

LIKE EASTWOOD TALKING TO A CHAIR:
THE GOOD, THE BAD, AND THE UGLY OF THE
OBAMACARE RULING

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I. INTRODUCTION

The legal challenge to the Patient Protection and Affordable Care Act, more commonly known as “Obamacare,” was a case that comes along once every generation, if not less often.¹ Not because it could affect a presidential election or was otherwise politically significant—those cases come around more frequently—but because it reconsidered so many aspects of our constitutional first principles: the fundamental relationships between citizens and the government and between the states and the federal government; the role of the judiciary in saying what the law is and checking the political branches; and the scope of and limits to all three branches’ powers. As I’ve repeated *ad nauseum* in more than a hundred speeches, debates, and panels on the subject, this case was not about the state of health care in America or how to fix this troubled area of public policy.² It was instead about how to read our nation’s basic law and whether Congress was constitutionally authorized to use the tools it used in this particular instance.

Anyone reading this article will already know at least the basic outline of the Supreme Court’s ruling. As I wrote on the leading Supreme Court blog in the wake of the decision, we—those who helped challenge the law—won everything but the case.³ That is, the Supreme Court adopted all of the legal theories that I suggested in my briefing regarding the scope of federal regulatory authority.⁴

1. I refer here collectively to the various lawsuits focused on the constitutionality of the individual mandate, which culminated in the Supreme Court’s decision in *Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566 (2012). Many more lawsuits are still pending, *e.g.*, *Liberty Univ. v. Geithner*, No. 11-438, 2012 WL 5895687 (U.S. Nov. 26, 2012) (granting petition for rehearing and remanding to the Fourth Circuit), and others have been filed after that ruling, *e.g.*, Amended Complaint for Declaratory and Injunctive Relief, *Pruitt v. Sebelius*, No. 6:11-CV-00030 (E.D. Okla. Sept. 19, 2012). More will surely be filed in the future—including other types of challenges to the new tax on “choosing” not to purchase qualifying health insurance (because this is either an unapportioned, and therefore unconstitutional, direct tax or some sort of tax not authorized by the Constitution, *see* Editorial, *A Vast New Taxing Power: The Chief Justice’s Obamacare Ruling Is Far From the Check on Congress of Right-Left Myth*, WALL ST. J., Jul. 2 2012, at A10). As with any major piece of legislation, we will not see the end of Obamacare litigation for quite some time.

2. *See generally* Ilya Shapiro, *A Long, Strange Trip: My First Year Challenging the Constitutionality of Obamacare*, 6 FLA. INT’L L. REV. 29 (2010).

3. Ilya Shapiro, *We Won Everything but the Case*, SCOTUSBLOG (Jun. 29, 2012, 9:38 AM), <http://www.scotusblog.com/2012/06/we-won-everything-but-the-case/>.

4. I filed a total of ten amicus curiae briefs on Cato’s behalf over the course of the individual mandate litigation—two at the district court level; four in four different circuit

II. NO ECONOMIC MANDATES

On the Commerce Clause, which grants to Congress the power to regulate interstate commerce, the Court said that Congress *cannot* compel activity or create commerce in order to regulate it.⁵ The Court distinguished Obamacare’s requirement to buy health insurance from previous cases where there was already some sort of existing economic activity that the federal government then either regulated or prohibited.⁶ In the foundational 1942 case of *Wickard v. Filburn*, for example, the Court upheld a federal law that prohibited farmers from exceeding crop quotas and required them to sell crops—in Roscoe Filburn’s case, wheat—at set prices.⁷ Similarly, if you run a car company, the federal government can require you to install seat belts and meet fuel efficiency and emissions standards. In short, as the *National Federation of Independent Business v. Sebelius* (*NFIB*) plaintiffs accepted, the federal government under modern doctrine can regulate even (certain types of) purely local economic activity when in the aggregate that local activity has substantial effects on interstate commerce.⁸

Or similarly, the federal government can look at that economic activity and say, “stop”: It can prohibit it, it can criminalize it, and it can punish it. So, for example, sixty years after the wheat case, we had the *weed* case, *Gonzales v. Raich*.⁹ There, Angel Raich and Diane Monson wanted a judicial ruling that their growth and consumption of marijuana for certain medicinal purposes as allowed under California state law would not subject them to federal prosecution under the Controlled Substances Act. They made clear that they were neither buying nor selling the marijuana nor were they transporting it across state lines. The Supreme Court ultimately ruled for the federal government; the theory was that these women were engaging in

courts of appeals; and four at the Supreme Court, one on each of the four specified issues that the Court set for argument. Most notably, I represented seventeen organizations (including Cato) and 333 state legislators on a Supreme Court brief regarding the scope of the Commerce and Necessary and Proper Clauses. Brief for Cato Institute et al. as Amici Curiae Supporting Respondents (Individual Mandate Issue), *NFIB*, 132 S. Ct. 2566 (No. 11-398).

5. *NFIB*, 132 S. Ct. at 2589.

6. *Id.* at 2587.

7. *Wickard v. Filburn*, 317 U.S. 111, 133 (1942).

8. *NFIB*, 132 S. Ct. at 2588.

9. *Gonzales v. Raich*, 545 U.S. 1 (2005).

local economic activity—growth and consumption—that had an aggregate effect on illegal interstate commerce.¹⁰ Justice Scalia famously concurred in that ruling, arguably espousing an even broader view of federal power, stating that the government can reach even *noneconomic* activity that, if left alone, can undermine a duly authorized national regulatory scheme.¹¹

Here, in contrast, the Court agreed with the challengers that what Congress was doing, for the first time ever, was requiring people to do something, to engage in an activity or conduct a transaction that they were not otherwise pursuing.¹² Even though that mandate was part of a broader national regulatory scheme, it was a bridge too far:

The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated. . . . As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching [economic] “activity.”

. . . .

