

National Federation of Independent Business v. Sebelius: Five Takes

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Introduction

In its recent decision in *National Federation of Independent Business v. Sebelius*,¹ the Supreme Court found that the Patient Protection and Affordable Care Act—popularly known as “Obamacare”—was an unconstitutional assertion of Congress’ power to regulate commerce among the several states, but was nonetheless sustainable under Congress’ power to tax. The Court also placed new limits on Congress’ spending power.

The decision—one of the most eagerly awaited of the twenty-first century—aroused much speculation. Most of this speculation turned out to be wrong—and resulted in considerable commentary. In this article, following our now-famous “Five Takes” format,² we will look at some possible meanings and implications of the Supreme Court’s decision.

We first consider the resemblance of *Sebelius* to a pair of famous cases whose opinions are held out as deftly straddling the line between principle and prudence: *Marbury v. Madison*³ and *Regents of the University of California v. Bakke*⁴ (Takes One and Two). Takes Three and Four examine the opinion through the lens of constitutional

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1. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012).
2. Brannon P. Denning & Glenn H. Reynolds, *Five Takes on McDonald v. Chicago*, 26 J.L. & POL. 273 (2011); Brannon P. Denning & Glenn H. Reynolds, *Five Takes on District of Columbia v. Heller*, 69 OHIO ST. L.J. 671 (2008); Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915 (2005).
3. 5 U.S. 137 (1803).
4. 438 U.S. 265 (1978).

theory. We consider whether the decision—Chief Justice John Roberts’s opinion especially—served what Charles Black called the Court’s “legitimizing” function: quelling doubts about the Act’s constitutionality and, thus, its legitimacy. We further consider whether, in ultimately upholding the Act despite its relative unpopularity, Chief Justice Roberts’s opinion could be seen as an example of judicial restraint à la James Bradley Thayer. Finally, in Take Five, we consider whether the opinion’s peculiar construction handed the Administration a somewhat Pyrrhic victory while laying the foundation for robust judicially enforced limits on congressional power. A brief conclusion follows.

I. Take One: It’s *Marbury* Time

Chief Justice Roberts’ opinion for the majority struck an odd note. On the question virtually everyone expected to be determinative—the constitutionality of the Act under the Commerce Clause—Roberts ruled as the oral argument prefigured: that the mandate to purchase health insurance fell outside of Congress’ commerce power. Indeed, he discussed this question at some length, and with considerable emphasis, before ultimately *upholding* the Act as an exercise of Congress’ power to tax. However, the Court did not find the healthcare law enough of a tax to trigger the Anti-Injunction Act, which would have precluded judicial review on the tax question. This somewhat unconventional approach came after a months-long campaign by supporters of the Act, both within and outside the Obama Administration, to persuade (some might say “bully”) the Court into upholding the Act.

The opinion’s half-a-loaf quality has led some commentators to suggest that Roberts’ holding in *Sebelius* was, like Chief Justice John Marshall’s opinion in *Marbury v. Madison*, a sort of Trojan horse, in that it smuggled in a victory over an important legal principle while shrouding that victory behind a win on the general issue for the opposing side. The problem is the conception of *Marbury* and *Sebelius* that this suggestion embodies.

Though the conventional wisdom is that Chief Justice Marshall won a stealth victory in *Marbury* by finding a power of judicial review even while exercising that power so as to hand Jefferson a win on the question before the Court, this conventional wisdom is more

“conventional” than it is “wisdom.”⁵ Today, the Marshall Court’s victory appears greater than it did at the time, thanks to the foreshortening effect of history.

In truth, Jefferson won the day, and the primacy of the Executive power over the Judiciary was established; Marbury never did get his commission. The Supreme Court’s power to overturn federal legislation that in its judgment contradicted the Constitution was not employed again until fifty-four years later in the ill-fated *Dred Scott* decision of 1857,⁶ by which time both Marshall and Jefferson were in the grave.⁷ Its next employment came in the 1870 *Hepburn v. Griswold* legal tender case.⁸ The former application was overturned by the adoption of the Fourteenth Amendment, the latter by the Court itself. In addition, the Court’s 1895 finding that the income tax violated the Constitution in *Pollock v. Farmer’s Loan & Trust Co.* was overturned by the Sixteenth Amendment.⁹

The Supreme Court did not begin overturning federal statutes routinely until well into the twentieth century, and even then the process was dubious during the New Deal. If *Marbury* was a stealth victory for the Court, it was an extremely *delayed* stealth victory. In *Marbury*, Marshall did what he could, but he held a weak hand. If he was tricky—and he was¹⁰—it was because he had no choice. And if the consequences of his trickiness were limited to the distant future, that was probably the best that could be done.

