commerce Clause while expanding its power under the Taxing and Spending Clause? Was it justified?

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[52] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2620 (2012) (internal citations omitted).
[53] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2622 (2012).
[54] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2612 (2012) (citing Helvering v. Davis, 301 U.S. 619, 644 (1937)).

The Act's Constitutionality under the Taxing and Spending Clause

The Chief Justice's conclusion as to the Act's constitutionality under the Taxing and Spending Clause and unconstitutionality under the Commerce Clause, accomplished two things. First, it allowed the Chief Justice to avoid a direct confrontation with the Obama Administration and insure the Court's legitimacy was not issue in the forthcoming Presidential election. More importantly, it enabled the Chief Justice to obtain the Obama Administration's acquiescence in a decision that greatly narrows the federal government's legislative power. This is because it is easier for Congress to socialize the cost of its legislative enactments by way of the Commerce Clause regulations than it is to directly pay for these programs via tax increases and government spending. Fearing the political consequences of this aspect to the Chief Justice's decision, the Obama Administration's position remains the mandate is a penalty and not a tax.[55] In fact, after the Court issued its decision, Republican Party politicians such as former Alaska Governor and former Republican Vice-Presidential candidate, Sarah Palin, accused President Obama of lying about the individual mandate and imposing a tax on the American public.[56] Recognizing the Chief Justice's decision greatly limits the federal government's power to enact social welfare legislation, the highly influential conservative columnist, George F. Will, writes:

> If the mandate had been upheld under the Commerce Clause, the Supreme Court would have decisively construed this clause so permissively as to give Congress an essentially unlimited police power — the power to mandate, proscribe and regulate behavior for whatever Congress deems a public benefit. Instead, the court rejected the Obama administration's Commerce Clause doctrine. The court remains clearly committed to this previous holding: "Under our written Constitution. . . the limitation of congressional authority is not solely a matter of legislative grace." The court held that the mandate is constitutional only because Congress could have identified its enforcement penalty as a tax. The court thereby guaranteed that the argument ignited by the mandate will continue as the principal fault line in our polity. [57]

Did the Chief Justice properly treat the mandate as a tax when it is never labeled as such in the legislation? Concerning the mandate's penalty provision, the Chief Justice writes, "it

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[55] George Stephanopoulos, *Despite Ruling, Jack Lew Refuses to Call Health Care Mandate a Tax*, ABC NEWS (Jul 1, 2012 11:14 AM), http://abcnews.go.com/blogs/politics/2012/07/despite-ruling-jack-lew-refuses-to-call-mandate-a-tax/.

[56] James Hohmann & Robin Bravender, *Health Care Ruling: GOPers Pounce on SCOTUS Tax Talk*, POLITICO (June 28, 2012, 11:29 PM), http://www.politico.com/news/stories/0612/77972.html.

[57] George F. Will, *Conservatives' Consolation Prize*, WP OPINIONS, June 28, 2012, http://www.washingtonpost.com/opinions/george-will-supreme-court-gives-conservatives-a-consolation-prize/2012/06/28/gJQAWyhY9V_story.html.

makes going without insurance just another thing the Government taxes, like buying gasoline or earning income. And if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress's constitutional power to tax."[58]

He further writes:

> The exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects. The "shared responsibility payment," as the statute entitles it, is paid into the Treasury by "taxpayers" when they file their tax returns. It does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code. For taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status. The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which—as we previously explained—must assess and collect it in the 'same manner as taxes'. This process yields the essential feature of any tax: it produces at least some revenue for the Government. Indeed, the payment is expected to raise about $4 billion per year by 2017.[59]

In short, notwithstanding the fact the "shared responsibility payment" is never labeled a tax in the Act's text or legislative history, the Chief Justice calls it a tax because all penalties must be paid to the IRS in the same manner as taxes. The Chief Justice further argues the exaction is more akin to a tax than a penalty because failure to purchase insurance is completely legal under the Act and Congress estimates that approximately $4 billion will be raised by the federal government, per year because many individuals will choose to pay the exaction rather than purchase private health insurance.[60]

However, this surely does not resolve the issue. The Court had never previously changed legislation to place a tax label on what the legislation itself describes as a penalty. The four conservative associate justices, in dissent, write:

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[58] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2594 (2012).
[59] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2594 (2012) (internal citations omitted).
[60] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2596-97 (2012) (quoting United States v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213 (1996); also United States v. La Franca, 282 U.S. 568, 572, 51 S.Ct. 278, 75 L.Ed. 551 (1931)) .