The Framers gave Congress the powers to *regulate* commerce, not to *compel* it¹³

This is very strong language, and there are many more examples of it, both in Chief Justice John Roberts’s controlling opinion and in the dissenting opinion that was jointly authored by Justices Scalia, Kennedy, Thomas, and Alito.¹⁴ For example: “The Commerce Clause isn’t a general license to regulate an

10. *Id.* at 32–33.

11. *See id.* at 40 (Scalia, J., concurring). Many observers—both those who supported and opposed Obamacare—speculated that Justice Scalia’s vote would be in play because of his *Raich* concurrence. They seem to have missed the fact that Scalia used the word “activity” forty-two times in that opinion.

12. *NFIB*, 132 S. Ct. 2566, 2587 (2012).

13. *Id.* at 2586–89 (citation omitted) (emphasis in original).

14. Chief Justice Roberts’s opinion on the Commerce Clause and Necessary and Proper Clause speaks for a Court majority and is a binding ruling. *Id.* at 2599 (“The Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity.”); *id.* at 2600–01 (“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.”). These issues may be purely academic, however, given that a future Court’s view on these doctrinal points will ultimately depend on that Court’s composition.

individual from cradle to grave, simply because he will predictably engage in particular transactions.”¹⁵

The Court could not have more clearly adopted the articulation of the limiting principle to federal power under the Commerce Clause suggested by the plaintiffs—twenty-six states and the National Federation of Independent Business—and their amici. The lower courts that ruled against the government never did to such an extent; they essentially said that however the government articulates its view, there is no principled limit to federal power there.¹⁶ No lower court clarified, as the Supreme Court did, that the federal government can regulate or prohibit existing economic activity but cannot mandate or compel new activity.

III. A LAW CAN BE NECESSARY BUT NOT PROPER

The Court’s ruling was even more striking with regard to the Necessary and Proper Clause—which is actually intertwined with the Commerce Clause power in the “substantial effects” doctrine.¹⁷ That is, Article I, Section 8 enumerates Congress’s seventeen powers, including: coining money, raising armies, establishing post offices, and regulating interstate commerce. The eighteenth clause of that section says that Congress can also enact laws that are “necessary and proper for carrying into Execution the foregoing Powers.”¹⁸ Relying on these provisions, the government said that it is necessary for the functioning of a larger health care scheme—the relevant parts of which for purposes of this litigation everyone agreed were authorized regulations of interstate commerce—to require people to buy health insurance.¹⁹

As a matter of economics, that assessment is probably true; the

15. *Id.* at 2591.

16. *See* Florida v. U.S. Dep’t of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011); Goudy-Bachman v. U.S. Dep’t of Health & Human Servs., 811 F.Supp.2d 1086 (M.D. Pa. 2011); Florida v. U.S. Dep’t of Health & Human Servs., 780 F.Supp.2d 1256 (N.D. Fla. 2011); Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F.Supp.2d 768 (E.D. Va. 2010).

17. The “substantial effects” doctrine is the Supreme Court’s articulation of the outermost bounds of Congress’s power under the Commerce Clause. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 599 (1995) (“We conclude, consistent with the great weight of our case law . . . the proper test requires an analysis of whether the regulated activity ‘substantially affects’ interstate commerce.”).

18. U.S. CONST. art. I, § 8. cl. 18.

19. *NFIB*, 132 S. Ct. at 2585.

government can't require coverage for preexisting conditions and impose price caps and other market distortions without also requiring young, healthy people to pay more than they otherwise would. But the Court said that even if the individual mandate was necessary to Congress's regulatory scheme—which, by the way, may not be necessary to the regulation of interstate commerce, regarding health care or more broadly—it's not *proper*.²⁰ Finding justification for the individual mandate in the Necessary and Proper Clause

would work a substantial expansion of federal authority. No longer would Congress be limited to regulating under the Commerce Clause those who by some preexisting authority bring themselves within the sphere of federal regulation. Instead, Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it.²¹

That is something new; while the challengers and especially certain amici had been arguing that the “proper” part of the Necessary and Proper Clause had to be considered separately, no court had ever held that. On the Commerce Clause, the Court essentially made explicit the line that *Raich* left unstated: that the substantial effects test reached even noncommercial economic activity such as growth and consumption (or, per Scalia, even certain kinds of noneconomic activity²²) but not inactivity or decisions to not engage in economic activity.²³ But the Necessary and Proper Clause ruling went further. This is the first modern acceptance of the idea that even if something might be necessary it might not be proper.²⁴ Why might it not be proper? As the joint dissent pointed out:

The Government was invited, at oral argument, to suggest what federal controls over private conduct (other than those explicitly prohibited by the Bill of Rights or other

20. *Id.* at 2592–93.

21. *Id.* at 2592.

22. *Id.* at 2626 (Ginsberg, J., concurring in part and dissenting in part) (quoting *Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring)).

23. *Id.* at 2586 (Roberts, C.J.).

24. The closest the modern Supreme Court has come to such a holding was in dictum in *Printz v. United States*, 521 U.S. 898, 923–24 (1997), where it discussed how the same circumstances that rendered the statute at issue there unconstitutional under our federal structure also could have rendered it improper under the Necessary and Proper Clause.

constitutional controls) could *not* be justified as necessary and proper for the carrying out of a general regulatory scheme. . . . It was unable to name any.²⁵

In other words, it's not proper to require people to engage in activity here because then there would be no limits on federal power. So however nicely the government crafted its theory here—which was not all that nice or coherent, as you'll recall from Solicitor General Donald Verrilli's answer to Justice Alito's request that he articulate this point “succinctly”²⁶—it failed for lack of a limiting principle.