Meanwhile, in *Sebelius*, Chief Justice Roberts held a much stronger hand. Although President Obama, various allied officeholders, and pundits spent several months prior to the decision criticizing the prospect of an Obamacare overturn—to the point that a panel of the U.S. Court of Appeals for the Fifth Circuit asked pointed questions of the Justice Department regarding the Administration’s belief in judicial review¹¹—there was no real

5. See Glenn Harlan Reynolds, *Marbury’s Mixed Messages*, 71 TENN. L. REV. 303 (2004).

6. 60 U.S. 393 (1857).

7. The Court did overturn state laws on constitutional grounds, but the overturning of state statutes does not raise the separation of powers concerns associated with the overturning of federal law on constitutional grounds.

8. 75 U.S. 603 (1870).

9. 157 U.S. 429 (1895).

10. See generally William Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 31–32 (describing Justice Marshall’s trickiness in considerable detail).

11. Jan Crawford, *Appeals Court Fires Back at Obama’s Comments on Health Care Case*, CBS NEWS, (Apr. 4, 2012, 12:36 PM), http://www.cbsnews.com/8301-504564_162-

prospect that an opinion overturning the healthcare law would be disobeyed. Since Jefferson's time, the growing prestige of the Supreme Court (along with, quite likely, the comparatively diminished prestige of the Presidency) has made the consequence of a showdown between the Executive and the Judiciary very different. Richard Nixon, after all, meekly resigned rather than resist an order to turn over incriminating White House tapes,¹² and George W. Bush submitted to Supreme Court decisions that he believed unconstitutionally infringed on the President's power to wage war.¹³ It is unlikely that President Obama would have acted differently, or that he would have succeeded had he tried.

Unlike Marshall, then, Roberts could have expected a ruling overturning the healthcare law to have been obeyed. And, given the unpopularity of the law according to public opinion polls,¹⁴ the Court was unlikely to have faced anything serious in the way of delegitimization.

So although the *Marbury* analogy has a certain appeal—the idea that upholding the Affordable Care Act was the spoonful of sugar that made the opinion's language restricting the extent of Congress' commerce and spending powers go down more easily—it doesn't really hold. If the commerce and spending language is to have an impact, it will be in the next few years, not decades hence, and the

57408827-504564/appeals-court-fires-back-at-obamas-comments-on-health-care-case/. ("In the escalating battle between the administration and the judiciary, a federal appeals court apparently is calling the president's bluff—ordering the Justice Department to answer by Thursday whether the Obama Administration believes that the courts have the right to strike down a federal law, according to a lawyer who was in the courtroom."). See also Ruth Marcus, *The President's Unsettling Attack on the Supreme Court*, WASH. POST, (Apr. 2, 2012, 5:45 PM) http://www.washingtonpost.com/blogs/post-partisan/post-obamas-unsettling-attack-on-the-supreme-court/2012/04/02/gIQA4BXYrS_blog.html ("I would lament a ruling striking down the individual mandate, but I would not denounce it as conservative justices run amok. Listening to the arguments and reading the transcript, the justices struck me as a group wrestling with a legitimate, even difficult, constitutional question. For the president to imply that the only explanation for a constitutional conclusion contrary to his own would be out-of-control conservative justices does the court a disservice.").

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

13. *Boumediene v. Bush*, 553 U.S. 723 (2008).

14. See, e.g., CNN Political Unit, *Poll: More Americans Pleased If Court Deems ObamaCare Unconstitutional*, CNN.COM, (June 26, 2012 2:51 PM), <http://politicalticker.blogs.cnn.com/2012/06/26/poll-more-americans-pleased-if-court-deems-obamacare-unconstitutional/> ("Thirty-seven percent of Americans say they would be pleased if President Barack Obama's sweeping health care law is deemed unconstitutional by the U.S. Supreme Court, nearly ten points higher than the number who say they'd be pleased if the law is ruled constitutional.").