> But we have never held— *never*—that a penalty imposed for violation of the law was so trivial as to be in effect 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. When an act "adopt[s] the criteria of wrongdoing" and then imposes a monetary penalty as the "principal consequence on those who transgress its standard," it creates a regulatory penalty, not a tax.[61]

Calling the exaction a tax cannot be justified solely because the payment is made to the IRS. After all, it would have been ridiculous for the legislation to require the penalty to be paid to a different administrative body such as the Department of Health and Human Services, when that body lacks the IRS's revenue raising capabilities and would be at an administrative disadvantage in determining an individual's eligibility for a penalty exemption. The conservative dissenters write:

> Against the mountain of evidence that the minimum coverage requirement is what the statute calls it—a requirement—and that the penalty for its violation is what the statute calls it—a penalty—the Government brings forward the flimsiest of indications to the contrary. . .[W]hile the penalty is assessed and collected by the IRS, § 5000A is administered both by that agency and by the Department of Health and Human Services (and also the Secretary of Veteran Affairs), see § 5000A(e)(1)(D), (e)(5), (f)(1)(A)(v), (f)(1)(E) (2006 ed., Supp. IV), which is responsible for defining its substantive scope—a feature that would be quite extraordinary for taxes.[62]

The four conservative dissenters further write the Court had never previously classified as a tax what the legislation itself calls a "penalty."[63] This is especially the case with the Act, where Congress never labeled the "shared responsibility payment" a tax, but labeled the exaction a "penalty" no less than 18 times in just one section of the Act.[64]

Calling the penalty a tax is also problematic because the penalty's purpose is solely to engender individual purchases of health insurance and not raise national government revenue.

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[61] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2651-52 (2012) (quoting Child Labor Tax Case, 259 U.S. 20, 38 (1922)).
[62] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2654 (2012).
[63] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2653 (2012).
[64] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2653 (2012) (internal citations omitted).

This distinguishes the mandate's penalty from sin taxes on alcohol and cigarettes and tariffs on imported goods, which, although intended to engender differences in consumer behavior, are also meant to enhance the public fisc.[65]

The four dissenting conservative justices write that calling the mandate a tax is belied by the Act's textual distinction between those who are exempted from the individual mandate and those who are exempted from the penalty.[66] They write that "if § 5000A were a tax, these two classes of exemption would make no sense; there being no requirement, *all* the exemptions would attach to the penalty (renamed tax) alone."[67] The conservative justices conclude the "nail in the coffin" is the Act's very structure, i.e. both "the mandate and the penalty are located in Title I of the Act, its operative core, rather than where a tax would be found - in Title IX, containing the Act's "Revenue Provision."[68]

The dissenting conservatives conclude that to call the penalty a tax is not to interpret the statute, but to rewrite it.[69] This rewrite is, from their perspective, problematic both constitutionally, as the Constitution requires all tax increases to originate in the House of Representatives and from an institutional competency perspective, as the legislature is more accountable to the people and therefore should have the primary role in raising tax revenue.[70]

The Chief Justice saved the Act's individual mandate by calling the penalty a tax that is authorized under the Constitution's Taxing and Spending Clause. The penalty, however, is never described as a tax, does not operate as a tax and the Court's jurisprudence had never previously countenanced such a rewrite of Congressional legislation. In short, the Chief Justice's decision to authorize the individual mandate under the Taxing and Spending Clause is most likely a political one based on an inclination to allow the Act to survive judicial review.