IV. CONGRESS CAN'T PULL A BAIT-AND-SWITCH ON THE STATES

Even more remarkable than the Commerce or Necessary and Proper Clause rulings, however—for the moment I'll skip the taxing power ruling, which was remarkable but not particularly important beyond upholding Obamacare (no mean feat, but not nearly as significant doctrinally)—was the Court's ruling on the states' challenge to Obamacare's Medicaid expansion. In the ruling that will likely have the greatest impact on constitutional litigation going forward, seven justices found that Congress's action here unconstitutionally coerced the states under the Spending Clause.²⁷

25. *NFIB*, 132 S. Ct. at 2647 (joint dissent).

26. Transcript of Oral Argument at 44–45, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 1017220. His response was:

We got two and they are—they are different. Let me state them. First, with respect to the comprehensive scheme. When Congress is regulating—is enacting a comprehensive scheme that it has the authority to enact that the Necessary and Proper Clause gives it the authority to include regulation, including a regulation of this kind, if it is necessary to counteract risks attributable to the scheme itself that people engage in economic activity that would undercut the scheme. It's like—it's very much like *Wickard* in that respect. Very much like *Raich* in that respect.

With respect to the—with respect to the—considering the Commerce Clause alone and not embedded in the comprehensive scheme, our position is that Congress can regulate the method of payment by imposing an insurance requirement in advance of the time in which the—the service is consumed when the class to which that requirement applies either is, or virtually most certain to be, in that market when the timing of one's entry into that market and what you will need when you enter that market is uncertain and when—when you will get the care in that market, whether you can afford to pay for it or not and shift costs to other market participants.

So those—those are our views as to—those are the principles we are advocating for and it's, in fact, the conjunction of the two of them here that makes this, we think, a strong case under the Commerce Clause.

27. *NFIB*, 132 S. Ct. at 2604 (Roberts, C.J., joined by Breyer and Kagan, JJ.); *Id.* at

This ruling was surprising in part because there isn't much precedent regarding Congress's spending power. The last Spending Clause case, *South Dakota v. Dole*, was decided twenty-five years ago and involved the federal government's conditioning of 5% of highway funds on states raising their drinking ages.²⁸ At the time, different states had different drinking ages, not the standard drinking age to which we have grown accustomed. Louisiana and South Dakota were the last two states to raise their drinking ages to twenty-one, and South Dakota argued that the government's condition was coercive. The Court upheld the condition but explained that there could be a time when "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"²⁹ *NFIB* presented such a case.

Under Obamacare, the federal government offers states a lot of money to expand their Medicaid programs, but that money comes with many conditions: states have to increase the number of people covered by Medicaid; create new regulatory structures; transform the administration of health care; and, perhaps most importantly, spend more of their own money—even if that constituted a fraction of the federal funds.³⁰ The states could refuse to take this money and its attendant conditions; but, if they turned it down they would lose even the *existing* Medicaid funding that the federal government had been providing.³¹ The twenty-six state plaintiffs thus argued that the new federal money represented the proverbial "offer they couldn't refuse."³² No state had anticipated such a regulatory and financial burden when it signed up for Medicaid between 1965, the program's inception, and 1982, when the last state—Arizona—joined.³³ Yet, at this point, no state can afford to lose its federal Medicaid funding,³⁴ and even if a state decided to try somehow to provide

2662 (joint dissent).

28. *South Dakota v. Dole*, 438 U.S. 203 (1987).

29. *Id.* at 211.

30. *See NFIB*, 132 S. Ct. at 2663 (joint dissent).

31. *Id.* at 2657; 42 U.S.C. § 1396c (Supp. II 2008).

32. *NFIB*, 132 S. Ct. at 2657 (joint dissent).

33. *See id.* at 2606 (majority opinion) (discussing how states could not have foreseen that Congress would so change the Medicaid program).

34. *See id.* at 2604 (citing NAT'L ASS'N OF STATE BUDGET OFFICERS, FISCAL YEAR 2010 STATE EXPENDITURE REPORT, 11 tbl.5 (2011)) (discussing the portion of states' budgets dedicated to Medicaid spending and how integral federal funding is to the states).

alternative care to its Medicaid beneficiaries, its taxpayers would still have to pay Medicaid payroll taxes. Perhaps the states shouldn't have been so eager to make the original Faustian bargain—let that be a lesson for the future—but now that they'd made the bargain, they were stuck.

The Court agreed with this framing of the matter and—again, for the first time ever—struck down a federal law as exceeding Congress's "spending power" to attach conditions to money it gives or offers the states.³⁵ "[T]he financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head."³⁶ In particular, it was the threat to the *existing* Medicaid funding that made Obamacare constitutionally toxic here: "The threatened loss of over [ten] percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce . . ."³⁷

Moreover, while states can anticipate and must accept modifications of an existing funding program, they can't be forced into something radically different from the program they originally joined.³⁸ Medicaid was originally a program to help four narrow categories of people—the disabled, the blind, the elderly, and poor children—which was later modified and expanded. It was *not* a national redistribution or health care program for the entire nonelderly population with income below 133% of the poverty line, which is what Obamacare creates.³⁹ "The Medicaid expansion . . . accomplishes a shift in kind, not merely degree," the Court concluded.⁴⁰ "It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage."⁴¹

The Court didn't provide an exact standard regarding when an offer of federal funds becomes coercive, but said that if we

35. *Id.* at 2591.

36. *Id.* at 2604.

37. *Id.* at 2605. It remains to be seen whether "dragooning" will join "commandeering" as an increasingly invoked term of art describing an action prohibited to Congress.

38. *Id.* at 2606 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981)).

39. *See id.* at 2605–06 (citing 42 U.S.C. § 1396a(a)(10) (Supp. V 2010) and discussing the expansion of the Medicaid program under the Affordable Care Act).

40. *Id.* at 2605.