Court's treatment of those issues could have had just as much of an impact (or, more likely, *more* of an impact) if the Court had overturned the Act entirely—something that was certainly within its power. Whereas Marshall lacked the ability to give *Marbury* his commission, Roberts was free to strike down the Affordable Care Act, but chose not to do so. It is possible that Roberts was being as tricky in his opinion as Marshall was in *Marbury*, but whatever was going on in *Sebelius*, it wasn't very *Marbury*-like.¹⁵

Indeed, to the extent that Roberts' decision was determined by politics—perhaps, as some have speculated, a desire to position the Court for more “conservative” decisions such as striking down Section 5 of the Voting Rights Act, or setting a precedent permitting the Court to uphold the Defense of Marriage Act on grounds of judicial minimalism—such motivation would be far removed from the institutional preservation that animated Marshall's decision in *Marbury*. Such motivations, if extant, would seem more along the lines of judicial politicking than judicial statesmanship.

II. Take Two: *Sebelius* as *Bakke*

On the morning of June 28, Court-watchers anxiously awaited an opinion in a hotly contested, deeply divisive case. The unprecedented nature of the question presented by the case had subjected the Court to intense pressure from the contending sides. “[N]o case in modern memory,” said one Justice from the bench when the opinion was read, had “received as much media and scholarly commentary.”¹⁶ During the run-up to oral arguments before the Supreme Court, “two positions clearly emerged. Both were intellectually coherent, legally tenable, morally defensible. They were also diametrically opposed.”¹⁷ As one commentator noted, “The choice was stark, and the stakes enormous. Ultimately, the decision lay with the . . . Supreme Court.”¹⁸ It was assumed the outcome would be dictated by the position of one Justice, usually regarded as a swing vote.

15. For one sort of possible trickery, if that is the word, see Einer Elhauge, *Roberts' Real Long Game?*, THE ATLANTIC MONTHLY (July 20, 2012), <http://www.theatlantic.com/politics/archive/2012/07/roberts-real-long-game/260080/> (“The unseen long game is that sustaining Obamacare as a tax helps preserve the Republicans' ability to adopt two items on their own political wish list: the Paul Ryan plan to privatize Medicare and George W. Bush's plan to privatize Social Security.”).

16. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL: A BIOGRAPHY 494 (2001).

17. *Id.* at 463.

18. *Id.* at 468.

When the decision was announced, many were puzzled by the odd 4-1-4 decision; the judgment announced by a Justice whose opinion on what was considered *the* issue did not garner a majority. The lone Justice's opinion satisfied almost no one, and criticism of it began almost immediately—even before observers had waded through its more than 150 pages. It seemed to raise more questions than it answered and left many of the hardest questions for the future. One commentator dismissed the lone opinion as the product of a “failure of principle or nerve or vision” and concluded that it was “unfortunate that the Court allowed his ambivalent, obfuscatory, and inconclusive opinion to stand as the common denominator on such an important issue.”¹⁹

The case described above, of course, was *Regents of the University of California v. Bakke*;²⁰ the “controlling minority of one”²¹ was the “pragmatic conservative,”²² Justice Lewis Powell.

From the beginning, Powell's biographer John Jeffries tells us, Powell was looking for a dodge. “Powell,” he writes, “wanted to allow some affirmative action, but also to constrain it, to keep it in check so that race-consciousness would not become the norm.”²³ Preserving the idea of constitutionally mandated color-blindness was of central importance to Justice Powell.²⁴ At the same time, he was reluctant to close the door completely to *any* consideration of race in admissions decisions. As Jeffries phrased it, Powell “wanted to say ‘yes’ now, while implying ‘no’ later.”²⁵ The resulting opinion was “as conflicted as its author.”²⁶ The opinion employed the rhetoric of strict scrutiny, identified as “compelling” the desire to achieve a “diverse”—including a racially diverse—class of students, but condemned the University of California, Davis plan as a constitutionally proscribed “quota” because it reserved sixteen spaces for minority applicants.²⁷ Powell's key point—that race could be a

19. Paul Brest, *Race Discrimination*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 113, 128 (Vincent Blasi ed., 1983).

20. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

21. JEFFRIES, *supra* note 16, at 490.

22. *Id.* at 470.

