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Strategy and Tactics in NFIB v. Sebelius

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This Article provides an in depth examination of the strategic judicial maneuvering witnessed in the Supreme Court’s 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. The reason Roberts was able to dramatically read down Congress’s main avenues of regulatory power was not despite the liberal outcome of the case, but because of it. Roberts’s strategic sacrifice in NFIB v. Sebelius suggests an obvious analogy to Marbury v. Madison, however that common and overused metaphor is misleading. Marbury was a unanimous decision. In contrast to Chief Justice Marshall, Roberts was unable to match his deft long-term strategic maneuvering with effective short-term tactics: he could not forge a majority opinion for most of his positions.

Understanding Roberts’s actions as sophisticated judicial strategy reveals much about the composition of his preferences. Although Roberts was clearly pursuing legal policy goals, the fact that he was willing to vote to uphold the individual mandate without a clear majority for his conservative legal innovations suggests that his dominant interest was not doctrinal. Rather, Roberts’s driving aim was to protect the institutional legitimacy of the Court from the appearance of partisan decision-making immediately before a presidential election. Roberts’s evident strategic action is an ideal vehicle for understanding 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 (NFIB) v. Sebelius*¹ to uphold the 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: “The Supreme Court’s decision in the healthcare case is best understood as an attempt to maximize damage to 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 him or the Court – but they still leave much unexplained. For instance: how does Roberts weigh these presumed institutional interests against the possibility that his decision will help President Obama win reelection, potentially enabling the President to appoint justices with far different preferences and jurisprudential views to Roberts? And why did Roberts’s preferences lead him to decide the case differently to the other conservative justices? Many scholars will focus on the doctrinal minutiae of *NFIB v. Sebelius* instead of these difficult questions, but a rigorous analysis of Roberts’s strategy also explains the intricacies of the doctrinal changes that he was carefully developing in this case, as well as revealing much about the nature of judicial power in our constitutional system.

In deciding the fate of the Affordable Care Act,³ 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.⁴ 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.⁵ Given that the Court nevertheless

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³ Patient Protection and Affordable Care Act, 26 U. S. C. (2010) [hereinafter “Affordable Care Act” or “ACA”], and specifically 26 U. S. C. §5000A, concerning the individual mandate, which requires most Americans to maintain a “minimum essential” level of insurance coverage, and 42 U. S. C. §1396c & d, which requires states to expand the existing Medicaid program to include adults with incomes up to 133 percent of the federal poverty level, conditional upon losing funding for Medicaid coverage otherwise.

⁴ 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). Discussed further in Part I, infra.

accepted Congress’s power to institute an individual mandate under the Tax Power,\(^6\) Roberts’s fifteen pages of 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.\(^7\) Second, while upholding the mandate as a tax, Roberts struck down the other central pillar of the healthcare legislation, the Medicaid expansion, as an overly coercive form of congressional spending.\(^8\) This the first time the Supreme Court ever found an exercise of Congress’s Spending Power unconstitutionally coercive.\(^9\) Moreover, Roberts declared the novel proposition that prior grants of funds to the states cannot be withdrawn if the states were not adequately put on notice of specific type of change to the federal spending condition that Congress would later enforce.

Roberts was able to craft so much new conservative legal 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.”\(^10\) 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”\(^11\) – Roberts made a calculated choice to take a short term hit in order to craft a larger long-term win.

Giving with one while taking with the other suggests an obvious analogy to *Marbury v. Madison*,\(^12\) however that common and overused metaphor is misleading. *Marbury* was a unanimous decision, whereas Roberts could not forge a majority opinion for most of his positions. Roberts’s sense of strategy – his sophisticated maneuvering to maximize his long-term interests – was more advanced than his use of tactics – the mechanisms he used to achieve specific, short-term goals. 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. The other four justices in the majority joined Ginsburg’s concurring and dissenting opinion on those points. In addition, Roberts wrote on behalf of just two other justices in the Part addressing federalism restrictions on Congress’s Spending Power. The dissenting justices, who agreed with Roberts’s conclusions about the Commerce Power and the Spending Power, nonetheless refused to join those parts or Roberts’s opinion and even declined to join as to Roberts’s decision – a

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\(^6\) *Id.* at 33-44 (Opinion of Roberts, C.J., Part III-C). Discussed in further detail in Part II.A, *infra.*

\(^7\) *Id.* at 44-45 (Opinion of Roberts, C.J., Part III-D). Discussed in further detail in Part III.A.2, *infra.*

\(^8\) *Id.* at 45-59 (Opinion of Roberts, C.J., Part IV). Discussed in further detail in Part IV.A, *infra.*


\(^12\) 5 U.S. 137 (1803).
slap in the face to Roberts from his usual stalwarts.

This Article examines Roberts’s strategic and tactical behavior in *NFIB v. Sebelius*, showing why the former was successful even though the latter was not. Ordinarily, analyses of strategic judicial behavior involve large statistical studies, crossing over multiple eras and issue areas, to discern subtle trends over time. This individual case, however, 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 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. Although *NFIB v. Sebelius* constitutes a great political win for Democrats and the Obama Administration, the decision is by no means liberal. Instead, it is a conservative opinion that is strategically engineered to have a long-range conservative impact.

Finally, *NFIB v. Sebelius* is an excellent device for understanding Roberts himself. As a young Chief Justice, Roberts will potentially wield massive influence over the Court for years to come. This case gives insight into how he is likely to exercise his power – as a moderate, and thus influential, justice; as a conservative intellectual leader; and from the institutional position of Chief Justice. This Article shows that Roberts will be very different from, for example, Justice Scalia, another powerful conservative intellectual. In *Gonzales v. Raich*, the Court’s last major Commerce Clause decision before *NFIB v. Sebelius*, Scalia switched sides from his previous positions in *United States v. Lopez* and *United States v. Morrison*, not only voting in favor of congressional power but setting out an exceptionally broad justification for governmental action in his concurring opinion. Scalia’s position in *Raich* was tactically consistent with his ideological conservative preferences, which

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13 For an explanation of why more moderate justices are more powerful, see Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 100 (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 those justices have greater sway over what eventual opinions will look like).

14 Measured using the influential Martin and Quinn scores of judicial ideology, discussed further infra at text at Figure 1, Roberts had a score in 2010 of 2.35; the average for that year was 1.49, as was the median, Justice Kennedy, and the standard deviation was 1.55. Roberts was thus just over half of one standard deviation to the right of Kennedy, making him a moderate conservative. 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 updated Martin and Quinn ideal point estimates are available at http://mqscores.wustl.edu/measure.php (last visited Aug. 19, 2012).

15 545 U.S. 1, 33 (2003).


17 529 U.S. 598 (2000).

18 *Raich*, 545 U.S. at 36 (Scalia, J., concurring) (“As we implicitly acknowledged in *Lopez*, however, Congress’s authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce.”).

19 Scalia’s Martin and Quinn score for 2005, the year in which *Raich* was decided, was 2.90 –1.13 standard deviations above that year’s average of 0.55.
predict a vote in favor of drug control legislation,20 but his position was strategically shortsighted in terms of the bigger ideological battle of defining congressional power. *NFIB v. Sebelius* shows that Roberts, in contrast, favors the long road.

Only once judicial preferences are understood can we talk meaningfully about the Chief Justice’s strategic choices. Part I begins with a detailed analysis of what the social science literature has carefully established constitute core judicial preferences. These include legal doctrine and methodology, preferences over policy outcomes, the institutional legitimacy of the Court, and individual personal legacy and reputation, including factoring in the special constitutional role of the chief justice. Then, by examining Roberts’s actions and statements, it is possible to infer backwards which of these general judicial considerations were at play, and which were dominant, for Roberts in *NFIB v. Sebelius*. It becomes evident that Roberts’s driving concern was for the institutional legitimacy of the Court. This theme is returned to in the concluding Part VI.

Part II then uses these revealed preferences to begin to examine the costs and benefits faced by Roberts in making a short-term policy sacrifice for long-term doctrinal and institutional gain. Institutional concern may have been dominant for Roberts, but he still sought to gain as many doctrinal benefits as possible in return for his policy sacrifice in upholding the individual mandate. These benefits include a coerciveness-based limitation on Congress’s Taxing Power. It shows how Roberts relied on entirely repudiated pre-New Deal cases to forge this distinction. In addition, Roberts created new constraints on Congress’s Commerce Clause Power as well as the Necessary and Proper Clause, as described in Part III. In the former, he crafted a distinction between activity and inactivity, which has the potential to revolutionize even the most settled aspects of Commerce Clause jurisprudence. In the latter, Roberts transforms the Necessary and Proper Clause from an expansion on congressional power into a restriction, sharply recharacterizing leading precedent in order to do so.

Part IV explores how, while everyone was distracted with the mandate decision, Roberts was also able to achieve a significant policy win, in the form of striking down the Medicaid expansion, as well as developing future limits on the Spending Power. Once again, these limits are based on the notion of coerciveness. In relation to the Spending Power, Roberts articulated two aspects of coerciveness –

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20 The standard means for categorizing case outcomes is to use Spaeth’s U.S. Supreme Court Judicial Database coding, which categorizes cases as “liberal” or “conservative.” These labels are designated according to whether the case outcome favors a particular category of party before the Court. For example, if the successful party before the Court is a person making a pro-business argument, the outcome is categorized as conservative. See The Original U.S. Supreme Court Judicial Database, available at The Judicial Research Initiative website, http://www.cas.sc.edu/poli/juri/sctdata.htm (last visited Aug. 19, 2012); see also HAROLD J. SPAETH, THE ORIGINAL UNITED STATES SUPREME COURT JUDICIAL DATABASE 1953-2003 TERMS DOCUMENTATION (2005). We discuss this coding in more detail in Part III-A, *infra*. The general database is available at the Judicial Research Initiative website http://www.cas.sc.edu/poli/juri/sctdata.htm
transformation and numerical size – but, as with the other distinctions he developed, he failed to articulate any boundaries on these concepts. Part V explains how this leaves Roberts enormous judicial discretion to take the law in a variety of possible directions in future cases. It also explores more generally how Roberts masked his conservative achievements in the cloak of judicial restraint, and how this claim of humility actually enables greater activism.

By way of conclusion, Part VI describes why Roberts’s coalition building tactics were less effective than his doctrinal maneuverings, and how this confirms this Article’s initial description of the relative influence on Roberts of different aspects of judicial preferences. Although Roberts was clearly pursuing legal policy goals, the fact that he was willing to vote to uphold the individual mandate without a clear majority for his conservative legal innovations reaffirms that his dominant interest was institutional rather than doctrinal.

Some have suggested that a strategic analysis of Roberts’s conduct in NFIB v. Sebelius is overly cynical: after all, Roberts may have been simply setting out his genuine view of the law in a restrained manner.21 This claim, however, is belied by a close examination of the text of the opinion itself. The NFIB case is best understood through the lens of judicial strategy and complex judicial preferences; analyzed in this way, it is possible to better understand the doctrinal intricacies of the case, as well as the likely trajectory of the law in its aftermath.

I. JUDICIAL PREFERENCES – DOCTRINAL, IDEOLOGICAL, INSTITUTIONAL AND REPUTATIONAL

There are many potential benefits to 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 are only increased for the justice writing the opinion.22 This Article’s study of judicial strategy begins with a simple question: what do judges want?23 The political science literature shows – and a close reading of NFIB v. Sebelius confirms – that judicial preferences cover a range of factors, including:

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21 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 (June 28, 2012), available at http://www.wbez.org/blogs/bez/2012-06/thursdays-game-plan-afternoon-shift-100506, at 8:30.

22 Some scholars go so far as to assume the assigned writer has monopoly power over an opinion – Jeffrey R. Lax & Charles M. Cameron, Bargaining and Opinion Assignment on the U.S. Supreme Court, 23 J.L., ECON. & ORG’N 276 (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 (2009) (arguing the views of the median of the Court coalition will dominate).

23 See generally Judge Richard A. Posner, What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does), 3 SUP. CT. ECON. REV. 1 (1993) (arguing that to decide every case in an outcome-focused mode would be too resource intensive for judges who typically want to minimize their workload).
i. doctrinal preferences – of which the development of new law is of significant value;\textsuperscript{24}

ii. policy preferences – including preferences over case outcomes, as well as rhetorical and political advantages of the justice’s ideological camp;\textsuperscript{25}

iii. institutional interests – which include promoting the legitimacy of the Court, collegiality and consensus building;\textsuperscript{26} and

iv. reputational interests – which encompass the current good opinion of the justice as a judge and her personal legacy – which is of heightened value for chief justices, due to the singular association between Court eras and the Court’s leader.\textsuperscript{27}

That justices have strong interests in the development of doctrine reflecting their views of the law is uncontroversial – even the social science literature on the importance of ideology in shaping judicial choices has empirically established that judges are also motivated by methodological and doctrinal rules.\textsuperscript{28} This is reflected in the consistency observed across judicial decisions. There is no need to belabor this uncontroversial assumption about doctrinal preferences. However, that justices in general, and Roberts in particular, care about policy, institutional and reputational preferences is worth analyzing more closely.

A. Policy – Paying the ideological price

Since Roberts is widely considered a conservative justice, his ruling in \textit{NFIB v. Sebelius} surprised many.\textsuperscript{29} If justices care about policy outcomes, Roberts was expected to favor 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. Yet Roberts upheld the individual mandate, and in doing so bore a hefty policy and political price. This section establishes, for

\textsuperscript{24} See infra note 28 and accompanying text.
\textsuperscript{25} See infra Part I.A.
\textsuperscript{26} See infra Part I.B.
\textsuperscript{27} See infra Part I.C.
\textsuperscript{28} Pablo T. Spiller and Emerson H. Tiller, \textit{Invitations to Override: Congressional Reversals of Supreme Court Decisions}, 16 \textit{Int’l Rev. L. & Econ.} 503 (1996), provide a persuasive account, supported by some preliminary evidence, 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., Gregory C. Sisk, Michael Heise & Andrew P. Morriss, \textit{Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning}, 73 N.Y.U. L. REV. 1377, 1497 (1988); Arthur D. Hellman, \textit{Precedent, Predictability, and Federal Appellate Structure}, 60 U. PIT. L. REV. 1029, 1039 (1999) (finding that at the federal Court level outcomes are remarkably predictable from Supreme Court precedent). Note that Hellman argued that the unpredictability that is observed stems from the fact that most cases involve issues that are “debatable among jurists of reason.” \textit{Id.}
\textsuperscript{29} However, 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 \textit{The Afternoon Shift}, supra note 21 (describing my prediction that Roberts would be in the majority, that he would write the opinion, that the opinion would probably be splintered and would partially uphold the law and partially strike it down).
those that need convincing, that Roberts felt the policy pinch of his decision; and that he is indeed a solid conservative justice, whose vote in favor of the ACA was in spite of (not because of) his political preferences. Sections B and C, below, examine the non-doctrinal and non-policy benefits to be gained from Roberts’s strategic choice, particularly the legitimacy of the Court and Roberts’s own reputation.

There are many reasons why Roberts is regularly labeled a conservative justice: his record before he sat on the Court; his judicial record as Chief Justice; and objective empirical scores of his voting record. Even before he was elevated to the Supreme Court, it was understood that then-Judge Roberts was conservative – the debate was only whether he would be moderately conservative or extremely conservative. This was because Roberts had strong conservative credentials, having served as a Reagan appointee who advocated right-wing positions. Since beginning his service on the Supreme Court, Roberts has proven to be a solid conservative vote. He signed onto the conservative positions taken in the Court’s most controversial cases during his tenure: Citizens United v. Federal Elections Commission, striking down federal restrictions on corporations and unions funding express advocacy in elections; District of Columbia v. Heller, recognizing an individual right to bear arms and striking down firearm prohibitions in one of the most crime-ridden cities in the United States; Wal-Mart Stores, Inc. v. Dukes, restricting class-action lawsuits and thus limiting the accountability of large businesses. Moreover, Roberts wrote the decision in Winter v. National Resource Defense Council that allowed the Navy to use sonar tests that put 30 species of marine life at risk, including five endangered species of whales; and his opinion in Herring v. United States announced a new “exclusionary rule standard” whereby the defendant-friendly rule has to “pay its way” before being applied in any case. In addition, the business-friendly nature of the Roberts Court has been much

30 Compare Peter Rubin, What Does John Roberts Believe?, SPEIGEL ONLINE. (July 21, 2005) (reporting that many believe Roberts may be as conservative as Scalia and Thomas) with Supreme Court: Roberts Confirmation Hearings, WASHINGTON POST (Sept. 12, 2005) (quoting John Yoo’s claim that Roberts is a moderate conservative and not an ideologue).

31 For instance, Roberts authored a memorandum that gathered together material that “should be highly useful in the campaign to amend or abolish the exclusionary rule” – John G. Roberts, New Study on Exclusionary Rule (Jan. 4, 1983), available at http://www.reagan.utexas.edu/roberts/Box24JGRExclusionaryRule1.pdf.

32 See e.g. Adam Liptak, Roberts Court Shifts Right, Tipped by Kennedy, N.Y. TIMES (June 30, 2009) (“Chief Justice Roberts has certainly been planting seeds in this term’s decisions. If his reasoning takes root in future cases, the law will move in a conservative direction 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.”).

33 558 U.S. 50 (2010)


discussed.\textsuperscript{39}

The ideological position of the justices can be more systematically assessed through scores developed by Andrew Martin and Kevin Quinn (the Martin-Quinn scores).\textsuperscript{40} The scores are based on each justice’s tendency to join, concur and dissent. Thus Martin-Quinn scores are grounded on voting coalitions – whether justices are labeled conservative depends on whether he or she votes with other conservative justices (and the equivalent for liberal justices). Figure 1 shows the distribution of judicial preferences for each of the nine current justice over their respective tenures, based on the most recent data available (up to and including October Term 2010).