The Decision Invalidates the Act's Medicaid Mandate

Finally, the decision further weakens the national government's power with regard to the several States by invalidating the Act's provision mandating the States to increase their Medicaid rolls or lose the entirety of their existing federal Medicaid funding. Medicaid is a federally subsidized health care program that provides health care benefits to a limited class of

[65] James Sadowsky, *The Economics of Sin Taxes*, 4(2) ACTON INSTITUTE: RELIGION & LIBERTY (2012), *available at* http://www.acton.org/pub/religion-liberty/volume-4-number-2/economics-sin-taxes.
[66] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2653 (2012).
[67] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2653 (2012).
[68] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2655 (2012).
[69] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2655 (2012).
[70] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2655 (2012).

individuals whose incomes range from 37 to 63 % of federal poverty levels.[71] The Act requires States to use federal funds to increase their Medicaid rolls to cover all persons whose incomes are below 133% of federal poverty guidelines or, should they refuse to implement the federally subsidized Medicaid expansion, lose the entirety their existing federal Medicaid funds.[72] The Chief Justice concluded this was an unconstitutional coercion of the several States. He writes:

> Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding. Section 1396c gives the Secretary of Health and Human Services the authority to do just that. It allows her to withhold "*all* further [Medicaid] payments ... to the State" if she determines that the State is out of compliance with any Medicaid requirement, including those contained in the expansion. In light of the Court's holding, the Secretary cannot apply Section 1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion.[73]

Indeed, the Chief Justice characterized the provision in the Act authorizing the Health and Human Services Secretary to withhold all Medicaid funds from States that do not comply with the Act as "a gun to the head."[74] He writes:

> A State that opts out of the Affordable Care Act's expansion in health care coverage thus stands to lose not merely "a relatively small percentage" of its existing Medicaid funding, but *all* of it. Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs. The Federal Government estimates that it will pay out approximately $3.3 trillion between 2010 and 2019 in order to cover the costs of *pre*-expansion Medicaid. In addition, the States have developed intricate statutory and administrative regimes

[71] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2601 (2012).
[72] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2601 (2012).
[73] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2607 (2012) (quoting 42 U.S.C. § 1396c).
[74] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2640 (2012).

> over the course of many decades to implement their objectives under existing Medicaid. It is easy to see how the *Dole* Court could conclude that the threatened loss of less than half of one percent of South Dakota's budget left that State with a "prerogative" to reject Congress's desired policy, "not merely in theory but in fact." The threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion (internal citations omitted).[75]

In short, the Chief Justice concluded the requirement that States increase their Medicaid rolls or risk losing their existing Medicaid federal funds, violates State sovereignty. This is regardless of the fact the Medicaid expansion is 100% funded by the federal government through 2016 and the subsidy will never drop below 90% of the Medicaid expansion's total program cost.

Why is the threat to remove existing Medicaid funding unconstitutional? After all, the Act does not threaten to directly penalize State treasuries for lack of compliance, but merely to deprive them of existing federal subsidies. As noted in Justice Ginsburg's dissent, Congress would have acted constitutionally were it to have passed legislation ending all Medicaid subsidies to States and then passed a new version of Medicaid that imposed the Act's terms.[76] In response, the Chief Justice writes:

> Justice Ginsburg suggests that the States can have no objection to the Medicaid expansion, because "Congress could have repealed Medicaid [and,] [t]hereafter, ... could have enacted Medicaid II, a new program combining the pre–2010 coverage with the expanded coverage required by the ACA." But it would certainly not be that easy. Practical constraints would plainly inhibit, if not preclude, the Federal Government from repealing the existing program and putting every feature of Medicaid on the table for political reconsideration. Such a massive undertaking would hardly be "ritualistic." The same is true of Justice Ginsburg's suggestion that Congress could establish Medicaid as an exclusively federal program (internal citations omitted).[77]

[75] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2604 (2012).
[76] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2636 (2012).
[77] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2606 n. 14 (2012).

Although the Chief Justice is most certainly correct about the feasibility of Justice Ginsburg's counterfactual, it is not the Court's place to evaluate the constitutionality of a proposed scenario based on its political plausibility. Indeed, as Justice Ginsberg sets forth in dissent, Congress could have simply cut the several States out of the Act's Medicaid expansion and constitutionally made it an entirely federal program as it did with Social Security.[78]