23. *Id.* at 469.

24. *Id.*

25. John C. Jeffries, Jr., *Bakke Revisited*, 2003 SUP. CT. REV. 1, 7 (2004).

26. *Id.* at 1.

27. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978).

factor, but not *the* factor—was characterized as “pure sophistry.”²⁸ Jeffries added that the opinion, “[c]onsidered purely as a matter of craft—of consistency with precedent, coherency as doctrine, and clarity of result . . . must be judged a failure.”²⁹ Contemporary critics certainly agreed.³⁰

Writing about *Bakke* in 2003, after the *Grutter* and *Gratz* decisions,³¹ however, Jeffries concluded that—for all its technical deficiencies—“Lewis Powell saved affirmative action” with *Bakke*.³² In the same article, he wrote, “I have come—slowly—to the view that Powell in *Bakke* was exactly right.”³³ The “Nation would have suffered for” a clearer answer that attempted to settle all the outstanding questions.³⁴ Powell, in Jeffries’s opinion, sacrificed “cogency for wisdom,” “spoke for the institution” and “bought time”³⁵ The opinion was “an appeal to the future” on Powell’s part. Without Powell’s “willingness to embrace [the contradiction between strict scrutiny and genuine diversity]—and to live with the criticism it provoked—Powell’s compromise would have failed.”³⁶ He concluded:

Sometimes, the gap between the conventional criteria of judging—what Bickel called “reason in the judicial process,” “analytical coherence,” and “principled judgment”—and a politically far-sighted decision is unbridgeably large. Where that is true, there is no easy melding of legal craft and political insight. The judge must choose between them.³⁷

Perhaps instead of being a *Marbury*-esque attempt to criticize the Administration’s signature legislative victory while protecting the

28. JEFFRIES, *supra* note 16, at 484.

29. Jeffries, *supra* note 25, at 2.

30. For a sampling of criticism following the decision, *see id.* at 9–10; *see also* JEFFRIES, *supra* note 16, at 496–97; *see also* Brest, *supra* note 19 and accompanying text (criticisms of Paul Brest).

31. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

32. Jeffries, *supra* note 25, at 1.

33. *Id.* at 18.

34. *Id.* at 21.

35. *Id.* at 21–22.

36. *Id.* at 23.

37. *Id.* at 25.

Court from political retaliation,³⁸ *Sebelius* is Roberts' "appeal to the future." In twenty-five years, perhaps the technical shortcomings of the opinion will pale against the statesmanlike, "pragmatic" thrust of the opinion. It's tempting to make the comparison—especially given the number of superficial similarities between the two opinions.³⁹ Tempting, but it's unlikely that the Roberts opinion will be regarded in quite the same way as Powell's.

First, there are differences in the underlying issues. The uninsured that the Affordable Care Act benefitted hardly occupy the same moral status as, say, African Americans only a generation removed from Jim Crow when *Bakke* was decided. A decision holding affirmative action unconstitutional for all time would have been regarded as a significant setback for civil rights—as it was, Powell's opinion was excoriated as "racist" for its holding that quotas were impermissible.⁴⁰ Had Roberts sided with the dissenters and invalidated the Act in its entirety, health care reform would have continued—piecemeal and incremental perhaps—but the invalidation of the mandate would have left open myriad other possibilities for expanding insurance coverage. Moreover, for those to whom fidelity to original intent matters, a stronger case can be made that a decision barring affirmative action *in toto* ran counter to the intent of the Framers of the Fourteenth Amendment, than one claiming the Framers would have disapproved the regulation of inactivity under the Commerce Clause.⁴¹

Second, while Powell could credibly claim to have sacrificed consistency in order to preserve a constitutional principle to which he was deeply committed (that of a color-blind Constitution), Roberts' opinion left himself open to the charge that he sacrificed *both* consistency (by holding that the mandate is both tax and not tax) *and* the principle of limited government (by upholding the tax/not-tax mandate). Whatever proponents of limited government—and of judicial enforcement of that principle—might have gained in *Sebelius*