Figure 1: Martin Quinn Scores of Supreme Court Judicial Ideology, Over Time

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\caption{Martin Quinn Scores of Supreme Court Judicial Ideology, Over Time}
\end{figure}

Source: Martin & Quinn (2002, updated 2011). Positive Scores are conservative. Kagan is depicted as a square rather than a line because she had been on the Court for only one year.\textsuperscript{41}

The x axis is the Term of the Court, and the y axis is the Martin-Quinn


\textsuperscript{40} Martin & Quinn, supra note 14, at 135.

\textsuperscript{41} The four liberal justices are clustered almost on top of each other: however, as there is variation for each justice’s score over time, our confidence in the actual position of Justices Sotomayor and Kagan is lower than for the more long serving justices, particularly Justices Scalia, Kennedy, Thomas, Ginsburg and Breyer (in order of seniority). \textit{Id.}
ideology score for each justice – the higher the score for a justice, the more conservative he or she is. The historical average of the Court in the modern era is approximately zero. Roberts’s score in 2010-11 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. 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 73 years.

Taking all of this evidence together, it is reasonable to conclude that Roberts is a solid conservative, albeit much less extreme than Justices Scalia and Thomas, who are two of the three most conservative justices to have served since at least 1937. Following oral arguments in NFIB v Sebelius and until the decision came down, all eyes were on Kennedy, the median on the Roberts Court. Yet even Kennedy, who is only moderately conservative by historical standards, favored striking down the entire law in NFIB v. Sebelius. As a solid conservative, it was widely expected that Roberts would also favor striking down 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. In addition, a source leaked that Roberts wrote both the majority opinion and a draft of what became the dissenting opinion – his original majority opinion ruling the mandate unconstitutional may have been adopted by the dissenting justices – although these leaks are at odds with one another. Other hints

42 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.

43 The standard deviation for all justices from the 1937 to the 2010 Terms is 2.10.

44 The other is then Justice Rehnquist, prior to his elevation to Chief Justice – see further discussion in Part I.C, infra.

45 Sam Favate, Justice Kennedy Remains 'The One Key Vote' On the Supreme Court, WSJ BLOG (June 8, 2012); Massimo Calabresi, Justice Anthony Kennedy: The Decider, TIME MAGAZINE, (June 18, 2012). Not only is Kennedy the median, he dominates the center of the Court – Kennedy straddles a large ideological space in the center of the Court, making it ordinarily very difficult to form a majority without him – see Epstein & Jacobi, supra note 13, at 100 (explaining that it is harder to form a coalition without incorporating those justices who sit at the center of the Court, and as such those justices have greater sway over what eventual opinions will look like).

46 In 2010, Kennedy was less than one standard deviation from the historical mean of zero, with a score of 1.49 (the standard deviation was 1.55). See Martin & Quinn, supra note 14 and accompanying text.

47 NFIB v. Sebelius, slip op., at 3-4 (Scalia, Kennedy, Thomas & 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.”).


49 Paul Campos, Roberts Wrote Both Obamacare Opinions, SALON.COM (July 3, 2012), http://www.salon.com/2012/07/03/roberts_wrote_both_obamacare_opinions/.
that Roberts may have switched sides were that Justice Ginsburg’s concurring and dissenting opinion reads like a dissent, whereas the dissenting opinion reads like an amended majority decision.\(^{51}\) Subsequently, Ginsburg admitted that her opinion was originally authored as a dissent.\(^{52}\) Ginsburg insisted she would not reveal whether the Chief switch sides, saying only that she wrote her opinion prior to Roberts circulating his opinion.\(^{53}\) Nonetheless, her comments strongly suggest a switch, since Roberts could only have assigned himself the opinion if he had already committed to a position at conference. 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 Roberts 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. Roberts joked that he was so unpopular that he had to flee to Malta for his own protection.\(^{54}\) But of course, “Many a true word’s spoken in jest.”\(^{55}\)

Why then, given that Roberts clearly disfavored upholding the law and faced the ire of his conservative colleagues, conservative elites and punditry for doing so,\(^{56}\)

\(^{50}\) 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. \emph{Id.} Furthermore, the source characterizes claims by Crawford’s sources that “the fact that the joint dissent doesn’t mention Roberts’ \textit{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 while the first 46 pages of the joint dissent never even mention Roberts’ opinion for the Court . . .” \emph{Id.}

\(^{51}\) In addition, other hints throughout the opinions support speculation that Roberts switched his vote: for example, Justice Ginsburg’s concurring and dissenting opinion is referred to as simply “the dissent” by the dissenting opinion; the actual dissent discussed severability at length, even though such discussion is entirely unnecessary given the majority’s decision to uphold most of the law; the small nature of the difference between the Roberts’s opinion and the dissenting opinion, yet the extensive nature of that latter opinion. \emph{See}, \textit{e.g.}, David Bernstein, \textit{Was the Dissent Originally a Majority Opinion?}, \textit{Volokh Conspiracy} (June 28, 2012), \url{http://www.volokh.com/2012/06/28/was-scalias-dissent-originally-a-majority-opinion/}; Lawrence Solum, \textit{Evidence That the Votes Shifted After Conference (Initial Vote to Declare Mandate Unconstitutional) (Updated)}, \textit{Legal Theory Blog} (June 29, 2012), \url{http://solum.typepad.com/legaltheory/2012/06/evidence-that-the-votes-shifted-after-conference-initial-vote-to-declare-mandate-unconstitutional.html}.


\(^{53}\) \emph{Id.} (describing Ginsburg’s statement that the process was fluid but “she suggested it was obvious from the earliest discussions after the late-March oral arguments that Roberts and the other conservatives were poised to limit Congress’ commerce power”).

\(^{54}\) Joe Mandak, \textit{John Roberts Jokes That He’ll Spend Some Time In An “Impregnable” Fortress}, \textit{Huffington Post} (June 29, 2012), \url{http://www.huffingtonpost.com/2012/06/29/john-roberts-joke_n_1637841.html}.

\(^{55}\) Jonathan Swift, \textit{POLITE CONVERSATION} 111 (1738).

\(^{56}\) \textit{See} \textit{e.g.} Quin Hillyer \textit{John Roberts’ Travesty, Point by Point}, \textit{The Volokh Conspiracy} (Wednesday, July 4 2012) \url{http://www.volokh.com/2012/07/09/quin-hillyer-john-roberts-travesty-point-by-point/}; James Antle, III., \textit{John Roberts’s Betrayal}, \textit{The American Conservative} (June 28, 2012) \url{http://www.theamericanconservative.com/articles/john-robertss-betrayal/}. 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: \textit{A Justice in Chief}, \textit{NEW YORK TIMES}, (June 28, 2012) (“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
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.

That justices in general decide cases strategically has been well established by an extensive political-science literature. Legal realists and political scientists have shown empirically that ideology is a significant, and arguably the dominant, determinant of judicial decisions. Building on this, the large strategic judicial behavior literature developed considerable evidence that judges pursue those outcome preferences strategically — that is, voting not just according to their immediate preferences, but sometimes voting against their favored outcome at one stage in order to bring about a more favorable outcome at a later stage. Furthermore, there is even evidence that Supreme Court justices vote in a way that not only strategically maximizes the chances of achieving their desired outcomes in present and future cases, but in seeing their outcome preferences promoted in cases that other courts decide. That is, justices seek to maximize the proportion of total cases that promote their ideology, and thus enable them to seek policy change throughout the nation and not simply determine outcomes in the specific cases that they personally review. Through this analysis, a wide range of legal phenomena been explained in strategic terms, and explanations of judicial decision-making have become more coherent.

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57 OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (2005) (first published 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.”).

58 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 (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).

59 See, e.g., Jeffrey A. Segal, Separation-of-Powers Games in the Positive Theory of Congress and Courts, 91 AM. POL. SCI. REV. 28 (1997) (reviewing the attitudinalist literature and arguing 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 (1996) (showing Supreme Court Justices decide cases according to their pre-existing revealed preferences in 90.8% of cases).


This is not to deny the power of doctrine and precedent – as mentioned, studies have also shown that judges are motivated by methodological and doctrinal rules.\textsuperscript{64} However, the strategic evidence is so strong that the debate has shifted from whether judges maximize to what judges maximize, with the main argument against the thesis that judges consistently strategically maximize their policy impact being that doing so in every case is resource intensive and judges need to control their workload.\textsuperscript{65}

If judges care about case outcomes – ideologically, doctrinally or both – we would expect them to pursue those preferences strategically, rather than myopically, because, as a class, judges are unusually intelligent and well educated. It should therefore come as little surprise that Roberts, considered an exceptionally well-qualified Supreme Court justice,\textsuperscript{66} would make considered strategic choices when deciding cases.

Roberts’s strategic choice to uphold the mandate in \textit{NFIB v. Sebelius} incurred significant policy and political costs. But there were two considerable advantages to be weighed against those costs: institutional benefits and doctrinal benefits. Doctrinally, the Roberts opinion lays the groundwork for significant restrictions on the Commerce Clause Power and the Tax and Spend Power in future cases.\textsuperscript{67} The doctrinal value of these benefits may be limited, however, if a liberal majority comes to dominate the Court. Consequently the doctrinal benefits Roberts creates need to be discounted probabilistically in Roberts’s strategic costs-benefit calculation since the long-term doctrinal benefits are uncertain. In light of this uncertainty, I propose that it

\begin{footnotesize}
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  \item \textsuperscript{64} See text at note 28, supra.
  \item \textsuperscript{65} See Posner, \textit{What Do Judges and Justices Maximize?}, supra note 23, at 2-3, arguing that judges are ordinary people who rationally attempt to minimize their own work. This, Posner argued, explains a number of judicial practices: dicta is explicable in terms of leisure-promotion because, since it is not binding, a judge can join an opinion in which she disagrees with much of the content without “mortgaging . . . future votes.” In a similar vein, see Lawrence Baum, \textit{Policy Goals in Judicial Gatekeeping: A Proximity Model of Discretionary Jurisdiction}, 21 Am. J. Pol. Sci. 13 (1977), which shows that judges seek to promote prestige and audience respect, as well as the reduction of future workload. Judges have also been empirically shown, under certain conditions, to make decisions with a view to their personal chances of promotion. \textit{See also} Sisk, Heise & Morriss, supra note 28, at 1470. Even those who still adhere more to a jurisprudential notion of judging acknowledge strategic judicial behavior. Standard jurisprudential questions, such as whether a case constitutes a good vehicle or whether there is a need for more percolation in the lower courts, see H.W. Perry, \textit{DECIDING TO DECIDE}, 278 (1991) (describing both of these questions as part of the jurisprudential mode – in contrast to the outcome mode – of judicial decision-making that justices attest to engaging in as standard procedure, are inherently long-range-focused strategic assessments of the benefits of acting now rather than later).
  \item \textsuperscript{67} See infra Parts II-V below.
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is the institutional benefits of maintaining the legitimacy of the Supreme Court that
primarily explain the actions of the Chief Justice in *NFIB v. Sebelius*. The nature and
salience of these institutional benefits are addressed in the remainder of this Part.68

**B. Legitimacy – Protecting the Court**

As critiqued below,69 in the wake of *NFIB v. Sebelius*, numerous
commentators likened Roberts’s actions to that of Chief Justice Marshall’s strategic
maneuverings in *Marbury v. Madison*.70 It is generally agreed that Marshall’s
decision to deny fellow Federalist Marbury the commission that Democratic-
Republican President Jefferson refused to grant was made to protect the Court from
the very serious threat that Republicans would otherwise not enforce the decision, and
could even further punish the Court – they had already canceled a Term of the Court
out of concern for what Marshall would do. Many reasons why *Marbury* is an inapt
analogy are discussed below, but it is argued here that even though the circumstances
facing the two chief justices were very different, they were still largely driven by the
same motivation: protecting the legitimacy of the Court.

In contrast to Marshall’s predicament, Roberts did not face any serious threat
that the Obama Administration would fail to enforce the Court’s decision. Ever since
President Eisenhower reluctantly sent National Guard troops into Little Rock to
enforce *Brown v. Board of Education*,71 it has become accepted orthodoxy that Supreme Court decisions will be enforced. But that 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,72 it is easy to assume that today it faces no serious threat to its
legitimacy. But this conclusion is only weakly grounded – we do not know how
political elites and the public would react if the Court did not restrain itself out of *anticipation* of any danger to its legitimacy. The view that the Supreme Court faces
no present threat to its legitimacy is similar to the statement, “There never was a nuclear attack against America, and so the U.S. wasted all that money developing a nuclear arsenal.” The Court’s record of avoiding the danger of popular backlash does

68 Arguably this institutional benefit is also uncertain, because the extent of the threat of doing otherwise is not clear; however, as will be shown, the Court and Roberts benefit from enhancing the Supreme Court’s legitimacy, even if it was not a question of judicial survival, rather one of degree.
69 See infra Part VI.
70 5 U.S. 137 (1803).
72 See e.g. Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POLI. SCI. 635 (1992) (describing the Supreme Court’s consistently high public evaluations compared to the other branches of government); Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POLI. SCI. REV. 1209 (1986) (describing the consistent core of support for the Supreme Court). Even with the Supreme Court’s low current approval ratings 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.
not necessarily mean that the danger does not exist.\textsuperscript{73}

In fact, there have been two notable periods where the Court did involve itself in the most controversial issues of the day, and the Court suffered blows to its legitimacy in both cases. First, deciding that slaves were property and unable to assert citizenship – and thus overturning the Missouri compromise – \textit{Dred Scott v. Sandford}\textsuperscript{74} not only made the Civil War inevitable, but it created a lasting stain on the Court’s reputation.\textsuperscript{75} 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. Instead, Justice Owen Roberts “switched” his vote in \textit{West Coast Hotel v. Parrish},\textsuperscript{76} and in doing so saved the Court from political retaliation.\textsuperscript{77}

The lesson that the Court seems to have drawn from these fraught episodes is that it was wrong to overreach in \textit{Dred Scott} and right to switch to save itself in \textit{West Coast Hotel v. Parrish}. 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.\textsuperscript{78} And 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 attacks – for example in the form of jurisdiction stripping – are more likely to occur.\textsuperscript{79}

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.\textsuperscript{80} But there has

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\item \textsuperscript{73} For more on the danger of drawing inferences of absence of an effect from the non-occurrence of that effect, see Rui de Figueiredo, Tonja Jacobi & Barry Weingast, \textit{The New Separation of Powers: Integrating the Study of American Politics}, in \textit{HANDBOOK OF POLITICAL ECONOMY} (Barry R Weingast & Donald Wittman, eds.) 199, 222 (2006).
\item \textsuperscript{74} 60 U.S. 393 (1857).
\item \textsuperscript{75} See, \textit{e.g.}, \textit{BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT} (1993) (describing how for “more than a century the case has stood as a monument of judicial indiscretion”).
\item \textsuperscript{76} 300 U.S. 379 (1937).
\item \textsuperscript{77} The long debate over whether Justice Owen Roberts did in fact switch has been ended by comprehensive empirical proof that he in fact did so. \textit{See} Daniel E. Ho & Kevin M. Quinn, \textit{Did a Switch in Time Save Nine?}, 2 J. LEGAL ANAL. 69 (2010) (showing a highly significant sharp, though temporary, shifts in voting patterns by Associate Justice Owen Roberts in 1936).
\item \textsuperscript{79} Sara C. Benesh, \textit{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.”).
\item \textsuperscript{80} \textit{Carolene Products}, 304 U.S. 144, 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
always been a dualism in American society between respect for fundamental law and popular will: the transgression of rights by the British led to an emphasis on fundamental law as constraining government, but simultaneously an embrace of the contradictory notion of popular sovereignty and democracy. This dualism in the political culture made Americans receptive to a Constitution that was ambiguous in the choice between the two, and it meant that the Supreme Court was accepted as the body that enforces fundamental law, but only “within delicately defined boundaries” of what popular opinion would tolerate. With an open-textured Constitution, policy making by the judiciary is unavoidable, but judges must make that policy “with their robes on . . . perform[ing] legislative (or quasi-legislative) tasks with judicial tools” and within the zone of public concurrence. So judges must not act as politicians, making decisions according to passing political fads, but there are sound theoretical grounds for recognizing they must act within the constraints of public acceptance, particularly in cases with direct political significance.

Of course, public opinion was solidly behind the New Deal in 1937 and the national governing coalition was united along party lines, whereas, in the context of NFIB v. Sebelius, both public opinion on the ACA and control of the government was divided. In the wake of NFIB v. Sebelius, it was not just Roberts whose popularity went down – the Supreme Court also suffered. Unsurprisingly, 40% of Republicans today have shifted their views of Roberts from positive to negative since his nomination in 2005, while 19% of Democrats viewed him more favorably, shifts that Gallup attributes largely to the decision. Overall, there was an 11-12% negative shift in favorability for all adults nationally. 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.

Does this mean, then, that Roberts miscalculated – that his sacrifice for the ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”

81 McCloskey, supra note 10, at 6-7.
83 Id. at 13-14.
84 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.
85 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-Supreme-Court.aspx?utm_source=google&utm_medium=rss&utm_campaign=syndication. However, Gallup concluded of a different polls showing a “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 72.
86 Id.
87 Id. The shift was 32% negative for Republicans, 22% positive for Democrats. In a poll taken prior to the decision, “more than two-thirds of Americans hope[d] that the Court overturns some or all” of the law. See Adam Liptak & Allison Kopicki, Approval Rating for Justices Hits Just 44% in New Poll, N.Y. TIMES (June 7, 2012).
greater good of the Court in fact damaged its 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. 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*,88 where the Supreme Court was seen as giving a direct boost to its favored political party. There is ample evidence that the Supreme Court suffered a serious blow to its legitimacy in the aftermath of that case.89 Just as a second head concussion causes exponential damage compared to the first blow, 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. Adding to this, at the time of the decision, the presidential election campaign was revealing the enormous monetary advantage that the Roberts Court had recently bestowed upon the Republicans in the form of *Citizens United v. Federal Elections Commission*.90 That controversial ruling allowed hundreds of millions of dollars to flow to Governor Romney from a handful of anonymous political donors.91 The furor over *Citizens United* added to 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. 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

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89 Liptak & Kopicki, supra note 87 (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.*”) In the long run it recovered its reputation. See James L. Gibson, *The Legitimacy of the United States Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL L. STUDIES 507 (2007) (showing the long-term support for the Supreme Court did not decline after the case). However, because the Supreme Court eventually recovered from the public disgust at a conservative Court effectively deciding an election in favor of a conservative candidate does not mean that the Court could survive so easily a second time.
90 558 U.S. 50 (2010).
of your goddamn business.\textsuperscript{92}

The public may be able to forgive one partisan case deciding a presidential election, but a second? A third? The Supreme Court faces criticism from the losing side in any controversial or especially salient decision but such attacks pale in comparison to the reaction to seemingly directly partisan judicial decisions. In \textit{NFIB v. Sebelius}, however unpopular the ACA, both the timing of the decision and the singular significance of healthcare to Obama’s reelection prospects\textsuperscript{93} would have made a decision to strike down the legislation akin to \textit{Bush v. Gore}.