Indeed, Congress could have easily "cut" the States out of the Medicaid expansion's administration, as it previously did with the Social Security program, but, with due regard for federalism, chose not do so.[79] The Chief Justice, however, focused on the Act's coercive threat to withdraw existing federal Medicaid subsidies from States that refuse to implement the Act's Medicaid expansion. He distinguishes this coercion from that found and upheld in *South Dakota v. Dole.*[80] *Dole* involved a federal statute that directed the Secretary of Transportation to withhold 5% of the federal highway funds otherwise payable to the State if the State allowed for the sale of alcoholic beverages to persons less than 21 years old.[81] South Dakota's challenge to the statute under the Twenty-First Amendment was rejected by the Court, which concluded 1) Congress's age condition was directly related to safe interstate travel, 2) there was no restriction on how the highway funds were to be used and 3) the 5% penalty constituted only "relatively mild encouragement to the States."[82] If anything, however, the relevant statute in *Dole* is far more intrusive of State sovereignty than the Act because, among other things, the Twenty-First Amendment guarantees the States sole jurisdiction to regulate alcohol consumption. Contrasting the Act from the applicable statute in *Dole*, Justice Ginsberg writes:

> The ACA, in contrast, relates solely to the federally funded Medicaid program; if States choose not to comply, Congress has not threatened to withhold funds earmarked for any other program. Nor does the ACA use Medicaid funding to induce States to take action Congress itself could not undertake. The Federal Government undoubtedly could operate its own health-care program for poor persons, just as it operates Medicare for seniors' health care.[83]

The Chief Justice's decision concluded the Medicaid expansion improperly coerced States into expanding their Medicaid rolls because the Act authorized the Health and Human Services Secretary to withhold pre-expansion Medicaid subvention to recalcitrant States. The Chief

[78] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2632-33(2012).
[79] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2633 (2012).
[80] 483 U.S. 203 (1987).
[81] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2634; National Minimum Drinking Age Act, 23 U.S.C. § 158 (1984).
[82] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2634 (2012).
[83] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2634 (2012).

Justice did this based on his own conservative and federalist jurisprudence. The weakness with his position is that the Court's most relevant precedent, *Dole*, if anything, supports the Medicaid expansion's constitutionality. As noted in Justice Ginsberg's dissent, the Chief Justice's conclusion is neither completely logical nor necessarily federalist, i.e. Congress could easily have constitutionally repealed the existing Medicaid program and enacted a revised Medicaid program that required the expansion or "cut" the States entirely out of a revised Medicaid program.[84] That said, the Chief Justice's position is plausible, defensible and consistent with his conservative and federalist beliefs. Whatever else, the Chief Justice successfully used the decision as a means to align the Court's jurisprudence in this direction.

SEVERABILITY

The Chief Justice, however, saved the Act by severing the ostensibly unconstitutional coercion of State sovereignty to leave the law's remainder intact. He writes:

> The Court today limits the financial pressure the Secretary may apply to induce States to accept the terms of the Medicaid expansion. As a practical matter, that means States may now choose to reject the expansion; that is the whole point. But that does not mean all or even any will. Some States may indeed decline to participate, either because they are unsure they will be able to afford their share of the new funding obligations, or because they are unwilling to commit the administrative resources necessary to support the expansion. Other States, however, may voluntarily sign up, finding the idea of expanding Medicaid coverage attractive, particularly given the level of federal funding the Act offers at the outset (internal citations omitted).[85]

In short, the Court "redrafted" the Act to authorize it under the Taxing and Spending Clause and preserved the Medicaid expansion by using the Act's severability clause to allow States to opt out of the mandated Medicaid expansion. As such, the Act will proceed into implementation and States can now refuse to expand their Medicaid rolls without risking the loss of existing federal Medicaid subvention.

The Chief Justice succeeded in issuing a decision that sets the Court's jurisprudence on a markedly conservative and federalist direction while avoiding a confrontation with the executive and preserving the body's institutional prestige and reputation for judicial restraint. This decision was facilitated by the Act's unique status as the most consequential piece of social

[84] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2632-33(2012).
[85] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2608 (2012).

welfare legislation signed into law by any President since the Great Society, by the Obama Administration's announced willingness to politicize the Court's legitimacy in the November 2012 election and because the Act has focused the body politic and therefore does not risk a ratchet-type federal government expansion.