38. See *supra* notes 5–15 and accompanying text (suggesting why that analogy is imperfect).

39. See *supra* notes 16–19 and accompanying text.

40. JEFFRIES, *supra* note 16, at 496 (discussing the reaction by the civil rights community).

41. Compare Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997), and Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985), with Dan T. Coenen, *Originalism and the Individual Mandate: Rounding Out the Government's Case for Constitutionality*, 107 NW. U. L. REV. COLLOQUY 55 (2012).

was substantially eroded by Roberts' capacious reading of Congress' taxing power. Now, the argument runs, nearly any aspect of contemporary life can be controlled by the government, if it simply taxes the decision *not* to comply with a government diktat. (There is, of course, another more charitable reading of his opinion, which we consider *infra*.⁴²)

Finally, one might dispute the premise that *Bakke* was wisdom incarnate and that such acts of prudence and far-sightedness ought to be emulated. Another take is that Powell's *Bakke* decision was embraced by affirmative action proponents who realized it was probably the best they could hope for from the Court in 2003 when affirmative action looked particularly shaky (especially after *Hopwood v. Texas*).⁴³ The Court, by adopting Powell's opinion, was able to emulate his manipulation of strict scrutiny⁴⁴ and produce a split decision that further encouraged the less-than-candid use of race in admissions decisions.⁴⁵ The Court's decision to revisit racial preferences in university admissions in *Fisher v. University of Texas at Austin*,⁴⁶ moreover, suggests that the canonical status of Powell's opinion (and its subsequent adoption by the *Grutter/Gratz* Court) is not assured.

The benefit of making an "appeal to history" is that one is either subsequently vindicated or not around to suffer repudiation. It remains to be seen whether Roberts is remembered as a judicial statesman or as the author of a too-clever-by-half opinion that put the Court's imprimatur on a dramatic expansion of governmental power. What makes us skeptical that his opinion will be praised in the future is the fact that much of the legal academic community embraced *Bakke* largely out of necessity; it was the best hope for preserving affirmative action in some form. Insofar as Roberts' opinion attempts to preserve the principle of judicially enforced limits on congressional power, it is unlikely to be as warmly embraced by the academy.

42. See *infra* notes 111–127 ("Take Five: The Umpire Strikes Back").

43. *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000) (invalidating Texas' use of racial preferences in law school admissions).

44. See Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 970–80 (2004) (criticizing the Court's application of strict scrutiny in *Grutter*).

45. But see Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347 (2003) (arguing that the outcome in *Grutter* reflected elite preferences on affirmative action).

46. *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (U.S. Feb. 21, 2012) (No. 11-345).

III. Take Three: *Sebelius* and the Power of Legitimation

Charles Black's 1960 defense of judicial review, *The People and the Court*,⁴⁷ has been largely forgotten,⁴⁸ probably because it was overshadowed by his colleague Alexander Bickel's more nuanced *The Least Dangerous Branch*,⁴⁹ published two years later. The neglect is unfair; in fact, *The People and the Court* influenced Bickel's own work. Bickel was particularly taken with Black's description and defense of the Supreme Court's "legitimation" function.⁵⁰ In addition to checking official action through judicial review, the Court also legitimated laws and acts alleged to be unconstitutional by upholding them. In this Take, we reintroduce Black's idea and suggest that *Sebelius* was perhaps a not-altogether-successful attempt to legitimate the Affordable Care Act, about which there was considerable constitutional doubt.

Black argued that by creating a government of limited powers, the Framers of the Constitution ensured that the legitimacy of governmental actions alleged to lie outside the boundaries of those powers would be called into question from time to time.⁵¹ The new government needed a forum in which to resolve those disputes that—again, for legitimacy's sake—would need to be seen as credible.⁵² Unfortunately the judge of that dispute would necessarily be a part of the very government the legitimacy of whose actions was being challenged.⁵³

47. CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT* (1960).

48. A search of "charles /2 black /2 'the people and the court'" yields 29 citations on Westlaw, while a search of "alexander /2 bickel and 'the least dangerous branch'" yields 2410 citations.

49. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

50. *Id.* at 69 (discussing the legitimating function of the Court).

51. BLACK, *supra* note 47, at 39 (writing that "for a government based on the theory of limited powers the problem of the legitimation of governmental action is one of special difficulty"); *id.* at 40 (observing that "limitation generates doubt and debate on the legitimacy of particular actions" and that "[w]here . . . limitations are built into government and into the theory validating government, it is certain that particular interests will from time to time discern in the limitations a forbidding of some action to which they are about to be subjected").