\textit{Citizens United} also added considerably to the heightened sense of political threat that the Court faced. There is evidence that there was reason for practical concern about threats of retaliation from the political branches. Prior to the \textit{NFIB v. Sebelius} decision, conservative pundits were up in arms, claiming that Roberts was being put under pressure from the Obama Administration to declare the ACA constitutional.\textsuperscript{94} The political branches have considerable power over the courts – not only their institutional powers over such matters as jurisdiction and composition, but also over their public regard, which is so important to the courts’ legitimacy. Arguably President Obama has shown his willingness to flex that muscle.\textsuperscript{95} Roberts was right to be concerned for the Court.\textsuperscript{96}


\textsuperscript{93} Although by no means definitive, the following graph shows considerable improvement in President Obama’s prospects of reelection after the \textit{NFIB v. Sebelius} decision, as measured on the online prediction market, intrade.


\textsuperscript{95} Obama Criticizes Campaign Finance Ruling, CNN.COM POLITICS (Jan 21, 2010), http://politicalticker.blogs.cnn.com/2010/01/21/obama-criticizes-campaign-finance-ruling/.

\textsuperscript{96} Of course, giving in to this kind of muscle flexing could create perverse incentives going forward, actually encouraging future threats to the Court. As such, upholding the mandate can be seen
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 of the Court. “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.” This is particularly true, according to Roberts, when politics are highly polarized.

Roberts cites Marshall as his example in many ways, including the choices Marshall made in response to threats to the Court’s legitimacy of faith in its early days:

Marshall could easily have got on the Court and said, “I’m the last hope of the Federalists—we’re out of Congress, we’re out of the White House—and I’m going to pursue that agenda here.” And he would have not only damaged the Court but could have smothered it in the cradle. But instead he said, “No, this is my home now, this is the Court, and we’re going to operate as a Court, and that’s important to me,” and as a result he made the Court the institution that it has become.

Thus, while it is arguable whether Roberts succeeded in mimicking Marshall, there is no doubt that he had similar institutional motives in mind when deciding to side with the liberals in *NFIB v. Sebelius*.

For if, in contrast, the Court had divided along partisan lines, deciding the case against the current administration, 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 Court, and not simply a political body. Some were doing so even before the decision.

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98 Id. *Roberts’s Rules*, (“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.”).

99 Id. (quoting Chief Justice Roberts).

100 Elizabeth B. Wydra, *Supreme Court’s legitimacy at stake on Affordable Care Act*, POLITICO (June 25, 2012), 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 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.”).
mandate in a 5-4 decision, then his life as a constitutional scholar would have been a fraud, because it would mean that the law does not matter, only “politics, money, party and party loyalty.”101

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. In fact, they seemed entirely unfettered by institutional legitimacy constraints, not only voting to strike down the Obama Administration’s key legislative success, but arguably making up new doctrine as they did so.102 For instance, the dissent stated that since it considered that an individual mandate was not within congressional power under the Commerce Clause, there was no reason to inquire further as to whether it was valid under the Tax and Spend Power – a proposition that is truly breath-taking in its novelty and a complete reversal of the canon of assuming the constitutionality of legislation.103

While it may be tempting to adopt armchair psychology to theorize about differences in personality that made Roberts compromise and the other conservative justices not, such comments would be pure speculation. There are more concrete measures to rely upon that explain the differences between the conservative justices. 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 upon his promotion to Chief Justice.104 Thomas is approximately two standard deviations more conservative than the historical average for the Court. Scalia is the next most conservative justice since 1937, approximately one and a half standard deviations right of average.105 Thus it is fair to characterize both justices as extremists, and it is the nature of extremists to care less about the institutional norms of the Court.106 Whether a justice is regarded as moderate or extreme is in large part a product of his or her tendency to join the majority or dissent, and when dissenting, whether he or she dissents alone or with others. 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. As such, an extreme conservative (or liberal)

101 Id. (quoting Amar). Whereas after the decision, comments such as “We learned there is still a difference in this country between politics and law” were made about Roberts’s decision to uphold the mandate – Deborah Pearlstein, Early Thoughts on the Health Care Case, Balkanization (June 28, 2012), http://balkin.blogspot.com/2012/06/early-thoughts-on-health-care-case.html.

102 See Paul Starr, Between the Lines, THE NEW REPUBLIC 10-11 (Aug. 2, 2012) (pointing out that Roberts embraced almost in their entirety the four conservative justices’ arguments used to overturn the ACA completely).

103 NFIB v. Sebelius, slip op. at 16-17 (joint dissenting opinion). Additional analysis of the arguments of the dissenting justices is provided below.

104 In 2010, Thomas scored 3.99. Then Judge Rehnquist’s highest score was reached in 1975, at 4.41. See Martin & Quinn scores, supra note 10.

105 In 2010, Scalia scored 3.02. His highest score was 3.52, in 2000. Id.

106 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.
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 conservative justices – Alito and Kennedy? Again we can look to the objective scores of each justice, but how to interpret that information is less clear. Kennedy is the most moderate of the four justices and yet was reported to be the pushiest of all those lobbying Roberts to switch (or switch back, as the case may be) to vote to strike down the ACA.\(^{107}\) But Kennedy has been the median justice for seven years, with a wide berth on either side; as such, he may simply have grown used to not having to compromise, because ordinarily he naturally falls in the majority on any issue. 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.\(^{108}\) Kennedy, too, is arguably not moderate in any of his views, he just appears to be moderate when aggregating his divergent views – a justice who is business friendly but libertarian on many social issues.\(^{109}\)

Justice Alito looks a lot like Roberts. They both had moderately conservative scores in their first year: 1.74 and 1.75 respectively. Over the last seven years, both seem to have become more conservative, moving to 2.56 and 2.35 respectively. There is a literature that shows that judicial preferences change over time; in fact it is claimed that all but one of the last 26 justices who served 10 or more terms since 1937 are alleged to have shifted their preferences significantly.\(^{110}\) However, the causal mechanism of this variation is under-theorized,\(^{111}\) and, at any rate, whether these particular shifts are not simply the product of a changing docket has yet to be

\(^{107}\) Crawford, *supra* note 48.


\(^{110}\) Lee Epstein, Kevin Quinn, Andrew D. Martin & Jeffrey A. Segal, *On the Perils of Drawing Inferences About Supreme Court Justices from the First Few Years of Service*, 91 JUDICATURE 168 (2008).

\(^{111}\) Theories include arguable categorical exceptions, such as that prior executive experience will lead to less dramatic change (but only for conservatives). *See* Michael Dorf, *Does Federal Executive Branch Experience Explain Why Some Republican Supreme Court Justices ‘Evolve’ and Others Don’t?* 1 HARV. L. & POLICY REV. 457 (2007). Or, in contrast, that prior judicial experience will have the same effect. *See* Timothy M. Hagle, *Freshman Effects* for Supreme Court Justices, 37 AM. J. POLI. SCI. 1142 (1993). For an explanation of how there could be change in apparent judicial preferences scores without an actual change in judicial preferences, see Alvaro Bustos & Tonja Jacobi, *Strategic Judicial Preference Revelation* (2012), available at http://ssrn.com/abstract=2027498 (showing that even with static actual judicial preferences, apparent judicial preferences will vary, because justices will strategically mask their true preferences so as to shape future judicial nominations).
established. There is some impressionistic evidence that Alito may be more willing to venture off on his own, as illustrated by his lone dissent in the important First Amendment case *Phelps v. Snyder*.\(^{112}\) Whereas it is quite likely that Roberts, like his mentor Rehnquist, feels the moderating pull of being Chief Justice.\(^{113}\)

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.”\(^{114}\) For instance, Rehnquist, who had previously vehemently opposed the *Miranda* rule, requiring that police inform suspects of their rights,\(^{115}\) wrote *Dickerson v. Arizona*, which not only upheld *Miranda* but arguably enshrined it as a constitutional rule.\(^{116}\) “He appreciated that it had become part of the law—that it would do more harm to uproot it—and he wrote that opinion as chief for the good of the institution.”\(^{117}\)

Scalia dismissed any suggestion of any threat posed to the Court’s institutional legitimacy posed by the President. 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.”\(^{118}\) But there is more incentive for the chief justice to be an institutional player – as discussed in the next section, divisions within the Court reflect more on the chief justice than any associate justice. Scalia can feel free to deliberately create controversy; as he himself puts it: “It is fun to push [people’s] buttons.”\(^{119}\) 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.

C. Reputation – the “Roberts Court”

Roberts’s concern for the institutional legitimacy of the Court is clear, but that does not mean that his actions were entirely selfless. Intrinsically interwoven with popular respect for the Court as an institution is a more personal aspect of legitimacy: the individual reputation of each justice. But Roberts’s interest is far greater than that of the other eight justices; as chief justice, his reputation as a jurist is far more closely

\(^{112}\) 131 S. Ct. 1207 (2011). Note also that Alito joined Breyer’s dissent in the recent Copyright Clause and First Amendment decision *Golan v. Holder* 565 U.S. ___ (2011) (Breyer, J., joined by Alito, J., dissenting) (arguing that a statute that withdrew material from the public domain was invalid under the Copyright Clause, interpreted in the light of the First Amendment).


\(^{114}\) Rosen, Roberts’s Rules, supra note 97.


\(^{117}\) Rosen, Roberts’s Rules, supra note 97.


\(^{119}\) Id.
associated with the long-term respect given to the Court than is the case for any other justice.

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 has 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. 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.\(^\text{120}\) And to the extent that the Court’s legitimacy would have suffered had Roberts not compromised in *NFIB v. Sebelius*, in what would have been perceived by many as a partisan electoral gift, it would be the “Roberts Court” that would be considered a failure. Ultimately, it would be Roberts’s legacy that was damaged if the Court’s reputation suffered.

For this reason, Robert stated that he made 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: “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.”\(^\text{121}\) Without consensus, the judiciary appears divided along partisan lines, undermining the rule of law by making the law that the justices articulate appear subject to personal whim or political preference. For this reason, Roberts advocated the justices be “willing to put the good of the Court above their own ideological agendas.”\(^\text{122}\) This is precisely what Roberts did in *NFIB v. Sebelius* – he put his own ideological agenda aside to the extent necessary, in order to attempt to craft a coalition and maintain the legitimacy of the Court.

Roberts was correct to adopt this approach. In general terms, public perceptions of the Court are inherently tied up with this notion of ideological decision-making. Although it is common in the media to characterize public knowledge about the Court as comically low,\(^\text{123}\) political scientists have shown in

\(^{120}\) Rosen, *Roberts Rules*, supra note 97.

\(^{121}\) Id. (quoting Chief Justice Roberts).

\(^{122}\) Id. (quoting Chief Justice Roberts) (emphasis added).

\(^{123}\) This point is typically made by comparing public knowledge of the Court to some form of popular culture, such as People’s Court or the seven dwarfs. See James L. Gibson & Gregory A. Caldeira, *Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court*, 71 J. POLITICS 429, 429 (2009) (describing those studies). A recent version compares public knowledge about *NFIB v. Sebelius* to public knowledge about the divorce between Hollywood celebrities Tom Cruise and Katie Holmes, showing knowledge of the former to be lower than the latter. However, even on its own terms this poll fails to show broad public ignorance about the Court or even this case. It shows that 84% of people knew that the Supreme Court upheld “Obamacare”; the fact that this high
recent years that in fact well over a majority of people can answer questions about the role of the Court.\(^\text{124}\) Furthermore, people who know about the Court also know the justices are not meant to be making political decisions.\(^\text{125}\)

In relation to *NFIB v. Sebelius*, public commentators on both the left\(^\text{126}\) and the right\(^\text{127}\) agreed with Roberts’s assessment of the effect of making a 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.\(^\text{128}\)

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.

> It is difficult to differentiate between institutional and reputational concerns without being able to look inside Roberts’s head. But there is reason to think that the institutional interest dominated for Roberts in upholding the mandate. Individual reputation has two basic elements: the reputation of the Court – which reflects

\(^{124}\) *Id.*, 433 (discussing and critiquing the orthodoxy that the public is woefully ignorant of the Supreme Court, and showing that in 2001, nearly 75% of respondents knew that the justices of the Court are appointed; 66% knew justices have life tenure; and more than 60% knew that the Supreme Court has the ultimate say on the Constitution, although these numbers dropped by a small amount in 2005); See also Vanessa A. Baird and Amy Gangl, *Shattering the Myth of Legality: The Impact of the Media’s Framing on Supreme Court Procedures on Perceptions of Fairness*, 27 *POL. PSYCH.* 597 (2006).

\(^{125}\) *Id.* at 439 (“[T]hose with the highest level of knowledge are those who distinguish the most between the judiciary and other political institutions.”).

\(^{126}\) Linda Greenhouse, *A Justice in Chief*, N.Y. TIMES (June 28, 2012) (“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.”).

\(^{127}\) Richard A. Epstein, *What Was Roberts Thinking?*, DEFINING IDEAS (June 29, 2012) (“[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.”).

indirectly on the reputation of each justice and particularly on the chief justice – and the impression of consistency of the justice himself. This 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 this latter regard, bucking his reputation as a solid moderate conservative.129 So without denying that reputation may have been a consideration, Roberts’s actions suggest that the institutional factor overwhelmed reputational, doctrinal or policy concerns.

But there are two important caveats to this characterization of Roberts’s action. First, there were nonetheless ways in which Roberts gained an advantage at the same time as conceding ground: both by drawing the constitutional limits that justified the ACA as narrowly as possible and by getting as much in return doctrinally for the sacrifice he made for the institutional good of the Court. Second, the intermediate step between promoting the good of the Court and setting aside one’s own ideological agenda was crafting a broad coalition – an important element of the process that Roberts failed to achieve. The following Parts describe these two aspects of Roberts’s behavior: the details of how he pursued his broad strategic goal of clawing back many of the ideological costs of deciding against his own preferences on the constitutionality of the individual mandate; and Roberts’s tactical failure to achieve a consensus – or even a majority coalition – to cement his doctrinal maneuverings.

II. SACRIFICE YOUR QUEEN – UPHOLDING THE INDIVIDUAL MANDATE AS A TAX

Although Robert’s vote in NFIB was technically liberal, his opinion is undeniably conservative. Roberts begins his analysis by finding the mandate unconstitutional under the Commerce Clause and by narrowing Congress’s choices in general under that head of power. He then hems in the Necessary and Proper Clause. And ultimately, he finds a major part of the legislation unconstitutional. But he does uphold the most politically salient part of the legislation, the individual mandate, under the Taxing Power. This is the price Roberts must pay to maintain the legitimacy of the Court. But as set out in this Part, Roberts found ways to lower that price. Put another way, Roberts recognized his limits – the limits imposed by concern for institutional judicial legitimacy – but attempted to define those limits as narrowly as possible: downplaying the significance of his finding that the mandate was constitutional as a tax; creating future limitations on the Taxing Power; and maintaining the moral high ground by maximizing the rhetorical advantage of finding that the mandate was a tax.

129 Benjamin Hart, John Roberts Criticism: Conservatives Continue To Attack Justice After Health Care Ruling, HUFFINGTON POST (June 29, 2012) (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”).
A. Pay the price

Roberts held that the payment compelled by the individual mandate (hereinafter, the “fee”) was within congressional power under the Taxing and Spending Powers. The ACA describes this fee as a legal command to buy insurance – and Roberts and four other justices (those who dissented) concluded that such a command cannot be justified by the Commerce Clause. Nonetheless, Roberts and the four liberal justices of the Court decided that it is legitimate for legislation to have more than one meaning: the fee could be simultaneously characterized as a tax imposed on those who do not purchase health insurance.

There are many factors that Roberts used to justify this characterization of the fee as a tax. The fee is not so high that there is no effective choice but to buy health insurance – in fact four million people are expected not to purchase health insurance and instead to pay the fee. Consequently, the fee constitutes a form of revenue collection for failing to buy health insurance, revenue expected to amount to approximately $4 billion. In addition, the fee looks like other taxes: it is collected by the Internal Revenue Service; and it uses factors similar to those applied by other taxes, such as income level, number of dependents, and an income threshold. The fee also lacks characteristics of penalties: it is not limited to willful violations, hinging on scienter (which would suggest penalizing a voluntary choice); and the law still permits the conduct to which the fee applies – instead of making non-compliance unlawful, the law simply taxes that conduct.

Nonetheless, there are a number of ways that Roberts could have avoided upholding the law as a legitimate exercise of Congress’s Taxing Power. First, Roberts could have found, as the dissenting justices did, that the extraction is in fact a penalty, not a tax, and thus does 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 that meets those criteria is in essence a penalty. The dissenting justices also rebutted many of the factors that Roberts pointed to as evidence that the fee is a tax rather than a penalty: they argued that although scienter is evidence of a

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130 *NFIB v. Sebelius*, slip op., at 44 (Roberts 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.”).

131 *Id.* at 32 (“The 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.”).

132 *Id.* at 35-36.