41. *Id.* at 2606.

accept the idea that the federal government is capable of coercing states in an unconstitutional manner, then Obamacare's Medicaid expansion is clearly past that line.⁴² In the future, courts hearing challenges to potentially coercive laws will consider factors such as: (1) the size of the grant that will be withdrawn if the state doesn't take the new money; (2) whether states are threatened with the loss of existing funds or just new ones; (3) whether the conditions attached to the funds in reality make the law a new program rather than just modifying the existing program; and (4) whether the conditions govern the use of the funds or are a threat to terminate other grants or otherwise alter other programs.⁴³

The Court is saying that the federal government can attach conditions relating to the use of funds offered or relating to the program that the funds support, but it can't fundamentally transform the program once the states are in it. It can't get states addicted to federal largesse and then all of a sudden foist something else on them. Regardless of how courts apply the Supreme Court's coercion factors in the future, however, states will be increasingly wary the next time some new joint federal-state program comes along—because who knows what the federal government might try twenty or fifty years later?

V. OBAMACARE'S UNICORN TAX

So this has all been great so far, right? The challengers won all the big things they wanted. The Supreme Court held: (1) the federal government can't impose economic mandates under the Commerce Clause, (2) it might even have less regulatory authority given the Court's interpretation of the "proper" part of the Necessary and Proper Clause, and (3) there's a great new tool to limit federal overreach via the Spending Clause. Yet Obamacare stands for the most part. That leaves us with just one small part of the case that the challengers lost: the taxing power.

Chief Justice Roberts alone conceived of this manner of saving Obamacare, not by upholding the individual mandate but by reinterpreting that mandate as a unique tax with very special characteristics.⁴⁴ The government had preserved the taxing

42. *Id.*

43. *Id.* at 2604–06.

44. *Id.* at 2596–600.

power argument as a back-up justification, but hadn't framed it quite the way Roberts did—and none of the justices seemed to buy that claim at oral argument.⁴⁵ Indeed, most law professors—including most whom I debated during more than two years of litigation—generally preferred the Taxing Clause argument because Congress's power there is broader than its power to regulate interstate commerce (as broad as the latter is). But they too didn't quite articulate it Roberts's way; both the government and academics considered the individual mandate to be simultaneously a regulation and a tax, with no judicially enforceable limit on Congress's power to legislate either when it comes to health care.⁴⁶ Chief Justice Roberts, on the other hand, admitted that the most “straightforward” and “natural” reading of the individual mandate is as a mandate—a regulation with a penalty attached for noncompliance.⁴⁷ But then he invoked the constitutional avoidance canon to reconstrue the provision as a tax and read certain qualifications into that tax to find it constitutional.⁴⁸

Roberts got this wrong for at least ten reasons.⁴⁹

First, Roberts misapplied the constitutional avoidance canon. He said that it's “fairly possible” to read the mandate as a tax and a court's “duty,” if it can, is essentially to bend over backwards to save a piece of legislation.⁵⁰ But that's not the correct way to apply the constitutional avoidance canon. The constitutional avoidance canon really stands for the idea that if you have two equally reasonable ways of interpreting an ambiguous statute, you should use the interpretation that avoids a difficult constitutional question and decide the case on statutory grounds—whether that means striking a statute down or upholding it.⁵¹ Here, the statute isn't ambiguous, and Roberts

45. Transcript of Oral Argument at 46–54, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 1017220.

46. Pet. for Writ of Cert. at 26, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398), 2011 WL 5025286; Shapiro, *supra* note 2, at 48–49 (describing debates with academic proponents of Obamacare).

47. *NFIB*, 132 S. Ct. at 2593.

48. *Id.* at 2593–601.

49. For a different articulation of a similar collection of points, see Quin Hillyer, *John Roberts' Travesty, Point by Point*, CENTER FOR INDIVIDUAL FREEDOM (July 4, 2012), <http://cff.org/v/index.php/commentary/42-constitution-and-legal/1483-john-roberts-travesty-point-by-point>.

50. *NFIB*, 132 S. Ct. at 2594.

51. Nicholas Quinn Rosenkranz, *Roberts Was Wrong to Apply the Canon of Constitutional*

explicitly stated that the better reading of the statute was as a regulation.⁵² Even Justice Ginsburg, who wrote the partial concurrence and partial dissent for the four “liberal” justices, was highly—perhaps most—skeptical about the taxing power at oral argument.⁵³ And when she summarized her opinion from the bench, her body language and tone seemed to indicate that even though she was going along with the Chief Justice’s taxing power argument, she much preferred the Commerce Clause argument.⁵⁴

Second, Roberts managed to read the mandate as a tax for constitutional purposes after finding that it was not a tax in the context of the Anti-Injunction Act (AIA), a federal law that prevents taxpayers from challenging a tax until it has been levied or assessed.⁵⁵ This claim is less bizarre than it sounds because it’s possible to draft a tax that’s not subject to the AIA—the constitutional and statutory standards are different⁵⁶—but Roberts’s own analysis belies such a finding. That is, the very example Roberts uses to detail the different legal standards, the *Drexel Furniture* child labor tax case from 1922, speaks of how a tax becomes a penalty when Congress imposes fines on those who fail to comply with a particular regulation.⁵⁷ If anything, *Drexel Furniture* supports reading the individual mandate as just that; a tax that became a penalty because Congress is imposing

Avoidance to the Mandate, SCOTUSREPORT (July 11, 2012), <http://www.scotusreport.com/2012/07/11/roberts-was-wrong-to-apply-the-canon-of-constitutional-avoidance-to-the-mandate/> (“It is crystal clear what the mandate requires: get insurance or pay a certain amount to the IRS.”).

52. See *NFIB*, 132 S. Ct. at 2593 (“The most straightforward reading of the mandate is that it commands individuals to purchase insurance.”).

53. See Transcript of Oral Argument at 47, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 1017220 (Ginsburg, J., characterizing the mandate as a penalty to encourage the purchase of healthcare, rather than as a tax to raise revenue).

54. Oral Concurrence of Justice Ginsburg at 1:03, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-393), available at http://www.oyez.org/cases/2010-2019/2011/2011_11_400.