52. *Id.* at 38 (noting that "one indispensable ingredient in the original and continuing legitimation of a government must be its possession and use of some means for bringing about a consensus on the legitimacy of important governmental measures").

53. *Id.* at 41 ("the resolution of doubts as to the legitimacy of governmental action must be undertaken, and bindingly effected, by the government itself").

The stakes, Black argued, were very high. If the forum for settling disputes is not seen as credible and its decisions legitimate, one might set off a “vicious circle” where losers in the process decry the decision (and the underlying action) as illegitimate, which will encourage others to make the same claims, and so on.⁵⁴ The ultimate risk is the government’s “loss of moral authority” to govern.⁵⁵ Thus, “[t]he task of persuading the greater part of our people that the principles of governmental limitation have been adhered to, notwithstanding differences of private opinion, is and always has been one of great urgency.”⁵⁶ Even short of a total loss of moral authority, Black maintained that a healthy republic cannot have too many of its citizens “obey and resent” like sullen teenagers nor should the state simply rely on coercion to effect its ukases.⁵⁷ The problem is compounded by the fact that contending arguments about broad powers and limits that will be made in good faith—and that the harder questions about constitutional meaning—will have no obvious or simple answers.⁵⁸

Discounting “hopeless” alternatives like departmentalism and appeal to reason, Black noted that our system settled on submission to a tribunal.⁵⁹ But what kind of tribunal would possess—or be seen to possess—the institutional integrity that would elicit obedience despite its location *in* government? Black argued that the tribunal would need to be (1) a plural body;⁶⁰ (2) “independent from active policy-making branches”;⁶¹ (3) comprised of “specialists in tradition”; who were (4) trained and socialized in “sifting carefully and then deciding firmly.”⁶² In other words: the Supreme Court of the United States.

But while many would say that the Court’s primary function is to exercise judicial review to prevent governmental overreaching by invalidating federal and state acts that violate constitutional limits,⁶³

54. BLACK, *supra* note 47, at 42.

55. *Id.*

56. *Id.* at 43.

57. *Id.* at 45.

58. *Id.* at 46–47.

59. *Id.* at 48.

60. *Id.* at 50.

61. *Id.* at 49.

62. *Id.*

63. Black’s book does discuss this “checking function” at some length. *See id.* at 87–155.

Black argued that perhaps its most valuable role is when it *upholds* acts. “[A] case can be made,” he wrote, “for believing that the prime and most necessary function of the Court has been that of *validation*, not of *invalidation*.”⁶⁴ Because of the aforementioned legitimacy problems that attend claims of *ultra vires* action by government, “some means of satisfying the people that it has taken all steps humanly possible to stay within its powers” must be devised.⁶⁵

Using the New Deal as a case study, Black argued that the Court there performed a valuable function by placing its imprimatur of constitutionality on the various measures undertaken to regulate the economy and end the Depression.⁶⁶ The so-called “switch in time,” he argued, was the “honest result of honest reconsideration,” and the Court’s upholding many programs after 1937 “was one of the clearest instances in our history of the difficulty of *legitimation* faced by a government of limited powers,” because of the vehement constitutional objections made by the New Deal’s opponents.⁶⁷ “We had no means, other than the Supreme Court,” he concluded, “for importing legitimacy to the New Deal.”⁶⁸

If *Sebelius*—specifically Chief Justice Roberts’ opinion—was intended to legitimate the Affordable Care Act and silence those who questioned its constitutionality, it appears to have fallen short of that goal. We think this is true because several of Black’s preconditions for a successful legitimating decision were lacking in the run-up to *Sebelius*. In addition, aspects of Chief Justice Roberts’ decision seemed unconvincing, even unprincipled. Appearances were unaided by a gusher of leaks that followed the decision suggesting Roberts had changed his vote in a bid to save the Court from becoming a target during the 2012 Presidential election.

First, Black stipulated that honest differences of opinion would arise over the scope of the government’s powers and the Court would satisfy the losers that they had had their day in Court through an honest judgment, honestly explained. That sort of goodwill was lacking in the debate surrounding the Act—especially the mandate.

64. *Id.* at 52.

65. *Id.*

66. *Id.* at 56–60.