133 *Id.* at 38.

134 *Id.* at 33.

135 *Id.* at 36.

136 *Id.* at 33.

137 *Id.* at 35.

138 *Id.* at 36.

139 *Id.* at 37.

140 *NFIB v. Sebelius*, slip op., at 18-19 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).
penalty, it is not required to conclude that a penalty is being imposed, and so the lack of a \textit{scireter} requirement alone does not establish that the fee is a tax.\footnote{Id. at 24.} Also, the dissenters gave weight to textual considerations – that the mandate and the fee both appear in Part I of the ACA, and not in Part IX, which is the Part of the law dealing with revenue.\footnote{Id.} They also considered that the fact that the fee is characterized in the legislation as a mandate cannot be dismissed so easily, suggesting it has significance beyond the realm of the Commerce Clause. The dissent argued that the legislation itself labels the fee as a mandate, not a tax, and that the legislation should be taken at face value. Both because the mandate provision uses mandatory language and because some individuals are exempt from the tax but not the mandate, it therefore makes no sense to characterize the mandate as a tax.\footnote{Id. at 19, 21.} What is important to note here is not whether the majority or the dissenters were correct, but that the fee could arguably have been labeled either a tax or a penalty. Accordingly, if a judge were amenable to finding the ACA unconstitutional, as Roberts’s conservative credentials suggests he ordinarily would have been, and his alleged switch shows he was in fact, then there existed considerable basis upon which to rest such a conclusion. Moreover, as addressed in detail in Part V, Roberts’s insistence that the fee could be a tax for Article III purposes, but not a tax for Anti-Injunction Act purposes, required a degree of intellectual contortion that was both ungainly and unpersuasive. Clearly, then, there were ways to avoid paying the price altogether.

A second way in which Roberts could have avoided paying the price of upholding the individual mandate for the good of the Court would have been 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 characterized differently.\footnote{Id. at 19, 21.} This argument has the appearance of ideological moderation, since 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 – arguably a mechanism of judicial restraint.\footnote{See Tonja Jacobi, \textit{Same-Sex Marriage in Vermont: Implications of Legislative Remand for the Judiciary’s Role}, 26 \textit{VERMONT L. REV.} 381, 386 (2002) (describing how remand to the legislature has both 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).}

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.

There were, then, at least two viable options that Roberts could have pursued instead of upholding the individual mandate as a tax. But each of these options had the disadvantage of potentially posing a threat to the reputation of the Court. Thus, Roberts upheld the constitutionality of the ACA, but he did so in a way that made it clear that he disapproved of the law as a policy and found the question of its constitutionality to be quite borderline. In this and other ways, he managed to reduce the price he had to pay to ensure the ongoing legitimacy of the Court.

B. Reduce the price as much as possible

Roberts may have felt obliged to uphold the ACA’s individual mandate – doing so was the price to be paid for the ongoing good opinion of the Court; but that does not mean he had to ‘pay retail.’ Even while upholding the Obama Administration’s key policy initiative, Roberts was able to diminish the value of that outcome for liberals and, conversely, to diminish the cost to conservatives (although these efforts were not much appreciated by conservatives on the whole). He did this both by reducing the cost of his conclusion that the mandate constituted a tax and at the same time by garnering both policy and doctrinal advantages in relation to the various issues of law that the case raised. This section examines the former strategy while the following three Parts detail the latter.

1. Downplay the significance

One of the most striking strategic moves by Roberts in minimizing the cost-to-benefit ratio of his strategic choice to uphold the individual mandate lies in the brief section justifying why his Commerce Clause analysis is not dicta. This is discussed in more depth in Part III.A, 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.

Roberts was saying that his own ruling that the fee is a tax is so close to the tipping point between constitutionality and unconstitutionality that the law was only upheld

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146 NFIB v. Sebelius, slip op., at 6 (Roberts opinion) (“It is not our job to protect the people from the consequences of their political choices.”).
147 NFIB v. Sebelius, slip op., at 44 (Roberts opinion).
because of the canon of finding legislation constitutional when in doubt. Roberts was using a novel rhetorical device, bringing into question his own analysis as borderline, which has the advantage of not only justifying the inclusion of his Commerce Clause analysis, as described below, but of minimizing the impact of the doctrinal price he has to pay in relation to the Taxing Power, at the same time as paying it.

Essentially, at the same time as finding that the Taxing Power legitimates the law, Roberts was reading that power narrowly. As described above, Roberts detailed numerous reasons why the fee constitutes a tax, but in this Part of his opinion he was describing his own analysis as marginal – so marginal that it would not apply except as a saving construction after failing to find the law constitutional under the Commerce Clause. Roberts was attempting to make clear that this law may be constitutional, but that does not guarantee similar laws will be allowed by the Court in future. According to Roberts, similarly borderline acts could easily cross the line into unconstitutionality under existing law. 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 future.

2. Create future limitations

The second way in which Roberts cuts the price he has to pay is 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. He made clear first that he was in no way expanding Congress’s Taxing Power; he states that whereas upholding the law under the Commerce Clause would be an expansion of congressional power, his finding that Congress has such power under the taxing clause does not do so. Then he goes further and explicitly leaves open the possibility that additional limits on the Taxing Power could be imposed in the future, by finding such taxes to be overly coercive.

Roberts opens his discussion with reference to United States v. Butler and Bailey v. Drexel Furniture, two pre-New Deal cases. Neither case has been overturned, but their logic has been entirely repudiated by subsequent cases. Drexel Furniture was a 1922 case that concerned the Child Labor Tax Law, which imposed a tax on manufacturing income gained using child labor – an attempt to get around the same regulation found unconstitutional under the Commerce Clause. The tax was held to directly, not incidentally, regulate child labor, and so constituted a penalty, not

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148 The ruling did, however, necessitate a narrow reading of what could potentially be a limit on 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. Roberts rejects the direct tax argument, concluding that it only applies to capitations and land taxes, which this tax does not. Id. at 41 (“A tax on going without health insurance does not fall within any recognized category of direct tax.”).

149 Id. at 42 (“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.”).

150 297 U.S. 1 (1936).

151 259 U.S. 20 (1922).

a tax, since at that time any tax had to be independently justified by some other enumerated power.\textsuperscript{153} In addition, control of child labor was held to be explicitly a state function, and so the law was prohibited by the Tenth Amendment, which defined congressional power subject to state power.\textsuperscript{154}

The former argument was rejected even before the New Deal, by Butler, decided in 1936 shortly before the previous Justice Roberts’s switch in time. Butler assessed the constitutionality of the Agriculture Adjustment Act; the law set taxes on production exceeding set limits and made grants to farmers for not producing, in order to control production and overcome the crisis in the bloated agriculture market. Butler rejected Drexel Furniture’s conception of the Taxing Power, holding instead that the confines of the Tax Power “are set within the clause which confers it,” so there is no need for additional empowerment through other clauses.\textsuperscript{155} Nonetheless, Butler mimicked Drexel Furniture’s Tenth Amendment analysis, holding that to allow Congress to indirectly regulate state police powers through taxing and spending would allow it to “become the instrument for total subversion of the governmental powers reserved to the individual states.”\textsuperscript{156} But, in turn, these two cases’ Tenth Amendment arguments were rejected in 1937 in Steward v. Davis\textsuperscript{157} and Helvering v. Davis.\textsuperscript{158} Those cases held that just because a power belongs by accepted practice to the legislatures of the states does not mean it is denied by the Constitution to Congress. Between Butler, Steward, and Helvering, then, both arguments of Drexel Furniture were repudiated; and the latter two cases, in turn, denounced Butler’s “aggressive policing” of regulating behavior through the Taxing Power. Roberts’s reliance on these pre-New Deal cases for their “aggressive policing” of limits on the Taxing Power was a sleight of hand to return to the pre-New Deal era.\textsuperscript{159}

There is good strategic reason, if little sound jurisprudential basis, for Roberts to equate the pre-New Deal cases with their post-1937 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 fees designed to regulate behavior as well as to raise revenue may become so great as that the fee loses its character as a tax, and so too its constitutional basis.\textsuperscript{160} In making this pronouncement, Roberts claims to be quoting a 1994 case called Department of Revenue of Montana v. Kurth Ranch,\textsuperscript{161} but

\begin{itemize}
\item \textsuperscript{153} Id. at 276.
\item \textsuperscript{154} Id. at 274.
\item \textsuperscript{155} Butler, 297 U.S. at 66.
\item \textsuperscript{156} Id. at 75.
\item \textsuperscript{157} 301 U.S. 548 (1937).
\item \textsuperscript{158} 301 U.S. 619 (1937).
\item \textsuperscript{159} NFIB v. Sebelius, slip op., 42 (Roberts 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 concedes that structuring the incentives of the states with bribes is not coercion. Id. at 36.
\item \textsuperscript{160} Id. at 42.
\item \textsuperscript{161} 511 U.S. 767, 779 (1994).
\end{itemize}
read the fine print closely and you will see that in fact the quote is entirely and exclusively a quote from *Drexel Furniture*.162

So the notion that there is a coercion limit on the Taxing Power was based entirely on repudiated pre-New Deal cases, and one subsequent quote 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.”163 He justified this imprecision on the basis that the tax was not struck down under those limits.164 However, as we shall see below, he came to the conclusion that 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.165 Part V explores in detail the strategic advantage of this vagueness; it suffices for now to note that doing so keeps Roberts options as open as possible in future cases.

3. *Maintain the moral high ground – maximize 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 that the mandate was 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 does not have the political advantage that actually striking down the law would have had for conservatives – prior to the Court’s healthcare decision, Romney was prospectively crowing that a repeal of the law would render Obama’s first term “entirely wasted.”166 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 being a tax increase.

Roberts made it clear in the course of 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

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162 *NFIB v. Sebelius*, slip op., at 42-43 (Roberts opinion).
163 *Id.* at 43.
164 *Id.* at 43 (“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.”).
165 *Id.* at 45-59 (Part IV).
permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.”  Roberts did not stop there in his disparagement of the policy choice: presumably designedly, he uses the pejorative term “tax hike.”

Republicans were quick to catch on to the rhetorical weapon that Roberts had created for them. Since the individual mandate had been characterized and justified by the Administration 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 precisely as a tax.”  Although the Court may recognize that simultaneous arguments can be made that the fee is a mandate or a tax, such slippery argumentation does not play so well with the public.

Second, the Administration had to deal with the change in the debate from 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 U.S. history. Although this claim is not true – both because most people will receive subsidies that outweigh the tax increase they bear, and because the new tax is by no means a historical record tax increase – the idea has caught on and is being 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.

In summary, although Roberts upheld the constitutionality of the individual mandate to protect the Court’s institutional legitimacy, he went to great lengths to do the minimum required in order to provide that protection. He emphasized that the ruling was not greatly significant, that it still allowed for future limits on the Taxing Power, and disparaged the legislation as a “tax hike.” The next two Parts show how Roberts also reaped doctrinal benefits – narrowing the Commerce Clause, the

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167 NFIB v. Sebelius, slip op., at 44 (Roberts opinion).
168 Id. at 32.
171 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, MINNESOTA PUBLIC RADIO (June 29, 2012) available at http://minnesota.publicradio.org/display/web/2012/06/29/politics/ad-campaign-affordable-care-act/.
Necessary and Proper Clause and the Spending Power – although the extent that he was able to ‘lock in’ those changes is considered in Part VI.

III. REAP THE BENEFITS – DOCTRINE

In embarrassing gaffes on the morning of June 28, 2012, when the decision came down, both Fox News and CNN reported that the individual mandate had been struck down. 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, he began “In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder.” 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. He then embraced New York v. United States, the modern decision to most forcefully revive the restrictions of the Tenth Amendment after it was dismissed as a “mere truism” after the switch of 1937. He approvingly quoted its language about “diffusion of sovereign power” – language that is contemporary jurisprudential code for dual sovereignty between the federal government and the states. Roberts then made approving reference to the states’ rights concept of subsidiarity – that as much power as possible should be exercised by those closest to the people, which is the lowest level of government. Then, finally, Roberts concluded that all congressional powers must be read narrowly so as not to confer a general power to legislate. Thus, the beginning of Roberts’s opinion is saturated with the sort of states’ rights language that generally precedes a conservative opinion against federal legislative exercise of power.

Roberts has learned from that strategic titan, Marshall, but it was not Marbury that Roberts was emulating, as many have suggested, but rather Gibbons v. Ogden. In invalidating a state law granting a monopoly over steamboating between states, Marshall provided a broad definition of commerce as covering all commercial intercourse, refused to exclude purely internal state matters, narrowed the role of

\[172\] NFIB v. Sebelius, slip op., at 2 (Roberts opinion).
\[173\] Id. at 3.
\[174\] Id. at 4 (citing New York v. United States, 505 U. S. 144, 181 (1992)).
\[175\] United States v. Darby, 312 U.S. 100 (1941).
\[176\] A concept that 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 Part III.B.1.).
\[177\] NFIB v. Sebelius, slip op., at 6 (Roberts opinion).
\[178\] 22 U.S. 1 (1824).
\[179\] Id. at 193 (“[T]hese words comprehend every species of commercial intercourse between the United States and foreign nations.”).
the Tenth Amendment,\textsuperscript{181} and provided the beginnings of the dormant commerce clause analysis.\textsuperscript{182} More than any of these enormously significant doctrinal rulings, the power of the case comes from Marshall’s opinion constituting an essay on federalism, providing 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 also.\textsuperscript{183} Roberts’s opinion in \textit{NFIB v. Sebelius} provides 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 constraining of the federal government that Roberts was about to endeavor to achieve under the Commerce Clause.

A. \textbf{Cutting back the Commerce Clause}

1. \textit{Craft new law – activity versus inactivity in the Commerce Clause}

Roberts recognized that the power of commerce is broad under the Constitution,\textsuperscript{184} but nonetheless maintained that the individual mandate went beyond that broad power, because it regulated inactivity, rather than activity. This distinction between activity and inactivity is the major doctrinal shift that Roberts develops under the Commerce Clause.\textsuperscript{185} To constitute a significant doctrinal payoff for his sacrifice, this distinction needs to be both important and likely to be adopted. The following section shows how Roberts artfully maneuvers 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.”\textsuperscript{186} As such, it cannot be used to compel individuals to purchase an unwanted product, as doing so is regulating individuals precisely because they are not acting.\textsuperscript{187} The individual mandate is necessary to the ACA because the legislation also prevents discrimination against people with pre-

\textsuperscript{180} \textit{Id.} at 209-10.

\textsuperscript{181} \textit{Id.} at 197 (describing the Commerce Clause as “plenary as to [its] objectives”; 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).

\textsuperscript{182} \textit{Id.} at 189 (proposing that whatever Congress can regulate is immune from state regulation, suggesting that it was not even necessary to have the federal legislation in this case for the state action to be unlawful).

\textsuperscript{183} \textit{Id.} at 187 (the “enumeration of powers expressly granted by the people to their government” resulted in federation and the states’ whole character changed).

\textsuperscript{184} \textit{NFIB v. Sebelius}, slip op., at 17 (Roberts opinion).

\textsuperscript{185} \textit{NFIB v. Sebelius}, slip op., at 18 (Ginsburg, J., concurring and dissenting) (“The Chief Justice’s novel constraint on Congress’ commerce power gains no force from our precedent and for that reason alone warrants disapprobation.”) Roberts’s other maneuverings, described in Sections 2 through 5 below, are essential tactics for achieving his goal, but less significant changes to the law.

\textsuperscript{186} \textit{NFIB v. Sebelius}, slip op., at 18 (Roberts opinion).

\textsuperscript{187} \textit{Id.} at 20.
existing conditions; without the mandate, healthy people would not obtain health insurance until they became unhealthy, which would bankrupt the system. 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.

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 the sale of marijuana, guns near schools, violence against women, bringing women and girls across state lines for the purpose of sexual exploitation, or the sale of wheat or lottery tickets. 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 everybody will at some point consume healthcare products and services over the course of their lives – more than 60% of those without insurance visit the hospital or doctor’s office within each year, 90% within five years. As such, she maintained, most of those who have not sought health insurance obtain healthcare, and thus are participating in the relevant commercial activity.

The point is not which of these two justices is correct, rather that the distinction between activity and inactivity is far from clear in application, and 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 be a vast expansion of congressional power, Roberts contended, to allow Congress to regulate inactivity along with activity. To do so would go further than Wickard, arguably the outer limit of the Commerce Clause, because in that

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189 Id. at 25.
190 Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (upheld in Gonzales v. Raich, 545 U.S. 1 (2005)).
196 NFIB v. Sebelius, slip op., at 18-19 (Ginsburg, J., dissenting).
197 NFIB v. Sebelius, slip op., at 20 (Roberts opinion). Part of this disagreement also stems from disagreement over definition of the relevant market – healthcare versus health insurance – discussed infra, Part III.A.3.
198 NFIB v. Sebelius, slip op., at 20 (Roberts opinion).
199 For a critique of this claim, see section III.A.2, infra.
case, farmer Filburn was engaged in producing wheat, and thus involved in commercial activity. But Ginsburg characterized Wickard differently: there the government forced farmers into the market rather than growing their own wheat, due to the possible future flow of local wheat grown for personal consumption into the market. Similarly, the plaintiff in Raich was ordered to cease cultivating marijuana “because of the prophesied future transaction,” the eventual sale of marijuana in the interstate market. The only difference in the current case, Ginsburg maintained, is that future healthcare consumption is far more certain to occur eventually.

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 claimed the distinction is entirely novel. To attempt to show that the concept was well-established, Roberts quoted multiple cases that use the term “activity,” from Lopez to NLRB v. Jones & Laughlin Steel Corp. However, not a single one of these quotes actually discusses the activity-inactivity distinction, the cases simply refer in passing to ‘activities being regulated.’ Roberts did nothing to show that any of the cases meant to make a distinction between allowed regulation of activities and disallowed regulation of inactivity. All that he established was that “activities” is a term that is often used as shorthand for “the topic being regulated.”