55. *NFIB*, 132 S. Ct. at 2582 (citing *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7–8 (1962)) (“Because of the Anti-Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund.”); *id.* at 2584, 2594; see also 28 U.S.C. § 2283 (Supp. V 2011).

56. See *NFIB*, 132 S. Ct. at 2594–95 (citing *Bailey v. George*, 259 U.S. 16, 20 (1922); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922)) (noting an instance where legislation was intended by Congress to be treated as a tax for AIA purposes, and was so treated by the courts, even where the legislation exceeded Congress’s constitutional taxing authority).

57. See *Drexel Furniture*, 259 U.S. at 38 (“But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment.”).

finer on those who fail to comply with Obamacare.

Third, Roberts simultaneously found that there's no scienter requirement to the individual mandate, meaning no requirement of conscious or knowing violation of the law—and that people have a “choice” of whether to buy health insurance or to pay the tax.⁵⁸ This “choice,” under Roberts's reading of the mandate as a tax, stands in place of a command to do something accompanied by a punishment for failing to do that thing. That sounds like a bizarre choice to me—akin to a mugger asking you to “choose” either your money or your life—but even if we accept Roberts's characterization, doesn't a choice by definition involve scienter? Curiously, Roberts found it salient that the Obamacare tax is set low enough to allow a person to make a “reasonable financial decision” to pay it.⁵⁹ The amount of money isn't prohibitory, coercive, or punitive.⁶⁰ That's interesting, because if Congress ever wanted to raise the tax to an amount that actually approached the cost of the minimum-coverage health insurance plan, the tax would fail Roberts's constitutional test. So Congress can't create a program where people have an incentive to buy health insurance—which I thought was the point of the health care reform.

Fourth, the fact that the payment for non-insurance is collected by the IRS through “the normal means of taxation,”⁶¹ another of Roberts's pro-tax factors, is irrelevant. The nature of a federal program isn't determined by the agency that administers it.⁶² For example, federal involvement in K–12 education would not somehow become constitutional if administered by the constitutionally authorized army or postal service. Also, if where a function is located is so significant, why doesn't it matter that the mandate and penalty are found in Obamacare's operative

58. *NFIB*, 132 S. Ct. at 2596 (no scienter); *id.* at, 2600 (“But imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice.”).

59. *Id.* at 2596.

60. *Id.* (citations omitted) (stating that the amount due won't be prohibitory, as the amount in *Drexel Furniture* was, and that the IRS isn't allowed to use punitive means to collect the tax).

61. *Id.*

62. *See, e.g.*, Jonathan G. Pray, *Congressional Reporting Requirements: Testing the Limits of the Oversight Power*, 76 U. COLO. L. REV. 297, 300–01 (2005) (discussing congressional oversight and reporting requirements regarding the implementation of federal programs).

core (Title I) rather than its “Revenue Provisions” (Title IX)?⁶³ Title IX contains all sorts of obvious revenue-raisers, including small ones like the tax on indoor tanning services (the so-called “Snooki tax”).⁶⁴ If the Snooki tax made it into Title IX, why didn’t the so-called tax that’s central to the entire reform? The nomenclature doesn’t matter—if Congress had labeled the provision at issue an “apple,” that wouldn’t mean you could bake it into a pie—so running something through the IRS doesn’t magically transform it into a tax. Finally, the Department of Health and Human Services administers part of the regulation.⁶⁵ Where multiple agencies are involved in a complicated program, are courts to evaluate which agency does a plurality of the work when determining that program’s constitutionality?

Fifth, Roberts noted that the IRS can’t punish people or attach any other “negative legal consequences” for the nonpayment of the Obamacare tax⁶⁶—which is important because Congress can use only its regulatory authority to punish people, not its taxing power⁶⁷—but this factor is too good to be true because money is fungible. Let me illustrate: Let’s say you owe \$1,000 in federal income tax and also \$1,000 in Obamacare tax. You pay the IRS \$1,000, thinking that you’re settling your income tax obligation. The IRS, however, applies that payment to your Obamacare obligation. All of a sudden, you still owe \$1,000 in federal income tax, the nonpayment of which carries definite criminal penalties. Now, the IRS hasn’t yet issued its rule on how it will administer the Obamacare tax, but unless that rule gives you *three* options—buy the insurance, pay the tax, *or do nothing* (which would defeat the point of the whole exercise)—there are going to be very real legal consequences for not paying the Obamacare tax.

Sixth, Roberts conflated tax credits on ownership or activity with his new tax on inactivity. That is, a credit, whether a

63. Compare Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119, 242-52 (2010) (laying out the operations of the mandate and the associated penalty within Title I of the statute), with *id.* §§ 9001-17 & 9021-23, 124 Stat. 847-83 (laying out the revenue raising provisions of the statute, but not addressing the mandate or penalty).

64. See *id.* § 10907, 124 Stat. 130, 1020 (modifying the language of Title IX to penalize the use of indoor tanning facilities).

65. 42 U.S.C. § 1320d-2 (Supp. IV 2010).

66. *NFIB*, 132 S. Ct. at 2596-97.

67. *Id.* at 2600.

deduction or exemption, is an incentive to relieve a generally applicable tax burden.⁶⁸ For example, the deduction for mortgage interest is an incentive for homeownership, relieving someone from the generally applicable income tax. There is no generally applicable “health insurance tax” from which purchasers are exempt (though Congress could have structured Obamacare this way). There has also never been a tax on inactivity or the failure to purchase something, so all of the examples Roberts gives to analogize his new Obamacare tax are inapposite: A tax on the purchase of gas is of course a tax on the purchase of a particular product. A tax on earning income is of course an income tax (which required an amendment to the Constitution to make lawful). As for Roberts’s hypothetical \$50 tax on not having energy-efficient windows,⁶⁹ until this ruling, it was actually an open question whether such a novel thing—as opposed to a deduction for installing the windows—was constitutional. Congress has long induced purchases through tax credits, and under Roberts’s logic, these provisions were hopelessly inefficient given that Congress could simply have taxed the non-ownership of electric cars or energy-inefficient windows. If the government truly had this direct way of achieving its goals, it would have used it long ago. Moreover, as the Court recently held in an opinion joined by Chief Justice Roberts, to think of tax credits and tax debits as the same thing for constitutional, as opposed to economic, purposes “assumes that income should be treated as if it were government property even if it has not come into the tax collector’s hands.”⁷⁰