THE DECISION'S CONSEQUENCES

On the very day the Court issued its decision affirming the Act's constitutionality, the President, speaking warmly of the decision, said:

> Earlier today the Supreme Court upheld the constitutionality of the Affordable Care Act, the name of the health care reform we passed two years ago. In doing so, they've reaffirmed a fundamental principle: that here in America, in the wealthiest nation on earth, no illness or accident should lead to any family's financial ruin. . .
>
> The highest court in the land has now spoken. We will continue to implement this law. And we'll work together to improve on it where we can, but what we won't do, what the country can't afford to do is refight the political battles of two years ago or go back to the way things were. With today's announcement, it's time for us to move forward, to implement and, where necessary, improve on this law. . .[86]

The President's positive reaction was joined by Democrat-leaning columnists and pundits. In a column titled "Taking One for the Country," the New York Times chief foreign affairs columnist, Thomas Friedman, writes:

> I know that this was a complex legal decision. But I think it was inspired by a simple noble leadership impulse at a critical juncture in our history — to preserve the legitimacy and integrity of the Supreme Court as being above politics. We can't always describe this kind of leadership, but we know it when we see it and so many Americans appreciate it.[87]

Similarly, the Washington Post columnist, E. J. Dionne, writes:

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[86] Lynn Sweet, *Obama reacts to Supreme Court: "What this means for you" Transcript*, CHICAGO SUN TIMES (June 28, 2012 11:52 AM), http://blogs.suntimes.com/sweet/2012/06/obama_reacts_to_supreme_court_.html.
[87] Thomas L. Friedman, *Taking One for the Country*, NY TIMES SUNDAY REVIEW, June 30, 2012, http://www.nytimes.com/2012/07/01/opinion/sunday/taking-one-for-the-country.html

> Roberts' rulings on Citizens United and a variety of labor and regulatory issues fed fears that he would happily take on the role as the leader of a right-wing judicial revolution — and there is still reason to worry that this is exactly what he'll do on many other issues, notably affirmative action. But on health care, Roberts chose to blunt these attacks. He cast himself as a jurist sensitive to the obligation of the courts to show at least some deference to the government's elected branches on matters of social policy. He took what might have been a center-left decision upholding the entire law and nudged it to the center or center-right. What he did not do — and this is to his credit — was join the right end of the court that wanted to gut the act.[88]

In short, the Chief Justice's decision meant the Obama Administration and the liberal segment of the American political culture accepted a decision that greatly narrowed the Commerce Clause, such that the national government will find it difficult to pass social welfare legislation to equalize what is presently one of the most unequal countries, as measured by income, wealth and life expectancy, in the developed world.[89]

Recognizing this reality, some conservative columnists wrote flatteringly of the Chief Justice's decision notwithstanding their philosophical objections with the Act. The very influential neoconservative Washington Post columnist Charles Krauthammer, in a column titled "Why Roberts Did It," writes:

> It's the judiciary's Nixon-to-China: Chief Justice John Roberts joins the liberal wing of the Supreme Court and upholds the constitutionality of Obamacare. How? By pulling off one of the great constitutional finesses of all time. He managed to uphold the central conservative argument against Obamacare, while at the same time finding a narrow definitional dodge to uphold the law — and thus prevented the court from being seen as having overturned, presumably on political grounds, the signature legislation of this administration.
>
> Why did he do it? Because he carries two identities. Jurisprudentially, he is a constitutional conservative. Institutionally, he is chief justice and sees himself as uniquely

[88] E. J. Dionne, *A win for President Obama, and Chief Justice John Roberts*, THE COMMERCIAL APPEAL (June 29, 2012, 12:00 AM), http://www.commercialappeal.com/news/2012/jun/29/a-win-for-president-obama-and-chief-justice-john/.

[89] Organisation for Economic Co-Operation and Development, *Society at a Glance 2011 - OECD Social Indicators* www.oecd.org/els/social/indicators/SAG.

> entrusted with the custodianship of the court's legitimacy, reputation and stature.[90]

The highly esteemed conservative public intellectual and Washington Post columnist, George F. Will, writes:

> By persuading the court to reject a Commerce Clause rationale for a president's signature act, the conservative legal insurgency against Obamacare has won a huge victory for the long haul. This victory will help revive a venerable tradition of America's political culture, that of viewing congressional actions with a skeptical constitutional squint, searching for congruence with the Constitution's architecture of enumerated powers. By rejecting the Commerce Clause rationale, Thursday's decision reaffirmed the Constitution's foundational premise: Enumerated powers are *necessarily* limited because, as Chief Justice John Marshall said, "the enumeration presupposes something not enumerated."[91]

This is not to say that reaction to the decision was unanimously positive. Many conservative commentators and academicians were highly critical of the Court's decision, but political reaction from right was muted and reaction from the liberal left was overwhelmingly positive. Most importantly, the Chief Justice's decision, by sustaining the Act, insured the Court's legitimacy would not be an issue in the forthcoming Presidential election. Rather, the election will focus on whether Americans should vote for politicians who would, among other things, expand or repeal the Act. The Chief Justice, like his greatest predecessor, issued a decision that furthered his jurisprudential objectives, enhanced the Court's institutional prestige and avoided a direct confrontation with the executive branch.