The second point illustrated by these divergent characterizations of Wickard and Raich 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. As will become apparent, this is because it is very hard to make this distinction meaningful in any way, and so the distinction is simply a mechanism for subjective judicial choice.

Roberts actually acknowledged that in terms of economics, there is no difference between activity and inactivity; “both have measurable economic effects on commerce.” He concluded, nonetheless, that the power to regulate under the Commerce Clause does not include the power to compel inactivity into activity, based on his understanding of the framers as “practical statesmen” who viewed the distinction as significant. Although in many cases it may be justifiable to favor traditional distinctions over the logic of economics, it is particularly hard to justify when analyzing what constitutes commerce. To make no effort to ensure that the

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200 NFIB v. Sebelius, slip op., at 22 (Roberts opinion).
201 NFIB v. Sebelius, slip op., at 20 (Ginsburg, J., concurring and dissenting).
202 Id. at 21.
203 Id.
204 Id. at 20 (“[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.’”) (quoting NFIB v. Sebelius, slip op., at 26 (Roberts opinion)).
205 Id. at 19-20 (Roberts opinion).
206 NFIB v. Sebelius, slip op., at 24 (Roberts opinion).
207 Id. (“The Framers gave Congress the power to regulate commerce, not to compel it… [and there] is no reason to depart from that understanding.”) (Emphasis original).
inherently economic concept of commerce makes sense economically, and instead to point to the utterly amorphous concept of what the framers as “practical statesmen” would favor, leaves the in/activity distinction appearing as simply a device for distinguishing between favored and disfavored actions – which are indistinguishable only in effect, and differentiated only based on rhetoric.

The in/activity dichotomy comes to look a lot like levels of generality in constitutional interpretation, which are notoriously indeterminate and manipulable. Anything described sufficiently broadly can be covered by an open-textured constitutional clause and so excludes little. Anything described sufficiently narrowly will be disconnected from previously established rights and never be apparent from the broad protections of the Constitution. 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,” or an even broader interest in “the most intimate of human activities and relationships”? Or is the question whether there is a “right of common vendors of contraceptives to sell them to unmarried minors”? The choice in level of abstraction is easily manipulated to achieve the desired outcome, 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, or many other topics, 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 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

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210 Id.


213 Id. at 717, (Rehnquist, J., dissenting).

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

215 Famously, 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; whereas 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.

216 In search and seizure law, for instance, see Tonja Jacobi, The Law and Economics of the Exclusionary Rule, 87 NOTRE DAME L. REV. 585 (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”).
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.\footnote{Michael Lewis, \textit{Boomerang: Travels in the New Third World} (2011); \textit{Wall Street’s Bad Dream}, \textit{Economist} (Sept. 18, 2008), \url{http://www.economist.com/node/12273023}.} Essentially, the world’s economic prospects were considered so precarious due to prior reckless loans that financial lending institutions became extremely gun shy about lending money, even to seemingly more reliable sources, because of the potential flow on effect of one institutional failure to another. Legislation attempting to address this national and international crisis would seem the very definition of interstate commerce as it is ordinarily understood, however under Roberts’s activity-inactivity distinction, it could be argued that \textit{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 crisis facing the nation, other than regulating its insurance mechanism, is surely the obesity epidemic and obesity-related illnesses.\footnote{\textit{NFIB v. Sebelius}, slip op., at 22 (Roberts opinion) (“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,” citing social science evidence of the link between obesity and rising medical spending).} But just as the fact that healthcare makes up 15% of U.S. GDP, considerably exacerbated by the fact that 16% of the population is uninsured,\footnote{U.S Department of Health & Human Services, \textit{Overview of the Uninsured in the United States: A Summary of the 2011 Current Population Survey} (Sept. 2011), \url{http://aspe.hhs.gov/health/reports/2011/CPSHealthIns2011/ib.shtml} (last visited Aug. 19, 2012).} did not sway Roberts that its regulation came with in the Commerce Clause, so, too, he argued that regulation attempting to combat obesity through diet would not constitute legitimate Commerce Clause legislation.\footnote{\textit{NFIB v. Sebelius}, slip op., at 23 (Roberts opinion) (“People, 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).} 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.\footnote{James Stewart, \textit{How Broccoli Landed on Supreme Court Menu}, \textit{New York Times} (June 13, 2012) \url{http://www.nytimes.com/2012/06/14/business/how-broccoli-became-a-symbol-in-the-health-care-debate.html?pagewanted=all}.}

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,”\footnote{\textit{NFIB v. Sebelius}, slip op., at 26 (Roberts opinion) (suggesting that legislation pertaining to clothing, transportation, shelter, energy and other topics, are analogous to regulating a healthy diet, and would be authorized if the individual mandate constituted commerce regulation).} which would be contrary to a government of limited powers,\footnote{\textit{Id.} at 23.} the intent of the framers,\footnote{\textit{Id.} (“That is not the country the Framers of our Constitution envisioned.”).} and the relationship the

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\item \footnote{\textit{Michael Lewis, \textit{Boomerang: Travels in the New Third World} (2011); \textit{Wall Street’s Bad Dream}, \textit{Economist} (Sept. 18, 2008), \url{http://www.economist.com/node/12273023}.}}
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\item \footnote{\textit{Id.} at 23.}
\item \footnote{\textit{Id.} (“That is not the country the Framers of our Constitution envisioned.”).}
\end{itemize}
Constitution authorizes between citizens and the federal government. 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 by the many other notions of liberty and freedom contained in the Constitution, such as the Fourteenth Amendment. As such, the slippery slope concern is misleading, since comprehensive Orwellian government control over the minutiae of everyday life would be unconstitutional even without the activity-inactivity distinction Roberts was attempting to justify. There is no need to insert an activity-inactivity 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 was saying that there could be many more applications of his activity-inactivity distinction. He pointed to the “markets for food, clothing, transportation, shelter, or energy” as potential illegal attempts to use the Commerce Clause. So, if the United States lacked a pre-existing interstate railway system, then 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 “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 redundancy. But he did not limit this argument to those clauses where the power to create is specified, since no such power exists for healthcare. As such, healthcare looks like transportation, and so creation of an interstate railway could arguably be regulation of inactivity, despite the fact that regulation of interstate mechanisms of travel is central to the Commerce Clause. Roberts gave no indication that his activity-inactivity 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 Congress does not have license to regulate.

Consequently, Ginsburg was wrong to emphasize that the application in NFIB}

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225 Id. 23-24 (“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.”).
226 Id. (Ginsburg concurring and dissenting opinion) at 29 (“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.”).
227 Id. (Roberts opinion) at 26.
228 Id. at 18 (For more on this textual implication, see the following section on selective textualism).
229 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.”)
230 Id. at 26 (“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.”).
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. It is the similarity between healthcare and other problems Congress may wish to address that makes Roberts’s new distinction potentially groundbreaking. 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 activity-inactivity 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 are three difficulties for Roberts, each of which requires a different strategic ploy to overcome. First, he must ensure that his entire Commerce Clause analysis is not dismissed as dicta; second, he has to reinterpret the general term “commerce” as the more specific term “market”; and third, he has to redefine the outer limits of prior precedent. The following three sections deal with each of these strategic devices in turn.

2. Redefine what constitutes 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, was the Commerce Clause, suggesting the importance of this doctrinal payoff to the Chief Justice. However, given that he concluded that the individual mandate can be upheld under the Taxing and Spending Power, his Commerce Clause analysis would ordinarily be considered dicta. As such, it would be more easily cast aside by future courts. As a result, it was vital for Roberts to overcome this strategic difficulty to claim his full reward.

Roberts’s fifteen pages of Commerce Clause analysis not only constitutes dicta, its inclusion is contrary to norms of judicial minimalism, whereby the Court should only decide the minimum necessary. As Ginsburg queried: “Why should the Chief Justice strive so mightily to hem in Congress’ capacity to meet the new problems arising constantly in our ever developing modern economy?” She answered the question herself: “I see no reason to undertake a Commerce Clause analysis that is not outcome determinative.” Ginsburg was accusing Roberts of reaching beyond what was necessary to decide in the case, implying that he was doing so in order to write new Commerce Clause jurisprudence.

Furthermore, Roberts’s analysis offends the judicial canon of avoiding rulings

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231 NFIB v. Sebelius, slip op., at 21 (Ginsburg concurring and dissenting opinion), (referring to NFIB v. Sebelius, slip op., at 25 (Roberts opinion)).
232 See Part V.A, infra.
234 NFIB v. Sebelius, slip op., at 37 (Ginsburg concurring and dissenting opinion).
235 Id. at 37 n.12.
on constitutionality wherever possible.\textsuperscript{236} Since the legislation 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 has an answer to the dicta accusation (if not the other two accusations), and it is here 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,\textsuperscript{237} Roberts developed an entirely new concept of constitutional analysis.

As described in Part II.A.1, above, Roberts described his own tax analysis as borderline. One advantage of this is to read down the significance of his own finding, the outcome he disfavors, as described above. But Roberts crafted a new advantage out of this unusually modest characterization of his own reasoning: he argued that it made his Commerce Clause analysis central, rather than marginal.

Roberts characterized the statute as “read[ing] more naturally as a command to buy insurance than as a tax.”\textsuperscript{238} Consequently, he said, he would uphold it under the Commerce Power if it was at all possible, and he only turned to the Taxing Power question because it was not possible to justify on the Commerce Clause. 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.”\textsuperscript{239} Roberts argued that since it was only because the Court has a duty to attempt to find any legislation constitutional that he turned to the impliedly unnatural question of whether the mandate can be justified as a tax, 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 tax – 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 crossing the line of constitutionality; once it crosses that line, it does not matter how close to that line the provision came.\textsuperscript{240}

\textsuperscript{236} United States v. Witkovich, 353 U.S. 194 (1957) (interpreting §242d, §§3 of the Immigration and Nationality Act not to give the Attorney General unbounded authority to seek whatever information he wants regarding immigrants to be deported, so as to not have to strike down the legislation as unconstitutional); The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of The New Habeas Provisions, 111 Harv. L. Rev. 157, (1998).

\textsuperscript{237} NFIB v. Sebelius, slip op., at 44-45 (Roberts opinion) (Part III.D).

\textsuperscript{238} Id. at 44.

\textsuperscript{239} Id.

\textsuperscript{240} Otherwise, on Roberts’s logic, he should also have written on whether the legislation would also have been found unconstitutional under s5 of the Fourteenth Amendment – Pearlstein, supra note 101. Ginsburg’s critique is to instead focus on what line should be used, arguing that rational basis scrutiny should apply – NFIB v. Sebelius, slip op., at 16-17 (Ginsburg concurring and dissenting
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.” And since he concluded that there was ample precedent that Congress had the 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 is sufficient to sustain it.” These quotes make clear that when it was in Roberts’s interests to apply deference to Congress and the norms of judicial minimalism and 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 turn 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 any given head of power than another is for a justice to know where she ought to start her analysis. The reason this is important is so as to decide as little as possible: if you start with the most natural reading of a legislative provision, you are most likely to find it justified by that head of power, and if so, your analysis can stop there. This satisfies both the general norm of judicial minimalism and the expectation of the Court doing 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, she should not address that question. 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 following section shows, one

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<td>“NFIB v. Sebelius, slip op., at 32 (Roberts opinion). Furthermore, he pointed out that deference must be given to federal 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.</td>
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of Roberts’s key doctrinal advantages from making his sacrifice was that he got to set out vast swathes of new Commerce Clause jurisprudence. If that new doctrine was all dicta, it would be of little advantage to him. As such, his saving construction analysis was the only way to gain that advantage. His saving construction analysis will not do much to persuade justices antagonistic to the substance of the Commerce Clause analysis, 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 as it is, with Roberts unable to garner a majority in future cases, as here, the *Marks* doctrine will apply. 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 among – *Marks* held that the later Court should adopt as precedent the opinion in the earlier case that was decided on the narrowest grounds. 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.” As such, Roberts, as the swing justice on this question, is quite likely to be the swing justice on future cases of the same natural Court, and also seems likely to find his own reasoning persuasive, even if others do not.

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. For instance, the congressional powers to coin money, to raise armies and to provide for a Navy are all specifications of the ability of Congress to bring a subject into existence. If it was possible to bring activities into existence merely when the power to regulate is

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243 As illustrated by the fact that the liberal justices have continued to reject restrictions on the Commerce Clause, whether writing in dissent – *United States v. Lopez* 514 U. S. 549, 560 (1995)) (Souter and Breyer, JJ., dissenting); and *United States v. Morrison*, 529 U.S. 598 (2000 (Souter and Breyer, JJ, dissenting) – in a majority – *Raich v. Gonzales*, 545 U.S. 1, 50 (2005) – or in concurrence – *NFIB v. Sebelius*, slip op., at 16 (Ginsburg concurring and dissenting opinion) (“Beyond dispute, Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce. Those without insurance consume billions of dollars of health.”).  
244 *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...” (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976) (opinion of Stewart, Powell, And Stevens, JJ.)  
246 *NFIB v. Sebelius*, slip op., at 18 (Roberts opinion) (“If the power to “regulate” something included the power to create it, many of the provisions in the Constitution would be superfluous”).  
247 U.S Const. art. I, §8, cls. 5, 7, 12, respectively.
granted, then each of these elements of these provisions would be unnecessary, given that each section also allows for the “regulation” of their respective topics: Congress may regulate the value of money, support armies and maintain a Navy.\textsuperscript{248} 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.\textsuperscript{249} Roberts was, however, selective in his reliance on textualism, and so such arguments should be interpreted as a strategy, rather than as methodological purity.

Even accepting the activity-inactivity 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.\textsuperscript{250} 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. Roberts rejected this argument, however, because he defined the relevant market here not as healthcare generally, which the uninsured are involved in, but rather as the insurance market.\textsuperscript{251} But there is no mention of “markets” at all in the Constitution; the only reference is to “commerce.”

Roberts rejected the notion that everyone will eventually be involved in healthcare as an inadequate temporal hook. He analogized the car market: just because you purchased a car two years ago or will so in the future, does not mean you are in the car market.\textsuperscript{252} But this analysis only applies if the healthcare market and the health insurance market are separated out and not looked at together to see if they constitute commerce. Roberts refused to consider them together: “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.”\textsuperscript{253} But 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 accepting Roberts’s addition of the requirement of an activity rather than an inactivity being regulated, the question should then 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, inactivities

\textsuperscript{248} NFIB v. Sebelius, slip op., at 18-19 (Roberts opinion).
\textsuperscript{249} Id. at 19 (“The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated.”).
\textsuperscript{250} See id. at 22 (Ginsburg, J., concurring and dissenting) (“Health insurance is a means of paying for this [health]care, nothing more.”).
\textsuperscript{251} See id. at 25 (“The Government repeats the phrase ‘active in the market for health care’ throughout its brief . . . but that concept has no constitutional significance.”).
\textsuperscript{252} Id. at 25.
\textsuperscript{253} NFIB v. Sebelius, slip op., at 27 (Roberts opinion).
“can readily have a substantial effect on interstate commerce.”\textsuperscript{254} as Ginsburg concluded they do.\textsuperscript{255}

As Ginsburg pointed out, “it is Congress’ role, not the Court’s, to delineate the boundaries of the market the Legislature seeks to regulate.”\textsuperscript{256} But focusing on markets and subordinating the notion of commerce made it easier to find that there is regulation of inactivity rather than activity. Once again, Roberts was playing with levels of generality, just as he did with characterizing inactivity versus activity. By narrowing what the relevant ‘market’ is, it is much easier to conclude that no activity is being regulated within that narrow conception, as compared to within the broad notion of ‘commerce’ that is actually found in the Constitution.

So putting his two central Commerce Clause arguments together, Roberts acknowledged that his activity-inactivity distinction makes no economic sense and acknowledged that the markets relevant to this topic, when combined, could have a substantial effect on commerce. In the former he nonetheless adopted the distinction, largely because of a technical textual implication; in 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. Avoid elephants in the room – redefining the outer limits of prior cases

\textit{Wickard v. Filburn} was described in Roberts’s \textit{NFIB v. Sebelius} opinion as the case that constitutes “the most far-reaching example of Commerce Clause authority over intrastate activity.”\textsuperscript{257} This is not a new characterization: it is a mantra that began in the Rehnquist era, and has been asserted and reasserted by conservative justices when defining restrictions on the commerce power.\textsuperscript{258} But it is a mischaracterization. Even though conservatives use this mischaracterization strategically in order to narrow the Commerce Clause, liberals do not dispute it, for their own strategic reasons.

\textit{Wickard} is certainly one of the most expansive Commerce Clause cases. In that case, Congress was allowed 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

\textsuperscript{254} \textit{NFIB v. Sebelius}, slip op., at 23 (Roberts opinion).
\textsuperscript{255} \textit{Id.} at 22 (Ginsburg, J., concurring and dissenting) (“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.”).
\textsuperscript{256} \textit{Id.} at 20.
\textsuperscript{257} \textit{NFIB v. Sebelius}, slip op., at 21 (Roberts opinion) (quoting \textit{United States v. Lopez}, 514 U.S. 549, 560 (1995)).
substantial dampening effect on the interstate market for wheat. Wickard, then, stands for the proposition that the definition of what constitutes commerce for the purposes of satisfying the Constitution can be met by aggregating even non-commercial behavior, if the activity is economic in nature and has a substantial effect on commerce. However, there are two cases that far more strenuously test the bounds of Commerce Clause jurisprudence in the post-Lopez era: Heart of Atlanta Motel v. United States and Katzenbach v. McClung (Ollie’s BBQ). Together those cases constitute the doctrinal elephant in the room.

Heart of Atlanta rejected a segregationist challenge to the Civil Rights Act and its application to hotel accommodation. The Court held that segregation in hotels impacted commerce because such discrimination discouraged African-Americans from traveling interstate. This extended even to local incidents of interstate commerce, which could be regulated by Congress if “interstate commerce feels the pinch.” While a large motel near an interstate highway may have an effect on interstate travel, Ollie’s BBQ went even further, upholding application of the Civil Rights Act to a local restaurant operating purely intrastate. Although there was no evidence that Ollie’s BBQ served interstate customers – in fact its trade was expected to decrease if it was desegregated – the Court held under the rational relationship test 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.