Seventh, Roberts’s correct statement that “the Constitution doesn’t guarantee that individuals may avoid taxation through inactivity” is beside the point given that he goes on to rule out the precise types of taxes (capitations and other direct taxes; see the tenth point below) levied on something other than activity.⁷¹ A capitation is a direct tax on a person—literally a “head tax”⁷²—not on that person’s inactivity. Instead, Roberts frames his view of the Obamacare tax as one “triggered by specific circumstances—earning a certain amount of income but not

68. See generally 26 C.F.R. §§ 1.30–1.51 (2012).

69. *NFIB*, 132 S. Ct. at 2597–98.

70. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448 (2011).

71. *NFIB*, 132 S. Ct. at 2599.

72. *Id.* at 2598.

obtaining health insurance.”⁷³ Until Obamacare, the federal government had never claimed the ability to “tax” a particular status or condition, or the *decision* to remain inactive, or the non-purchase of something, however one articulates the ostensible subject of taxation here.⁷⁴

Eighth, Roberts erroneously declined to examine Congress’s motive, which was clearly intended to compel behavior rather than raise revenue. While the Court has of late eschewed evaluating whether a measure’s primary purpose is to regulate or to raise revenue—which Roberts noted—it’s quite obvious that Congress wouldn’t have passed Obamacare if the mandate had been written as a tax. Indeed, Roberts himself said that “the essential feature of any tax” is that it “produces at least some revenue for the Government.”⁷⁵ This mandate, however, is meant to discourage revenue because it’s designed to compel as many people as possible to buy health insurance and thus avoid paying any penalty at all.⁷⁶ The scheme doesn’t work as well if people “choose” to pay the tax, which is set at a level far less than the minimum cost of a qualifying insurance policy. Roberts himself states: “There comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.”⁷⁷

Ninth, building on the above point, Chief Justice Roberts, while thinking that he was throwing Obamacare back to the people for final judgment via the ballot box, actually allowed the political branches to escape political accountability. That is, if Congress had wanted to create a taxation system to fund Obamacare or incentivize health insurance purchases, it could’ve done so. It could’ve increased income taxes. It could’ve created a new payroll tax. It could’ve removed the “65 and older” requirement from Medicare⁷⁸—making it Medicare for all.

73. *Id.* at 2599.

74. *See id.* at 2587 (“As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching ‘activity.’”).

75. *Id.* at 2594.

76. *See id.* at 2580 (“The act aims to increase the number of Americans covered by health care.”).

77. *Id.* at 2599 (quoting *Dep’t of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 779 (1994)).

78. 42 U.S.C. § 426 (Supp. II 2008).

Under modern constitutional law, all these options would've been constitutional and the debate would've been between health care policy wonks instead of constitutional lawyers. But Congress didn't do those things, and that's a constitutionally significant fact. As the dissent put it:

Congress knew precisely what it was doing when it rejected an earlier version of this legislation that imposed a tax instead of a requirement-with-penalty. Imposing a tax through judicial legislation inverts the constitutional scheme, and places the power to tax in the branch of government least accountable to the citizenry.⁷⁹

Structure matters because the taxing power operates differently than the commerce power under the Constitution's system of checks and balances. That is, the taxing power is indeed quite broad but there's a greater political check on it than there is on the somewhat narrower federal regulatory authority. What Chief Justice Roberts allowed the political branches to do here was to run the easier political gauntlet and then the easier legal one, too. He didn't defer to Congress; he rewrote the law—on the remedy for the coercive Medicaid expansion also, making it voluntary rather than striking it down⁸⁰—in order to save Congress's handiwork from its own infirmities.

Tenth and finally (and perhaps most importantly), Roberts never explained what kind of tax he was upholding. He goes out of his way to explain why this isn't a "direct tax" because those have to be apportioned among the states on the basis of population, which obviously isn't the way that the Obamacare tax operates.⁸¹ But he never identifies what kind of indirect, constitutionally authorized tax we have here. The Constitution only allows for four kinds of taxes in addition to direct ones.⁸² There are duties and imposts—which are taxes on international trade that aren't too relevant here because we don't import insurance policies on container ships from China—and then there are income taxes and excises. The Obamacare tax isn't an income tax because it's not a tax on the accrual of wealth—whether that be wages, interest, or capital gains. Yes, a person's

79. *NFIB*, 132 S. Ct. at 2655 (joint dissent) (citation omitted).

80. *Id.* at 2608 (majority opinion).

81. *Id.* at 2599.

82. U.S. CONST. art. 1, § 8, cl. 1; U.S. CONST. amend. XVI.

income factors into how the Obamacare tax is calculated, but it's not the trigger. As Roberts himself described, if this is a tax then what it taxes is the condition of not having health insurance.⁸³ Using income as part of a formula for some payment doesn't make that payment an income tax. That leaves excises, which are actually the most common taxes.⁸⁴ The Medicare and Social Security payroll taxes are excises, for example, having been construed by courts as taxes on the activity of employment or the exchange of your labor for money.⁸⁵ Excises are thus taxes on activities, transactions, and the enjoyment of privileges. In Roberts's own words, there is no activity to be taxed here, but it's unclear whether he thinks that this is an excise on the privilege of not buying something or if the tax is something else.⁸⁶

In short, Roberts's taxing power section simply doesn't compute. It's still unclear what the provision at issue is; even after the ruling, a debate rages over whether it's a tax or a penalty.⁸⁷ I've taken to calling it a unicorn tax—a creature of no known constitutional provenance that will never be seen again. It's also not a very big power—Congress can impose small non-coercive, non-punitive taxes for not buying something—and it's a power that comes with much political baggage. But regardless of the power's size, it won't be seen again any time soon because Congress won't be able to fool people in this manner again. It'll be difficult to pass any noxious regulation that has a hint of taxation about it because people will know that the Supreme Court might just uphold it in a similar manner. Roberts thus succeeded in crafting a ticket good for the Obamacare train only. He must have at some point posed to himself the conundrum of how to uphold this law without expanding federal power, and that's the result we got.