CONCLUSION

The Chief Justice's decision effectively "threaded the needle" by promulgating a decision that both avoids a direct confrontation with the Obama Administration and greatly narrows the national government's powers *vis-a-vis* the several States. Although the Chief Justice's decision was criticized by some conservatives, including the four dissenting conservative associate justices, his decision most likely enhanced the Court's legitimacy and evidenced a measure of

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[90] Charles Krauthammer, *Why Roberts Did It*, WP OPINIONS, June 28, 2012, http://www.washingtonpost.com/opinions/charles-krauthammer-why-roberts-did-it/2012/06/28/gJQA4X0g9V_story.html.

[91] George F. Will, *Conservatives' Consolation Prize*, WP OPINIONS, June 28, 2012, http://www.washingtonpost.com/opinions/george-will-supreme-court-gives-conservatives-a-consolation-prize/2012/06/28/gJQAWyhY9V_story.html.

judicial restraint. Unlike his four conservative brethren, the Chief Justice surely recognized that overturning the Act would have been the Court's first decision to invalidate an Administration's chief legislative accomplishment on Commerce Clause grounds since the New Deal era, i.e. neither the "Gun-Free School Zones Act" in *Lopez*, nor the "Violence Against Women Act" in *Morrison* were significant legislative accomplishments for any Congress or President and the Court's invalidation of these statutes on Commerce Clause grounds did not risk either its legitimacy or institutional prestige within the broader political culture. This legitimacy and prestige, however, was affected in *Bush v. Gore* when the Court decided the disposition of Florida's electoral college votes to determine the outcome of the 2000 Presidential election and when it invalidated, on First Amendment grounds, many of the nation's existing campaign finance laws.

The Court's institutional prestige would have been further eroded were it to have invalidated the Act, which is the most significant piece of social welfare legislation enacted since the Great Society era. In any event, the Act is the type of legislation that focuses the political culture such that its ultimate fate will be determined by the political process. Accordingly, conservatives can rest assured the decision will not risk a ratchet-type growth of federal government power as perhaps might have been the case with the "Gun-Free School Zones Act" and "Violence Against Women Act" in *Lopez* and *Morrison,* respectively.

The Chief Justice's decision upholding the Act reminds us of our greatest Chief Justice's decision in *Marbury* that avoided a direct confrontation with the Jefferson Administration to establish the Court's judicial review power over both executive and legislative actions and adumbrated the Judiciary's eventual status as an equal branch of the federal government. Like his greatest predecessor, the Chief Justice issued a carefully reasoned decision that institutionally strengthens the Court, avoids a potentially damaging fight with the executive branch and furthers his own jurisprudential goals.

The Chief Justice's decision is based on logic that is far from foolproof. The Chief Justice's Commerce Clause jurisprudence is both activist and a marked departure from the Court's prior precedent to limit the national government's power. Moreover, his decision to avoid a confrontation with the executive and authorize the individual mandate's penalty as a tax is both remarkable in its originality and tenuous based on the Court's prior precedent and the Act's legislative history and text. However, the Chief Justice's foremost duty, as custodian of the Court, is to preserve the Court's institutional prestige in the broader American polity. After the Obama Administration signaled its willingness to politicize the Court's decision-making in the forthcoming Presidential election, the Chief Justice's role as custodian of the Court's institutional prestige most likely took precedence over his inclination to invalidate the law on both conservative and federalist principles. Notwithstanding both legitimate and plausible

jurisprudential objections to the decision from both conservatives and liberals, the Chief Justice issued a decision that both protected the Court's role as final arbiter of judicial disputes and left the issue of how Americans use and distribute their increasingly scarce health care resources to the political process. The decision, in the end, was an act of patriotism.