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 come years after being forced to buy health insurance. Dealing with this actuarial reality is vital to health insurance as an industry: offering health insurance is only viable if the costs of most people’s healthcare are incurred significantly later than their purchase of health insurance. 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. It is Heart of Atlanta and Ollie’s BBQ that constitute the most difficult hurdle with which Roberts must reconcile his conclusion, not Wickard.

260 See Lopez, 514 U.S. at 559-60 (citing Wickard, 317 U.S. 111).
263 Heart of Atlanta Motel, 379 U.S. at 261-62.
264 Id. at 258
265 Katzenbach, 379 U.S. at 296 (Although it did serve food made from meat primarily obtained from out-of-state, albeit purchased indirectly through an interstate intermediary).
266 Id. at 299.
267 Id. at 300.
268 NFIB v. Sebelius, slip op., at 27 (Roberts opinion) (“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.”).
Heart of Atlanta and Ollie’s BBQ raise the question of whether anything at all was beyond the scope of the Commerce Power, a question not answered until Lopez and Morrison more than 30 years later. In those cases, Rehnquist, like Roberts after him, characterized Wickard as the outer limit of commerce jurisprudence. However, given that Lopez stands, more than anything, for the necessity of any effect on commerce being substantial in order to satisfy the head of power, Heart of Atlanta and Ollie’s BBQ present a far bigger challenge than Wickard.

But neither the conservative nor the liberal justices want to talk about why these cases about desegregation stretch the notion of commerce under the Constitution. The conservatives do not want to acknowledge the breadth of Heart of Atlanta and Ollie’s BBQ, quite simply, because if they did so they would either have had to limit the new constraints that Lopez created, or else 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-Ollie’s BBQ branch because they do not want to raise the specter of racial discrimination not being within Commerce Clause power.

Heart of Atlanta 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 on racial discrimination. And so it is in the strategic interests of both camps to pretend that Wickard provides the outer limits of Commerce Clause jurisprudence.

B. Inverting the Necessary and Proper Clause

1. Interchange powers with restraints

Since McCulloch v. Maryland, the Necessary and Proper Clause has been given broad range, incorporating anything that is ‘convenient’ or ‘useful’ within the notion of necessary. The mandate was seemingly on safe grounds on this front, then. 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 the nondiscrimination against those with prior conditions. As discussed, without the mandate, the entire insurance market would fail; consequently, the mandate is clearly necessary. As the majority in United States v. Comstock, of which Roberts was a

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269 Consequently, despite writing 61 pages overwhelmingly devoted to rebutting Roberts’s conservative doctrinal developments, Ginsburg does not rebut Roberts’s mischaracterization of the outer limits of prior Commerce Clause cases.

270 17 U.S. 316, 413 (1819).


272 NFIB v. Sebelius, slip op. at 32-33 (Ginsburg, J., dissenting and concurring).
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.”\textsuperscript{274} Consequently, as long as healthcare generally is within its ambit, Congress has choice over the mechanism used to regulate that topic, as long as that mechanism does not violate any other provision of the Constitution.

Roberts acknowledged this broad definition,\textsuperscript{275} but differentiated “proper” as a separate requirement from what was “necessary” under the clause.\textsuperscript{276} Even those who support Roberts’s view\textsuperscript{277} acknowledge that this approach is novel: the opinion was “the first in Supreme Court history to find that a law which is “necessary” is not proper.”\textsuperscript{278} The reason for this is that the concept of a separate requirement of propriety was rejected in 1819. As Marshall noted in \textit{McCulloch}: “the word ‘necessary’ is considered as controlling the whole sentence.”\textsuperscript{279} 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 is not for courts to assess whether the legislative mechanism is also proper, since doing so looks to be making a judgment about the policy choice involved in legislating, something that Roberts insisted the Court should not do.\textsuperscript{280}

The Necessary and Proper Clause is not meant to be a separate head of power, as Roberts correctly noted.\textsuperscript{281} However, it is 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:

The 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.\textsuperscript{282}

Yet Roberts was attempting to turn the Necessary and Proper Clause from an addition

\textsuperscript{273} 130 S. Ct. 1949 (2010).
\textsuperscript{274} Id. at 1956.
\textsuperscript{275} \textit{NFIB v. Sebelius}, slip op. at 28 (Roberts opinion).
\textsuperscript{276} Id. at 29.
\textsuperscript{278} David Kopel, \textit{Necessary and Proper Clause returned to the Original Understanding}, VOLOKH CONSPIRACY (June 29, 2012), available at http://www.volokh.com/2012/06/29/necessary-and-proper-clause-returned-to-the-original-understanding-podcast-with-illya-somin-and-more/ (also noting that it is “the first opinion to hold that a particular law is not valid because it is not an incident of an enumerated power”) (emphasis original).
\textsuperscript{279} \textit{McCulloch v. Maryland}, 17 U.S. at 413.
\textsuperscript{280} “We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation’s elected leaders.” \textit{NFIB v. Sebelius}, slip op., at 2 (Roberts opinion).
\textsuperscript{281} Id. at 29 (“Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power.”).
\textsuperscript{282} \textit{McCulloch v. Maryland}, 17 U.S., at 419.
to congressional power into a restriction, requiring the Court assess the propriety of the means chosen by Congress.

What, then, did Roberts encompass within this new inquiry the propriety of Congress’s chosen means? A law is not proper if it would “undermine the structure of government established by the Constitution.” Roberts did not specify which element of the Constitution would be undermined by the mandate, but he did cite two modern federalism cases, Printz v. United States and New York v. United States. Those federalism 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 say that in analyzing an exercise of congressional power, the Court should always begin with looking to the enumerated legislative powers, then encompass all incidental aspects of those powers, and all that remains is left to the states. Whereas in New York v. United States, O’Connor began with the enumerated powers but then defined the states’ powers positively, asserting dual sovereignty. This ignores considering Congress’s incidental powers. 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. Here, however, there is no issue of commandeering: Roberts seems to be incorporating Tenth Amendment analysis where none applies.

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 uphold the mandate under the Commerce Clause would mean that Congress would not be restricted to exercising regulation over pre-existing activities. Roberts was using his freshly minted activities requirement not only to restrict the Commerce Clause but also to restrict the Necessary and Proper Clause. So Roberts was asserting a new restriction on the Necessary and Proper Clause, but when we look beyond the citations and the phrases such as “usurpation,” the argument simply collapses down to the same invention he applied to restrict the Commerce Clause. As discussed, the term “activities” is mentioned in many cases, but Roberts

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283 NFIB v. Sebelius, slip op., at 28 (Roberts opinion).
284 Id. at 29.
287 22 U.S. 1 (1824).
288 McCulloch v. Maryland, 17 U.S. at 421.
289 In addition, in McCulloch, Marshall seems to reject the notion of dual sovereignty, arguing that the State conventions were a convenience, deliberately constituted differently to the States.
290 An argument can be made that the individual mandate amounts to commandeering of individuals that is analogous to commandeering of the states that these cases forbid – see Randy E. Barnett, Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional 5 NYU J. L. & LIBERTY 581 (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 by stealth.
291 NFIB v. Sebelius, slip op., at 29 (Roberts opinion).
was attempting to wring a lot from very little.

2. Gloss over unattractive precedents – Raich forgotten

Despite being the most recent Supreme Court Commerce Clause precedent, Roberts referred to Raich only twice in his discussion of the Commerce Clause. Both times, he cited the case as a constraint on Congress’s commerce power.\(^{292}\) However, like Heart of Atlanta 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. First, the Act in Wickard exempted small farming operations;\(^{293}\) as such, Wickard considered a weaker as-applied challenge than did Raich. Second, Wickard did involve an economic activity – a commercial farm – whereas in Raich there was no selling of marijuana;\(^ {294}\) 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;\(^ {295}\) as such, 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.

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 overall scheme would fail without including the class of non-commercial activity within the bounds of the regulation, it was nonetheless legitimate.\(^ {296}\) The test Stevens developed was whether Congress was providing a comprehensive regulatory scheme, of which the provision under challenge was one small part.\(^ {297}\) He concluded that Congress’s ability to regulate the interstate market for marijuana would be substantially undercut if it could not also

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\(^{292}\) Once, as authority for the requirement that an activity is regulated – NFIB v. Sebelius, slip op., at 25 (Roberts opinion) – and once as authority that commerce must include a pre-existing economic activity – id. at 26. 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.

\(^{293}\) Agricultural Adjustment Act of 1938, supra note 193, at § 335(d).

\(^{294}\) Raich, 545 U.S. at 50.

\(^{295}\) Id. at 20.

\(^{296}\) Id. at 38-39.

\(^{297}\) Id. at 22-24.
regulate intrastate possession and consumption of marijuana. But O’Connor argued in dissent in *Raich* that regulation of medical use of marijuana *could* be separately regulated, and thus did not constitute an inseparable part of a broader regulatory scheme. 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, in the ACA, it was not disputed that the very reason for the 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 part of a larger regulation of economic activity”; without the provision, “the regulatory scheme[w]ould be undercut.”

An entire day of Supreme Court oral argument was devoted to the question of severability 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. He did not dispute Ginsburg’s characterization of the purpose behind the mandate but instead drew a 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.”

But Roberts’s characterization of this *Raich* quote constitutes a gross misrepresentation of 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. 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

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298 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.* (Scalia J., concurring).

299 *Id.* at 24-25.

300 *NFIB v. Sebelius*, slip op., at 32-33 (Ginsburg, J., dissenting and concurring) (quoting *Raich*, 545 U.S. at 37 (Scalia, J., concurring)).

301 *NFIB v. Sebelius*, slip op., at 17 (Roberts opinion). (“The individual mandate was Congress’s solution to these problems. By requiring that individuals purchase health insurance, the mandate prevents cost-shifting by those who would otherwise go without it.”).

302 *Id.* at 30 (quoting *Raich*, 545 U.S. at 23) (emphasis added by Roberts).
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.

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 order to reap the doctrinal rewards of his sacrifice in upholding the individual mandate, it was necessary for Roberts to sidestep the difficulty that the only previous Commerce Clause challenge the Court had faced in the 21st century raised for his argument.

**IV. HAVING GIVEN WITH ONE HAND, TAKE WITH THE OTHER – THE MEDICAID PENALTY**

1. *Achieve a big conservative win while everyone is distracted*

The Court’s decision on the ACA was heralded as a substantial victory for the Obama administration, with the media overwhelmingly focusing on the fact that the Court upheld the individual mandate.303 The President likewise emphasized the aspect of the law that was upheld, saying “today’s decision was a victory for people all over this country and whose lives will be more secure because of this law and the Supreme Court’s decision to uphold it.”304 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.”305 But the Court did not say that the act “does not violate the Constitution”; seven justices voted to strike down the part of the act that expanded the Medicaid scheme. Roberts’ 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.306 The four dissenting justices came to the same conclusion.307

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303 The headlines involving “Obama healthcare win” or “Obama healthcare victory” are too numerous to count – typical examples are: Jan & Rowland, supra note 169; Frank James, *Obama’s Supreme Court Health Care Victory Hard To Overstate*, NPR (Aug. 2, 2012) (saying it is “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.”) http://www.npr.org/blogs/itsallpolitics/2012/06/28/155914563/obamas-supreme-court-health-care-victory-hard-to-overstate.


305 Jan & Rowland, supra note 16.

306 *NFIB v. Sebelius*, slip op., at 58-59 (Roberts opinion).

307 *NFIB v. Sebelius*, slip op., at 3 (Scalia, Kennedy, Thomas, 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.”).
With the country distracted by the fate of the individual mandate, Roberts was able to achieve a significant conservative policy goal – preventing the forced expansion of Medicaid – and at the same time realize a conservative doctrinal achievement – restricting Congress’s power to control activities of the states through withholding federal grants.

As discussed in detail in the next section, Roberts concluded that the conditional grant to the states for expanding Medicaid was unconstitutionally coercive, since it withdrew all Medicaid funds for noncompliance, not only those funds provided for the expansion itself. The remedy he provided was to strike down that part of the law that withdrew Medicaid funds to states that failed to comply with the condition.308 This still made it possible for Congress to make grants to states that chose to adopt the new system expanding Medicaid. The dissent wanted to go further. It proposed that simply striking down the compulsory nature of the Medicaid expansion was inadequate: effectively making the Medicaid expansion optional would be contrary to the ACA’s structure and design, amounting to the Court making a new law.309 Consequently, it argued, the Court should strike down the entire part of the act expanding Medicaid.310 Roberts had legal justifications for not doing so: first, Congress provided explicit textual severability instructions regarding the rest of the Medicaid part; second, Roberts had a different view of the legislative intent behind the whole of the act, reasoning that presumably Congress would want some states to participate in the expanded Medicaid program, even if it could not force all to do so.311 But there were also strategic reasons for not striking down the whole provision, weighing both the costs and the benefits. First, for the reasons discussed in Part I, doing so would have had considerable costs in terms of the legitimacy of the Court. 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 more subtle but still highly effective political weapon.

If past experience is anything to go by, even without the stick of losing additional funding, the carrot of supplementary federal money to fund state Medicaid programs will prove irresistible. Every state eventually adopted the original Medicaid program, none have ever withdrawn from it, and eligibility has only ever increased in each state.312 So despite the very vocal opposition from Republican governors to the ACA’s Medicaid expansion, and the stated intent of many to refuse to accept the federal funds and imposition of the expanded program, in all likelihood all states will eventually adopt the expanded program. Even if this is the case, however, in the meantime, Roberts has given those conservative politicians a rhetorical armament to

308 *NFIB v. Sebelius*, slip op., at 55-56 (Roberts opinion).
309 *NFIB v. Sebelius*, slip op., at 47 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting)
310 *Id.*, 48 Since the dissent also found the mandate violated both the tax and spend power and the Commerce Clause, it also wanted to strike down the rest of the act also – *Id.*, at 49-64 (Part V).
311 *NFIB v. Sebelius*, slip op., at 58 (Roberts opinion).
312 Phillip B. Levine & Diane Schanzenbach, *The Impact of Children’s Public Health Insurance Expansions on Educational Outcomes*, 12 FORUM FOR HEALTH ECON. & POL. 11, Figure 1A (2009).
use in the upcoming electoral battle. Although they may eventually capitulate, they can delay their consent. Doing so has two rhetorical advantages. First, it provides a mechanism of continuing to criticize and oppose the health care legislation. This allows the Republican governors to continue to raise the divisive issue of the ACA and to continue to pose a challenge to its legitimacy. Second, refusing the Medicaid expansion and its funding brings to light that aspect of the *NFIB v. Sebelius* that has been largely ignored— that the decision did not find the act to be fully legitimate, that it actually struck down part of the act.

2. *Create future opportunities through developing ambiguous doctrine*

Whether 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, given his sacrifice, were not limited to the substantive outcome or the political rhetoric associated with it. It also offered the opportunity for advancing a more conservative doctrinal agenda in relation to Congress’s Spending Power.

In providing grants to the states, the Spending Power allows Congress to impose conditions, including conditions that require the states to take actions that Congress could not force them to do directly.\(^{313}\) 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.\(^{314}\) This caveat draws on the same political theory contained in the anti-commandeering cases, *New York* and *Printz*, whereby otherwise legitimate exercises of the Commerce Clause were struck down. There, Congress was attempting to govern through the states; without knowing and voluntary consent, the states would not truly be governing, and so political accountability for a given policy was impossible.\(^{315}\) 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. Then, the states would effectively be simply implementing a federal program, not exercising a real choice whether to adopt the program.\(^{316}\) Roberts distinguished between the states meaningfully consenting 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. But much like the activity-inactivity distinction in the Commerce

\(^{313}\) *Steward Machine 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.”); *South Dakota* v. *Dole*, 483 U. S. 203, 207 (1987); *NFIB v. Sebelius*, slip op., at 46 (Roberts opinion).

\(^{314}\) *NFIB v. Sebelius*, slip op., at 46-47 (Roberts opinion) (“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 School and Hospital v. Halderman*, 451 U. S. 1, 17 (1981)); *Steward*, 301 U. S. at 586 (contemplating the line “between duress and inducement”); *Dole*, 483 U. S. at 211.

\(^{315}\) *New York v. United States*, 505 U. S. at 174-75; *Printz*, 521 U.S. at 933; *NFIB v. Sebelius*, slip op., at 47 (Roberts opinion).

\(^{316}\) *NFIB v. Sebelius*, slip op., at 48 (Roberts opinion).
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 as to why the Medicaid expansion is coercive. The first was that, 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. Thus Congress was threatening to terminate “independent grants” and so was pressuring the states to adopt policy changes.\textsuperscript{317} Seemingly in support of this concept, Roberts cited \textit{South Dakota v. Dole}, the major modern case to consider whether conditions on grants can become coercive. But \textit{Dole} is not precedent for the notion that a condition being “independent” of a grant makes it illegitimate. \textit{Dole} allowed highway funding to be conditioned on state adoption of a set drinking age of 21.\textsuperscript{318} Roberts’s independence distinction looks much like O’Connor’s position that there must be a “genuine” and not “attenuated or tangential” relationship between the condition and legitimate congressional action.\textsuperscript{319} However, this argument was made in dissent in \textit{Dole}; it was rejected by the majority, which concluded that highway fund expenditure and drinking ages are adequately linked since both have somewhat of a relationship to road safety.\textsuperscript{320} No doubt Medicaid expenditure and Medicaid funding are at least as equally related as \textit{Dole}’s rather loose connection. Instead of addressing this, Roberts ignored the fact that \textit{Dole} actually contradicts his independence distinction.