VI. WHAT WAS JOHN ROBERTS THINKING?

Despite his self-description as an umpire who just calls balls

83. *NFIB*, 132 S. Ct. at 2594.

84. See BLACK'S LAW DICTIONARY 563 (6th ed. 1990) (“[P]ractically every internal revenue tax except the income tax” is an excise tax.).

85. See *Helvering v. Davis*, 301 U.S. 619, 635 (1937).

86. *NFIB*, 132 S. Ct. at 2594. For more on this point, see *A Vast New Taxing Power*, *supra* note 1.

87. See, e.g., Oliver Knox, *White House: Sorry, Roberts, Obamacare mandate is a penalty, not a tax*, ABC NEWS (Jun. 29, 2012), <http://abcnews.go.com/Politics/OTUS/white-house-roberts-obamacare-mandate-penalty-tax/story?id=16679772#.UJxKfFH7WfQ>.

and strikes,⁸⁸ Chief Justice John Roberts in *NFIB* didn't so much "call 'em as he saw 'em," as rewrite a law to create a national regulatory scheme that differed from the one that the political branches enacted in several important ways. Obamacare's "minimum coverage provision" said that people "shall" buy qualifying health insurance or pay a penalty⁸⁹—and yet Roberts, while correctly finding that such a command exceeded federal regulatory authority, reimagined it as a "choice" between doing something and paying a tax. Obamacare expanded Medicaid such that states would be required to cover many more people than they currently do—and yet Roberts, while recognizing that expansion as coercive, merely made it optional rather than striking it down altogether.

The Chief Justice thus made a dog's breakfast of American health care. Some people will choose to buy insurance, but most will make the rational choice not to buy insurance. Some states will expand Medicaid, others will not—and that's on top of the "exchanges" that many states are already declining to establish, decisions that are apparently surprising both the legislation's drafters and the agencies charged with implementation.⁹⁰ It seems that we'll have a patchwork quilt rather than the comprehensive (if otherwise problematic) program Congress designed. In the words of the joint dissent:

The Court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching. It creates a debilitated, inoperable version of health-care regulation that Congress did not enact and the public does not expect. It makes enactment of sensible health-

88. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. On the Judiciary*, 109th Cong. 56 (2005) (Statement of John G. Roberts, Nominee to be Chief Justice of the United States).

89. 26 U.S.C. § 5000A (Supp. V 2011).

90. In an unfortunate but not unexpected twist on Nancy Pelosi's infamous exclamation, the more we find out about Obamacare's details, the more legal and constitutional problems we discover. For example, the legislation provides tax credits and subsidies for the purchase of qualifying health insurance plans on state-run—but not federal-run—insurance exchanges. See 26 U.S.C. § 36B (Supp. V 2011). The IRS, however, is promulgating a rule that extends these credits and subsidies to the purchase of health insurance in *federal* exchanges, a rule that plainly lacks statutory authority. And this is no drafting error: the state-exchange-only subsidies are an attempt by Congress to provide incentives to states to create their own exchanges. Because the granting of tax credits can trigger certain fines on employers, the IRS rule will face a very credible legal challenge. See Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, HEALTH MATRIX (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2106789.

care regulation more difficult, since Congress cannot start afresh but must take as its point of departure a jumble of now senseless provisions, provisions that certain interests favored under the Court's new design will struggle to retain. And it leaves the public and the States to expend vast sums of money on requirements that may or may not survive the necessary congressional revision.⁹¹

In masterminding such a maneuver, Roberts damaged the reputation of the Court and of Congress, not to mention the freedom of the society to which these branches of government are supposedly accountable. Again, the dissenters put it best:

The values that should have determined our course today are caution, minimalism, and the understanding that the Federal Government is one of limited powers. But the Court's ruling undermines those values at every turn. In the name of restraint, it overreaches. In the name of constitutional avoidance, it creates new constitutional questions. In the name of cooperative federalism, it undermines state sovereignty.⁹²

* * *

Look, there's a word for people who accurately predicted that Obamacare would be saved by a 5-4 vote with the Chief Justice providing the decisive vote and Justice Kennedy in dissent: liars. There are two words for those who additionally predicted that the individual mandate would be rewritten and upheld as an exercise of the taxing power: damned liars. There's a further word for those who also predicted that the Court, while holding that the individual mandate was invalid as an exercise of the commerce power, would nonetheless—and by a 7-2 vote—rule that the Medicaid expansion was impermissibly coercive under the Spending Clause: statisticians.⁹³

Having filed ten amicus briefs, including one on each of the four issues that the Supreme Court set for oral argument, written dozens of articles, and attended all the appellate arguments—including in the lower courts in Richmond, Cincinnati, and Atlanta—I thought I knew what to expect. Indeed, before any

91. *NFIB*, 132 S. Ct. at 2676 (joint dissent).

92. *Id.*

93. If you liked that joke, good. If not, take it up with the folks from whom I stole it. See John P. Elwood & Eric A. White, *What Were They Thinking? The Supreme Court in Revue, October Term 2011*, 15 *GREEN BAG* 2d 405, 406 (2012).

district court had even ruled, I predicted that the Court would “either strike down the reform or find a technical way to avoid ruling on the constitutional merits and thus allow the law to stand.”⁹⁴ And then in the summer of 2011, I argued that “the Supreme Court will not issue a decision ratifying a more expansive use of the commerce power than it did in *Raich*. It will either strike down this law or find some way to avoid the merits while effectively allowing the individual mandate to stand.”⁹⁵ I was nevertheless gobsmacked as I sat in the marble palace courtroom that fateful morning of June 28, 2012, and heard Chief Justice Roberts give the government a bottom-line victory while neither expanding federal regulatory authority nor dismissing the case on some technical ground.