The second reason that the Medicaid condition was deemed to be coercive seems to be the primary one for Roberts, as illustrated by the fact that, as already mentioned, he slipped past the independence distinction as soon as he made it, and began examining whether the extent of the withdrawn funds makes the condition coercive. 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 refuse to comply, rather than simply losing the new funding.\textsuperscript{321} There are actually two elements to this part of Robert’s analysis: first, the condition is coercive because it threatens to terminate prior grants, which amounts to instituting a whole new program that the states did not consent to. As such, the Medicaid expansion amounts to a new program that the states did not truly consent to, as they could not have foreseen that it would be expanded to address poverty more generally, rather than addressing specific categories, such as children and pregnant women.\textsuperscript{322} Second, the amount itself is simply too high. Whereas in \textit{Dole} it was acceptable to threaten to take

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\item \textsuperscript{317} \textit{Id.} at 50.
\item \textsuperscript{318} Nor is this distinction adopted in \textit{Steward}: “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.” \textit{Steward}, 301 U. S. at 590.
\item \textsuperscript{319} \textit{Dole}, 483 U. S. at 215 (O’Connor, J., dissenting)
\item \textsuperscript{320} \textit{Id.} at 208.
\item \textsuperscript{321} \textit{NFIB v. Sebelius}, slip op., at 51-52 (Roberts opinion).
\item \textsuperscript{322} \textit{Id.} at 54.
\end{itemize}
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*.

Ginsburg raised a number of problems with this analysis, on both factual and legal grounds. In relation to the former argument, she described numerous other prior amendments to Medicaid that amounted to millions of dollars in expansions, challenging the notion that the expansion constitutes a new program. She also pointed out that Congress reserved the right to alter or amend the terms of the original Medicare grant. 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. But he did not spell out how governments or even lower courts are meant 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 transformative and so illegitimate, and which is not, but Congress has very little guidance as to the legitimacy of changes to any other programs that are funded by federal grants to the states.

The same ambiguity, it turns out, 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 increased burden put on states is only an additional 0.8%. 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.

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

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323 *NFIB v. Sebelius*, slip op., at 18 (Ginsburg, J., dissenting and concurring) (“Expansion has been characteristic of the Medicaid program.”).
324 *NFIB v. Sebelius*, slip op., at 54 (Roberts opinion).
325 *Id.* at 53 (“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.”).
326 Noah, *supra* note 2 (describing the distinction between legitimate federal mandates and illegitimate ones as based on a “capricious” distinction).
327 *NFIB v. Sebelius*, slip op., at 52 n. 12 (Roberts opinion). In addition, Roberts observes that 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 to say the least to have the Court protecting 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.
selective in whether the actual amount of the burden threatened by the condition 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, he 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.”

Thus once again, Roberts provided barely any guidance for Congress, lower courts or state governments as to what will constitute 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 “inducement turning to duress.” 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 the possibility of whether a condition can ever become coercive and thus illegitimate. Whereas in NFIB v. Sebelius, Roberts was making that condition an actuality, and striking down a congressional monetary grant for the first time in the Court’s history.

In sum, Roberts offered two elements of coerciveness: transformation and numerical size, but refused to give courts or governments guidance as to how to apply either element. The dissent also acknowledged that identifying the line at which the condition becomes coercive is difficult, and offered the seemingly equally unhelpful standard that the coercive nature of a condition being “unmistakably clear.”

However, the dissent did flesh out a number of factors that 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 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.”

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.” 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. 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. So it

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328 Id. at 55.
329 Steward, 301 U. S. at 591-92 (“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.”).
330 NFIB v. Sebelius, slip op., at 38 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).
331 Id. at 41.
332 Id. at 38.
333 Id. at 43.
334 Id. at 44. However, another factor that the Court articulates to give detail to its “unmistakably clear” standard is frankly 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
seems that the complete lack of guidance offered by Roberts was not inevitable, suggesting that it may have been a deliberate strategy.

As described in greater detail in Part V below, not articulating with greater specificity what constitutes coercion can be advantageous for a strategic justice. The effect is to massively expand judicial power and judicial discretion, since every question needs to be litigated, and every question could come out either way, depending on the preferences of the median judge. While Roberts is not the median on the Court, he was certainly the swing vote in this case, and may well be so on similar future issues. As such, by withholding greater detail as to what constitutes coercion – and similarly, relying on the mutable activity-inactivity distinction – Roberts was leaving the development of future doctrine wide open. In relation to both the Spending Power and the Commerce Power, then, Roberts was displaying a consistent strategy: crafting new conservative doctrine, and giving himself many future opportunities to further shape the law.

V. HIDDEN ACTIVISM

A. Deciding to decide: when a ‘tax’ is not a ‘tax’

On its face, it seemed impossible for the Court to both decide to rule on the constitutionality of the ACA and to uphold it as a constitutional tax. This is because the Anti-Injunction Act prohibits litigation challenging the enforcement of any tax collection mechanism prior to its actual initiation, yet the ACA’s penalty provision for failing to comply with the individual mandate does not come into effect until 2014. Thus 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 of the Constitution. But Roberts very carefully threaded the needle to establish jurisdiction. Doing so required: careful avoidance of avoidance canons; imaginative use of syllogisms; and selective use of statutory interpretation canons.

1. Avoiding avoidance

Since the Anti-Injunction Act prohibits preemptive determination of taxation issues, and Roberts concluded that the individual mandate was a tax, he had an easy form of case avoidance available to him 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.

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 37. Although it then acknowledges in a footnote Ginsburg’s response that states have no claim on money paid by its 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 of States to collect their own taxes.” Id. at 37 n. 13. This analysis reads more like anti-tax political hyperbole 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.

335 26 U.S.C. §7421(a).
The Supreme Court has multiple forms of avoidance available to it, and uses those mechanisms regularly. When justices are deciding whether to grant cert, one of the first questions they ask is whether the case constitutes a good ‘vehicle’ for doctrinal development. If not, they may cast ‘defensive denials’ – voting to deny cert even though they would like to reverse the decision below. Numerous studies have established this strategic choice is made regularly. In addition, even after a case is granted cert, it can nonetheless be dismissed as improvidently granted, which has also been shown to be used strategically. And even if a case is decided by the Court, avoidance can still be utilized by skirting core issues – most often through standing or other jurisdictional restrictions. A striking recent example was the Newdow case, in which the Court avoided the controversial question of the constitutionality of the Pledge of Allegiance on the grounds that Mr. Newdow did not have standing because he was the non-custodial parent of his child who was forced to recite the pledge. However the Court was not asked to address the custody issue, and so the domestic relations exception to diversity jurisdiction would ordinarily not prevent the courts from answering a substantial federal question, suggesting instead that the Court simply preferred to avoid the controversy surrounding the case.

Avoidance analysis is only useful, however, where the Court wants to skirt controversial issues. Sometimes the justices actively want to decide cases. In fact, studies in judicial signaling have shown that at times justices actively scout for cases, sending coded indications that they would like to see particular types of cases brought or specific issues argued. Here, Marbury is apt, since Marshall clearly was very determined to decide what became the central issue of the case, despite many ways of avoiding doing so. Marshall ruled that the Court lacked jurisdiction to provide a

336 Perry, supra note 65, at 275. (In his extensive study based on numerous interviews with judges and judicial clerks, Perry described the process of judicial decision-making as (in part) the following: first, ask if the case is frivolous and if so, deny; if not, the next question is whether the justice cares strongly about the outcome; if so, ask “will I win on the merits?”; if not, deny unless it is institutionally irresponsible not to take the case).
337 Id.
338 Caldeira, Wright, & Zorn, supra note 4; Ryan C. Black & Ryan J. Owens, Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence 71 J.Pol., 1062 (2009). These studies both show that, even after controlling for the many factors that Perry identified as affecting the justices’ votes on cert – such as conflict in the lower courts – the justices are quite strategic in their thinking.
339 See e.g. Michael E. Solimine & Rafael Gely, Supreme Court and the Dig: An Empirical and Institutional Analysis, 2005 Wis. L. Rev. 1421 (2005).
341 Id. at 1.
342 Id. at 21 (Rehnquist, J., dissenting)
remedy: although the Judiciary Act granted the power of mandamus Marbury sought to enforce his commission, it did so by unlawfully expanding the Court’s original jurisdiction, rather than through its appellate jurisdiction. As such, Marshall should never have got to the substantive issues in *Marbury*, because of the norm that the Court should decide as little in constitutional law as it can. The Court should have addressed the jurisdictional issue first, and upon finding that it was unable to provide a remedy, it did not then need to address whether Marbury had a right under law.

But of course, Marshall wanted to declare that although the Jeffersonians had the power to prevent the commission, they were wrong in principle, and also to take the opportunity to decide that in future cases the judiciary would have power to review both legislation and executive actions. Thus Marshall actively wanted to decide the substance of *Marbury*, and he maneuvered to be able to do so. Roberts likewise had to thread the jurisdictional needle in order to “decide to decide” *NFIB v. Sebelius*. Considering why Roberts wanted to avoid avoidance in this case is very revealing about his preferences. For Roberts, avoidance had two potential downsides.

First, if the Court 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 force and thus could be challenged through injunction. Although it may have been appealing to Roberts to have entirely avoided the issue, given the enormous criticism he faced from his own ideological brethren following the decision, once the Court had 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, millions of 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, because he was truly was concerned with institutional legitimacy and the reputation of the Court.

Second, Roberts would lose the opportunity to air his views and develop the law in the direction he favored. That downside would not apply to the alternative he chose of upholding the law on very narrow grounds while whittling back congressional power more generally. But this second strategic equation only makes

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345 Another way that Marshall could have avoided the issue was by ruling that grant of power to the Court to issue mandamus was limited to appellate jurisdiction, which would have avoided the question of whether granting that power under original jurisdiction was constitutional or not – see §13 of the Judiciary act (“The Supreme Court shall also have appellate jurisdiction…; and shall have power to issue writs of… mandamus…”). It is quite reasonable to read those two grants of power as both covered within the general concept of the former, relating to appellate jurisdiction, rather than as two completely separate rights of how they appear within one sentence. Even if this interpretation is not the most obvious, given the canon of avoiding rulings of unconstitutionality, it would have been an appropriate one for Marshall to make.

sense if the uncertain benefit of Roberts’s doctrinal developments outweigh the policy cost of upholding the individual mandate. Here the question is not whether Roberts should strike down the mandate, with all of the institutional costs that involves, but rather whether he should avoid the issue entirely. If his main motivation was doctrinal, then avoidance made sense, given that he could not lock in his doctrinal innovations. The fact that Roberts went to great lengths to ensure that he was able to decide the case adds further weight to the argument that institutional interests were significant, if not dominant, in Roberts’s choice in upholding the mandate.

2. Syllogisms as prestidigitation

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

Roberts rejected this 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. Since the ACA and the Anti-Injunction Act are statutory, Congress could decide how they relate to each other. Thus Roberts concluded that the mandate fee is a tax for the purposes of constitutional law but not for the purpose of legislation. That is, a tax is not always a tax.

Roberts’s logic may appear appealing, since he was clearly correct that Congress cannot define how its powers apply simply through using a particular label – to allow it to do so would be to 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 label determined the question. He justified this conclusion by reasoning that since 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. For his interpretation to be correct, however, that would have to mean that Congress intended that the Anti-Injunction Act apply to prevent litigation over anything not labeled a tax, rather than to prevent litigation over

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347 In contrast, the dissent does give 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. NFIB v. Sebelius, at 18 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

348 Note the Amicus response to this was to try to argue that Congress does in fact effectively incorporate the mandate as a tax – see NFIB v. Sebelius, slip op., at 13 (Roberts opinion) – but Roberts rebuts this argument – Id., at 14.

349 Id. at 12.
anything that actually is a tax. But 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.” So clearly it was not the intent of Congress in writing the Anti-Injunction Act to allow litigation obstructing collection of revenue through mechanisms simply not labeled taxes, but rather to protect its actual revenue stream.

Thus Roberts replaced the Court-appointed amicus’s syllogism with one of his own: since whether Congress defined something as a tax cannot determine its own constitutional power, the Court need not be bound by whether Congress labeled something a tax. But this argument was just as weak as the one he rejected: just because whether Congress labeled something as a tax can determine whether something is a tax does not mean it has done so in this case. Answering that question requires a more detailed inquiry than Roberts undertook, something Roberts was no doubt aware of but chose to ignore.

3. Selective use of canons

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

While we rely on statutory canons of difference in language to suggest difference in meaning, statutory canons are at most a presumption, and sometimes as little as a decider in the case of a coin flip. In analyzing a statute’s text, the Court was 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. As such, any canons must give way if context reveals an evident contrary meaning.

Given that the Roberts opinion subsequently delved into the subjective question of how to characterize the fee, as a tax or not, and found that it was a tax, the statutory language difference that Roberts relied on should have fallen by the wayside. Roberts concluded this was a tax for not buying insurance rather than a command (and penalty) for not doing so because: the fee was capped, and so was not so high that there was effectively no choice but to buy health insurance; the fee was not limited to willful violations, and thus does not turn on the intent of the law breaker; the payment was to be collected solely by the IRS through normal means

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350 Id. at 11.
351 Muscarello v. United States, 524 U.S. 125 (1998) (the existence of statutory ambiguity is not enough to warrant the application of the rule of lenity, 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”).
352 NFIB v. Sebelius, slip op., at 35 (Roberts opinion).
353 Id. at 36.
of taxation, raising an expected $4 billion revenue;\textsuperscript{354} and the law does not make the conduct unlawful per se, or subject to any other penalty other than taxation.\textsuperscript{355} These very same factors go into both questions – being a tax for the purposes of the Anti-Injunction Act and the Tax Power. As such, the conclusion for both questions should be the same; or, as the dissent so flamboyantly put it, concluding that the mandate penalty “is not a tax under the Anti-Injunction Act show that it is a tax under the Constitution… carries verbal wizardry too far, deep into the forbidden land of the sophists.”\textsuperscript{356}

So not only did Roberts not take the opportunity to avoid an enormously controversial case that could easily have been ducked, he maneuvered artfully in order to address it at all, while leaving himself the option to decide it as he did. This sophistry that the dissent accuses Roberts of was necessary, because Roberts wanted to both assert the judicial power to decide the issue, and create an opportunity to craft new doctrine about the Commerce Clause and the Spending Power. Avoidance, however, would be more in line with the judicial restraint of which Roberts claims to be a champion.

B. Act humble – Restraint and the art of not doing

“My job is to call balls and strikes and not to pitch or bat.”\textsuperscript{357} This phrase from then Judge Roberts’ 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.”\textsuperscript{358} 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 was avoiding 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 [congressional] boundaries.”\textsuperscript{359} This claim of restraint itself served a strategic purpose: of masking, and thus actually enabling, greater strategic manipulation.

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. He stressed the Court’s

\textsuperscript{354} Id.
\textsuperscript{355} Id. at 37.
\textsuperscript{356} NFIB v. Sebelius, slip op., at 28 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting)
\textsuperscript{357} Text of John Roberts’ Opening Statement, ASSOCIATED PRESS, (Sept. 9, 2005), http://www.usatoday.com/news/washington/2005-09-12-roberts-fulltext_x.htm
\textsuperscript{358} Id.
\textsuperscript{359} NFIB v. Sebelius, slip op., at 2 (Roberts opinion).
“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.” 360 Second, he promoted the concept of ‘departmentalism’ – insisting that the Court was enforcing the boundaries demarcated by the separation of powers and respecting the power of each branch to define its own role. 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.”361

Some popular commentators have described the series of maneuvers that Roberts undertook in order to decide the case as he did as “restraint.”362 That Roberts took the opportunity to develop 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 needs to be litigated in order to ascertain the boundaries of its reach. As such, the range of judicial power is expanded, since every question needs to come before the courts. But not only that, when those questions do come to court, each case could come out in any way, depending on the preferences of the judge. So the ambiguousness of the concepts not only increases judicial power in terms of judges getting to hear 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. And presumably in future cases, there will not be as much public attention and danger to judicial legitimacy, allowing Roberts to decide according to his own preferences without the need to constrain his choices to protect the Court.

Once again, a chief justice laying the groundwork for so much future judicial power could be compared to Marbury, but that comparison actually downplays the significance of what Roberts was doing. Marbury was a case in which the Court was deciding the realm of judicial power, and the Court explicitly expanded its own reach, whereas NFIB v. Sebelius was not a case about judicial power, but about

360 Id., 6.
361 Id.
362 See e.g. BLOOMBERG NEWS, Scotus Justice John Roberts Chooses Restraint Over History (June 28, 2012) (arguing that the case shows that Roberts “loves the Supreme Court more than he loves political conservatism… Roberts now enters the pantheon of true judicial conservatives, judges who hold back from activist results no matter how it affects presidential politics.”) http://newyork.newsday.com/news/nation/scotus-justice-john-roberts-chooses-restraint-over-history-1.3811200
congressional power. Roberts was expanding judicial reach by *restricting congressional* power. Increasing judicial power by expanding its authority to check the other branches is not departmentalism at all, but rather its opposite.