What I (and everyone else) missed was the possibility that the case would be decided on something other than the law. That is, eight justices decided *NFIB* using competing legal theories—four finding that the Constitution limits federal power,⁹⁶ four that constitutional structure must yield to “Congress’[s] capacity to meet the new problems arising constantly in our ever-developing modern economy”⁹⁷—but one did something else, basing his decision on considerations that have nothing to do with constitutional law. I’m not concerned that that one may have changed his mind;⁹⁸ judges do that all the time, particularly in big, hard cases. Instead, what bothers me is that his taxing-power opinion simply doesn’t make sense. It’s not worthy of perhaps the most acute legal mind of his generation.

There are two regrettable inferences to draw, which most likely explain what happened. The first, which may be counterintuitive to some, is that Roberts adhered to an extreme judicial restraint, the idea that judges should defer to the political branches, if at all possible, regardless of how they view

94. Ilya Shapiro, *State Suits against Health Reform Are Well Grounded in Law—And Pose Serious Challenges*, 29 HEALTH AFFAIRS 1229, 1232 (2010). I was of course thinking of standing, ripeness, or, especially in the later stages, the Anti-Injunction Act.

95. Ilya Shapiro, *The Individual Mandate: An Unprecedented Expansion of Federal Power*, SCOTUSBLOG (Aug. 3, 2011, 3:38 PM), <http://www.scotusblog.com/2011/08/the-individual-mandate-an-unprecedented-expansion-of-federal-power/>.

96. *NFIB*, 132 S. Ct. at 2642 (joint dissent).

97. *Id.* at 2629 (Ginsburg, J., joined by Breyer, Sotomayor, and Kagan, JJ., concurring in part and dissenting in part).

98. See, e.g., Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS, (July 1, 2012), http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/.

the law. That is, whereas the four Democratic appointees could be said to be “activist” in finding no judicially administrable limits on federal power—though I don’t like the term “activism” because it typically refers to any ruling with which the speaker disagrees—John Roberts displayed a certain “pacifism,” which is an unfortunate legacy of the knee-jerk conservative reaction to the liberal judicial excesses of the 1960s and ’70s. Instead of engaging the judicial battle on the terrain of constitutional theory, pacifists express alarm at the overturning of democratically enacted laws. John Roberts’s *NFIB* ruling is the fruit of that poisonous judicial philosophy.

The second inference—the more common one, though I don’t think we know the relative salience of either—is that, for reasons of politics or reputation, Roberts decided that he needed to uphold the law while not expanding federal power. That’s quite a dilemma, but it explains why we’re left with a head-scratching tax on inactivity at the heart of a rewritten statute that no Congress would ever have passed.

The sad thing about this entire episode is that the Chief Justice didn’t have to do what he did to “save the Court.” For one thing, Obamacare has always been unpopular—particularly its individual mandate, which even a majority of Democrats thought was unconstitutional⁹⁹—so upholding it, and in such a bizarre way, has actually hurt public trust in the Court.¹⁰⁰ For another, Roberts only damaged his own reputation by making this move after months of warnings from politicians—including President Obama—and pundits that striking down the law would sully the Court. (I don’t at all believe that he succumbed to pressure of that sort, but many people do.) Perhaps most importantly, though, the reason we care about maintaining the Court’s integrity is so it can make the tough calls in the controversial cases while letting the political chips fall where they may. Striking down Obamacare would have been just the sort of thing for which the Court needs all that accrued institutional respect and gravitas. Instead, we have a strategic decision dressed up in

99. See, e.g., Jeffrey M. Jones, *Americans Divided on Repeal of 2010 Healthcare Law*, GALLUP (Feb. 27, 2012), <http://www.gallup.com/poll/152969/americans-divided-repeal-2010-healthcare-law.aspx> (summarizing results of Feb. 20–21 *USA Today*/Gallup poll).

100. Lydia Saad, *Americans Issue Split Decision on Healthcare Ruling*, GALLUP (June 29, 2012), <http://www.gallup.com/poll/155447/Americans-Issue-Split-Decision-Healthcare-Ruling.aspx> (summarizing results of June 28 *USA Today*/Gallup poll).

legal robes, judicially enacting a law Congress didn't pass.

But what was Roberts saving the Court for if not the sort of epochal case that *NFIB* was? In refraining from making the hard balls-and-strikes calls he discussed at his confirmation hearings, Roberts showed precisely why we don't want our judges playing politics.

In sum, the Constitution's structural provisions—federalism, separation and enumeration of powers, checks and balances—aren't just a dry exercise in political theory, but a means to protect individual liberty from the concentrated power of popular majorities. Justice Kennedy said it best in summarizing the joint dissent from the bench: "Structure means liberty."¹⁰¹ If Congress can avoid the Constitution's structural limits by "taxing" inactivity, its power is no more limited and liberty no better protected than if it were allowed to regulate at will under the Commerce Clause. The ultimate lesson to draw from this two-year legal seminar, then, is that the proper role of judges is to apply the Constitution regardless of whether it leads to upholding or striking down legislation. And a correct application of the Constitution inevitably rests on the Madisonian principles of ordered liberty and limited government that the document embodies.

101. Oral Dissent of Justice Kennedy at 9:58, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-393), available at http://www.oyez.org/cases/2010-2019/2011/2011_11_400. See also *Bond v. United States*, 131 S. Ct. 2355, 2365 (Kennedy, J., for a unanimous Court) ("Federalism secures the freedom of the individual.").