It is no coincidence that Roberts’s accretion of judicial power at the expense of congressional power was done under the guise of self-restraint. Homage to self-restraint can in fact readily enable activism, and Roberts was following a grand tradition. The great theorist and advocate of judicial restraint, Alexander Bickel, recognized that the Court is capable of accruing power while appearing to limit itself. The Court exercises a “‘triune function:’ it checks, it legitimates, or it does neither.”\(^{363}\) It ‘does neither’ by employing devices such as vagueness and delegation. ‘Doing neither’ in fact means doing something else, such as permitting previous judgments to have a certain effect, frustrating or checking a prior legislative or official decision, or allowing lower courts to engage in constitutional experimentation. As such, while taking no positive action, the Court nevertheless affects the outcomes of cases. Bickel labels these tactics ‘the devices of not doing’ or ‘the passive virtues.’ Unlike constitutional action, the passive virtues “leave the other institutions, particularly the legislature, free . . . to make or remake their own decisions.”\(^{364}\) So, for instance, stating that the Court need not decide the outer limits of a concept it is creating has the dual advantages of appearing to do less – appearing restrained – while simultaneously deciding current cases and also leaving itself options in future cases.\(^{365}\)

Unlike positive action, inaction requires little justification. If the Court avoids having to take 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. Refusing to make rules prevents lower courts from being able to make authoritative decisions. “[U]nbound even by own its rules and in receipt of a large number of appeals,” the Court is also able to increase the *area* of discretion.\(^{366}\)

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364 *Id.*, 202.
365 *NFIB v. Sebelius*, slip op., at 43 (Roberts opinion). (“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.”).
366 Martin Shapiro, *The Supreme Court from Warren to Burger*, in *The New American Political System* 206 (Anthony King ed., 1979). The concept of self-restraint can be used as a sword as well as a shield. Before the conservative revolution on the Court, self-restraint was used to attempt to prevent judicial expansion of congressional power: “‘self-restraint’ has become a code phrase designed to lend respectability to those who would hesitate to set limits on the actions of governments, largely because they approve of what the governments do and dislike the way the Court in recent years has enormously expanded the reach of the Bill of Rights and the Fourteenth Amendment. Popular and elite judgments of the Court have always depended on *what* it did rather than *how* it reaches its decisions.” Richard Hodder-Williams, *The Politics of the U.S. Supreme Court*, at 173(1980) (emphasis in original).
As one commentator noted of Roberts’s opinion, the result of the Medicaid ruling being unclear “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.”\(^{367}\) This is true, but 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 activity-inactivity 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,\(^{368}\) the strike zone is not defined by the rules of the game, but by what he says it is on any given day.

**VI. BUILD A COALITION – FORGETTING JUSTICE MARSHALL**

In the immediate aftermath of *NFIB v. Sebelius*, numerous commentators\(^{369}\) likened it to *Marbury v. Madison* (1803),\(^{370}\) the case in which Chief Justice Marshall displayed his own strategic mastery in protecting the Supreme Court from further attack by the Democratic-Republicans. *Marbury* is a natural comparison, for in that case Marshall found in favor of his political opponents in the immediate battle of whether his compatriot Federalist nominees would be installed, which allowed him to win the larger war for the Federalists by laying the groundwork for judicial power\(^{371}\) – just as Roberts upheld the individual mandate while laying the groundwork for multiple conservative doctrinal turns. In addition, again like Roberts, Marshall did so by setting out vast swathes of new doctrine that are arguably dicta – since Marshall found that the Court had no jurisdiction in the case, he 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.

The analogy to *Marbury* is convenient and obvious, but also misleading. Pointing to *Marbury* misses 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. For example, in *Gibbons v. Ogden*, Marshall expanded the concept of interstate commerce to include all forms of commercial intercourse, and navigation in particular, consistent with his expansive

\(^{367}\) Starr, supra note 102, 11.

\(^{368}\) Roberts’ opening statement to the Senate Judiciary Committee, supra note 357, (“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”).

\(^{369}\) See for example Chris Geidner, Did Chief Justice Roberts Take a Cue From Two Centuries Ago?, THE DAILY BEAST (June 28, 2012) (describing the similarities as striking); John Yoo, Chief Justice Roberts and His Apologists, WALL STREET JOURNAL (June 29, 2012); Daniel Epps, In a Health Care Ruling, Roberts Steals a Move from John Marshall’s Playbook, The Atlantic (June 29, 2012); Campos, supra note 49 (arguing that the case mirrors Marbury and that in future decades, legal observers will think of it in the same terms).

\(^{370}\) 5 U.S. 137 (1803).

\(^{371}\) Id., 178-79 (“The judicial power of the United States is extended to all cases arising under the constitution. … the constitution must be looked into by the judges.”)
view of congressional power. But at the same time, he sidestepped the other pressing question in the case—whether that broad definition of congressional power limited state power in the field—concluding that while the argument had “great force” it was not necessary to decide it yet.

Furthermore, 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 the Court. For instance, almost 20 years before Marshall began his tenure, the Court in Hayburn’s Case in 1792 refused to include certain functions in the judicial realm. 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.

The strategy of simultaneously denying itself power that was being tested while asserting untested power was only one such effective strategic maneuver; another tradition at the Court was promoting its own discretion through avoiding pronouncing groundbreaking decisions. Throughout the late 19th century, the Court deliberately slowed down the development of doctrines; in doing so, it not only better preserved its power base but was able to develop a rule that was a “far more effective tool of judicial governance... because it was flexible enough to mean anything the Judiciary wanted it to mean” and could thus be used to shape social policy. A similar practice was adopted by the Burger Court: the Court would typically develop a line of precedent on either side of an issue, which left it “always free to go whichever way it pleased.”

Not only does pointing to the tired analogy of Marbury ignore, and so downplay, the deep history of similar judicial strategy, but it also underrates Marshall’s tactical brilliance in that case. In Marbury, Marshall displayed not only long-term strategic planning but the short-term tactical skills that Roberts appeared to lack. NFIB v. Sebelius contains an Opinion of the Court, but only two other justices besides Roberts signed on to the Part of the opinion that struck down the penalty provision of the Medicaid clause, and no justice signed on to Roberts’s Commerce Clause or necessary and proper analysis. In contrast, Marshall managed to corral seven previously wayward justices, five of whom had been appointed by the

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372 22 U.S. 1 (1824) (the words commerce among the several States “comprehend every species of commercial intercourse” between the United States and foreign nations and among the states.)
373 See McCloskey, supra note 10. 45-46 (“Once again, as so often in the past, Marshall had managed to achieve imperishable results while sidestepping the area of greatest controversy.”)
374 Hayburn’s Case, 2 U.S. 409 (1792) (refusing to rule on whether non-judicial duties could be assigned by Congress to the courts).
376 Id., 89 (describing the emergence of due process).
377 Shapiro, The Supreme Court from Warren to Burger, supra note 366. This allowed it “to enhance its own policy discretion and then wield that discretion case by case to achieve what it believed to be desirable social results.” See also Martin Shapiro, The Supreme Court from Early Burger to Early Rehnquist, in THE NEW AMERICAN POLITICAL SYSTEM 59-60 (Anthony King ed., 1990); Ruth Bader Ginsburg, Gender in the Supreme Court: the 1973 and 1974 Terms, 1975 SUP. CT. REV, 1, 2 (1975).
opposition party, creating a unanimous Court in *Marbury* itself – and thus locking in its dicta – as well as promoting a strong unwritten rule of joint opinion writing more generally. That norm of unanimous opinion writing would govern until the modern era,\(^{378}\) and was essential to developing the institutional strength of the Supreme Court. Not only did it make individual judgments more powerful due to their large and unopposed coalitions,\(^{379}\) but it strengthened the power of the Supreme Court itself, making it appear less political and more judicial.\(^{380}\)

The point is not simply that there is so much more to understanding Marshall’s strategic skills than that displayed most famously in *Marbury*, or that comparing *Marbury* to Roberts’s at times one-, three-, and five-person opinion in *NFIB v. Sebelius* fails to appreciate the enormous tactical skill that Marshall displayed in garnering a unanimous opinion. Rather, there are two greater problems such superficial analysis creates. First, it masks the fact that strategic judicial behavior is far more widespread in the Supreme Court generally – strategic judicial behavior is not limited to a master such as Marshall. A deep and rich literature has established the existence of strategic judicial behavior in many forums: granting certiorari, majority opinion writing, writing dissents, issue emphasis, coalition building, and more.\(^{381}\) Second, equating *NFIB v. Sebelius* 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 is largely dependent upon his ability to maintain consensus.\(^{382}\) 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.”\(^{383}\) The Court issuing many closely divided and intensely divisive cases – or even the perception of their doing so – creates a “steady wasting away of the notion of the rule of law, a personalization of

\(^{378}\) Although periods of strong dissent followed, such as during the 1930s, the Court never returned to the British tradition of seriatum opinions.


\(^{380}\) See e.g. R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* 151 (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” – Rosen, *Roberts’ rules supra* note 97.

\(^{381}\) See infra Part I.A.

\(^{382}\) Id. (“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.”)

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.\textsuperscript{385} Coalition building involves often unavoidable trade-offs with each justice’s ideal outcome in a case,\textsuperscript{386} and 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, even delivering Opinions of the Court contrary to his preferences, so as to maintain the strength of the Court through unanimity.\textsuperscript{387} He did so because the power of the Court was fundamental to his core notion of federalism, as much as any substantial policy preference, and unanimity was key to that power.\textsuperscript{388}

Many other justices have learned this lesson: when the Court was deciding \textit{Brown v. Board of Education},\textsuperscript{389} 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. To maintain unanimity, he had to avoid the most difficult question, of how and when the opinion would be enforced, leaving that question to subsequent cases,\textsuperscript{390} and he also had to avoid overruling \textit{Plessy v. Ferguson}.\textsuperscript{391} More generally, judicial notes and letters reveal that many of the justices engage in negotiation and bargaining with one another. Comparing early and late drafts of opinions, and justices’ initial conference votes to their final case positions, shows the justices amending their draft opinions so as to maintain majority coalitions—sometimes with explicit statements such as: “As I need you for a Court... I send the draft to you before circulating it”\textsuperscript{392}

This is true of cases generally, but far more important in cases such as \textit{NFIB v. Sebelius}, where the Supreme Court makes a decision that may well determine the fate of a political administration. In similarly high-stakes cases, with the striking exception of \textit{Bush v. Gore}, the Court has managed to craft a unanimous ruling, even

\textsuperscript{384} \textit{Id.} (quoting Chief Justice Roberts).
\textsuperscript{385} See e.g. William H. Rehnquist, \textit{THE SUPREME COURT} 64 (2002) (explaining that potential dissents who want to see substantial changes to the majority opinion before they sign on have far less leverage if the Court has already achieved unanimous lopsided vote).
\textsuperscript{386} 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 & Paul J. Wahlbeck, \textit{Strategic Policy Considerations and Voting Fluidity on the Burger Court}, 90 AM. POLI. SCI. REV. 581, 583 (1996); FORREST MALTZMAN, JAMES F. SPRIGGS & PAUL J. WALHBECK, \textit{CRAFTING LAW OF THE SUPREME COURT: THE COLLEGIATE GAME} (2000); Jacobi, \textit{Competing Theories of Coalition Formation and Case Outcome Determination}, supra note 379; Jacobi & Sag, supra note 12.
\textsuperscript{388} \textit{Id.}
\textsuperscript{390} \textit{Brown v. Board of Education of Topeka (Brown II)} 349 U.S. 294 (1955) (establishing the “with all deliberate speed” concept).
\textsuperscript{391} 163 U.S. 537 (1896) (endorsing the ‘separate but equal’ doctrine for schools).
\textsuperscript{392} Epstein & Knight, supra note 63, at 66.
in the face of strong ideological heterogeneity, because of the delicacy of the Court effectively deciding the fate of a sitting president. So, for instance, the Court unanimously decided that the Nixon Watergate tapes could not be held back by President Nixon under executive privilege, despite Chief Justice Burger’s friendship with Nixon.393 And it unanimously held that President Clinton could be sued by Paula Jones even while he served as president,394 despite Justice Breyer clearly having strong reservations.395 Yet in this most politically sensitive case, Roberts, who has been so explicitly concerned with the legitimacy effect of consensus on the Court,396 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 commerce and the Necessary and Proper Clause. 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, but for upholding the mandate as a tax. 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.397 If so, this response is unusual, given that justices switching sides in cases is quite common, and particularly so in landmark cases.398 There are famous examples of swing justices switching, such as Kennedy changing his vote in Planned Parenthood v. Casey399 to largely uphold Roe v. Wade.400 In fact, Burger regularly simply withheld his vote on key cases, so that he could ensure he was in the majority and could thus assign the opinion.401

Although Scalia has denied that his actions were driven by animus, arguing that he and his colleagues disagree over cases all the time “without taking it

395 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. Id., (Breyer J., concurring).
396 See supra Part I.B.
397 Crawford, supra note 48; however this is directly rebutted by other sources – see Campos, supra note 49.
398 11% of general cases and 26% of landmark cases show at least one justice transforming his or her opinion, for example from a dissent into a concurrence or vice versa. Epstein & Knight, supra note 63, at 78. 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, suggesting the potentially even greater occurrence of such switches, were it not for these accommodations. Id., at 98.
401 Justice Douglas made a note of Burger’s habit of reserving his vote and then casting it contrary to what Douglas believed was Burger’s actual preference, in order to strategically control the assignment. Supporting Douglas’s supposition, Epstein & Knight, supra note 63, at 129, found that Burger cast more pass votes than any other justice.
personally, “... much of his behavior since the decision suggests otherwise. For instance, he has also provided the following unflattering analogy of Roberts’s analysis: “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.” But 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 that they agreed with, leaving the strong impression that the only reason was pique. This suggests that Roberts’s tactical capacity fell short of his strategic vision.

As for the liberal justices, Ginsburg’s concurring and dissenting opinion was almost entirely dissent, in which she sharply criticized the Chief Justice at every turn. For example, she described his Commerce Clause analysis as “stunningly retrogressive,” a “crabbed reading” akin to pre-1937 analysis, and creating a “novel constraint.” Despite Roberts giving Ginsburg what she wanted in regard to upholding the individual mandate, he seemingly received nothing in return – Ginsburg did not pull her punches and refused to join any Parts of his opinion with which she disagreed. At the end of his first Term, Roberts said of persuading his colleagues: “Just because a case ends up unanimous doesn’t mean that’s how it started… The vote may be divided in conference, and yet if you think it’s valuable to have consensus on it, you can get it.” It seems Roberts may have been overly optimistic about his persuasive abilities in regard to coalition formation.

Roberts did manage to persuade Breyer and Kagan to join the Medicaid Part of his opinion, but no explanation was provided 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 set up on Congress’s granting power, but not so for the congressional restrictions he established, this argument is not a strong one. Neither Justice was serving when Dole was decided, so there is no direct evidence of their preferences on the Spending Power, however at least for Breyer, his position in the anti-commandeering cases is highly informative. In Printz v. U.S., Breyer joined Stevens’s dissent on the basis that the Commerce Clause allowed regulation of handguns and the Necessary and Proper Clause permitted temporary enlistment of local police officers in “identifying persons who should not be entrusted

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402 Mark Sherman, Scalia: Supreme Court disagreements not personal, ASSOCIATED PRESS (July 26, 2012) (“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.”).
404 NFIB v. Sebelius, slip op., 2 (Ginsburg J., concurring and dissenting opinion).
405 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.”)
406 Id., at 18.
407 Rosen, Roberts rules, supra note 97 (quoting Chief Justice Roberts).
with the possession of handguns.**409 In addition, Breyer also wrote his own dissent, arguing that other federal systems, including Switzerland, Germany, and the European Union, allowed assigning federal duties to state officials, having concluded that doing so offered less rather than more interference with state government, and so there was no need to interpret the U.S. Constitution as forbidding it.**410

These arguments are consistent with Breyer’s general liberal positioning; his joining Roberts’s opinion as to restrictions on the granting power is not. So too for Kagan, on the information we have so far.**411 As such, it is reasonable to assume that these two Justices struck a strategic bargain with Roberts – which suggests that Roberts had at least some coalition formation skills. Yet apparently joining his opinion as to Commerce Clause and Necessary and Proper Clause restrictions was too much for Breyer and Kagan. While some have suggested that their concurrence on Medicaid “may have been Roberts’s price for not tossing out Obamacare altogether,”**412 this characterization begs the question of why that was enough for Roberts. If all of the justices were just trading votes, each attempting 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 important element of the decision, Medicaid?

If the case is seen purely as a strategic deal, then it seems that 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 caliber, Roberts may have made a massive error. It is all very well giving with one hand and taking with another, but if what you take is not respected in the long-term because of a failure to craft a majority coalition, all of that giving may be ill-advised. Doctrinally, whether Roberts’ strategy will work in the long run will depend in part on the outcome of the 2012 election, and the almost inevitable appointments that the next president will get to make. A future Court resembling President Obama’s previous nominees, Justices Sotomayor and Kagan, could largely brush aside *NFIB v. Sebelius*, treating it as lightly as it did *Raich*; and by giving Obama a victory, Roberts may have made an Obama 2012 victory somewhat more likely.**413 If Romney wins, Roberts will have laid solid

409 Id., at 941 (Stevens J., dissenting).
410 Id., at 976 (Breyer J., dissenting).
411 See infra, Part I.A.
412 See e.g. Noah, supra note 2.
413 The overwhelming consensus is that the case is 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) (quoting Drew Dellinger); see further discussion in Part IV.A, infra. Although a few pundits have suggested that the decision may help Romney’s election chances – see e.g. William Bennett, *Health care ruling can help Romney* CNN (July 11, 2012) http://www.cnn.com/2012/06/29/opinion/bennett-court-romney/index.html (“the verdict, while a serious judicial blow to conservatives, may favor them politically. Mitt Romney and Republican leaders can now campaign relentlessly against a massive, sweeping tax increase... His campaign reports that he raised $4.6 million in the 24 hours after the Supreme Court decision came down.”).
groundwork for future conservative judicial coalitions to cut back on congressional power; but if Roberts becomes part of a permanent minority through the second Obama administration’s appointments, all NFIB v. Sebelius will stand for is a minor distinction between acts and omissions, something that seldom arises in legislation. The case will not look like Marbury, because Marbury was unanimous whereas NFIB v. Sebelius had no majority, except for that 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. If, instead, his central aim was to protect the legitimacy of the Court, and his doctrinal maneuverings were simply attempts to win back some benefits for doing so, then his actions do not appear to be 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 sake of the good reputation of the Court.

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 by turns 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, and tax and spend doctrine may come to nothing; that he knew that the cost he was paying was certain but that the doctrinal benefit was uncertain. The fact that he decided to uphold the mandate, contrary to his policy preferences and despite his failure to manage to garner a coalition – something he has explicitly stressed the importance of – suggests that the legitimacy of the Court was his overwhelming concern.