67. *Id.* at 63 (emphasis added); see *id.* at 64 (writing that “the Supreme Court, without a single change in the law of its composition, or, indeed, in its actual manning, placed the affirmative stamp of legitimacy on the New Deal, and on the whole new conception of government in America”) (emphasis added).

68. *Id.* at 65.

Nearly from the beginning, proponents of the Act alleged that any constitutional objections had to be simply a proxy for political opposition to health care reform.⁶⁹ Having been outvoted and outmaneuvered by the Democrats, in other words, Republican opponents of the Act were seeking a second bite at the apple by challenging the Act's constitutionality. As the litigation progressed, some law professors piled on, alleging that no serious constitutional arguments existed and that those who claimed otherwise were either dim or partisan hacks.⁷⁰ Opponents of the Act often responded in kind, alleging that no one who was for limited government could fail to see the obvious unconstitutionality of the Administration's attempt to regulate inactivity.⁷¹

Moreover, as courts began to take opponents' legal claims seriously, members of the academy began battlefield preparation in anticipation that the Court would ultimately decide the Act's fate. This preparation alternated between flattering members of the Court—op-ed writers were *sure* that the Court would do its duty and uphold the obviously constitutional Act⁷²—and preemptive claims that any decision invalidating the Act would be an act of sheer political will by a conservative majority run amok.⁷³ Yale professor Akhil Amar, for example, was quoted lamenting that his entire teaching career will have been a fraud were the Court to invalidate

69. See, e.g., Neal Devins, *Why Congress Did Not Think About the Constitution When Enacting the Affordable Care Act*, 106 NW. U. L. REV. COLLOQUY 261, 276 (2012) ("Furthermore, to the extent that minority lawmakers invoke the Constitution, they do so to derail legislative initiatives that they oppose on policy grounds. These very same lawmakers conveniently ignore the Constitution when their party is in the majority.") (footnote omitted).

70. See, e.g., Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1 (2012).

71. See, e.g., Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581 (2010).

72. See, e.g., Laurence H. Tribe, *On Health Care, Justice Will Prevail*, N.Y. TIMES, Feb. 8, 2011, at A27 ("There is every reason to believe that a strong, nonpartisan majority of justices will do their constitutional duty, set aside how they might have voted had they been members of Congress and treat this constitutional challenge for what it is—a political objection in legal garb.").

73. See, e.g., Kevin Drum, *What It Will Mean If the Supreme Court Strikes Down Obamacare*, MOTHER JONES, (June 18, 2012, 9:34 AM), <http://www.motherjones.com/kevin-drum/2012/06/clock-ticks-down-whether-weve-entered-new-era-american-politics> ("It would mean that the Supreme Court had officially entered an era where they were frankly willing to overturn liberal legislation just because they don't like it.").

the mandate.⁷⁴ In such an atmosphere, neither side was likely to be persuaded of the legitimacy of any decision.

Black further described the ideal legitimating forum as one whose members were schooled in “tradition” and capable of “sifting carefully and deciding firmly.” Though he didn’t say so explicitly, it seems that he assumed the justices would render principled decisions. As his colleague Alexander Bickel would write, “judicial review brings principle to bear on the operations of government.”⁷⁵ This form of decision-making was regarded by both as distinct from legislative decision-making, in which deals are struck, logs are rolled, and votes are traded. Black regarded it as essential that the legitimating forum be “independent” of those branches. Bickel thought that the “separation of the legislative and judicial functions” was “beneficial” because “courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government.”⁷⁶ Courts’ “insulation and the marvelous mystery of time,” he continued, “give[s] [them] the capacity to appeal to men’s better natures, to call forth their aspirations, which may have been forgotten in the moment’s hue and cry.”⁷⁷

Chief Justice Roberts’ opinion fails this test, precisely because it gave the appearance of being a product of the “hue and cry.” The bulk of the opinion, of course, explains why the individual mandate could *not* be upheld under the commerce power⁷⁸—a point on which the joint dissenters agreed.⁷⁹ But then it pivots, upholding the mandate as a permissible exercise of the taxing power,⁸⁰ which was

74. Ezra Klein, *Of Course the Supreme Court Is Political*, WASH. POST, (June 21, 2012, 12:42 PM), <http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/06/21/of-course-the-supreme-court-is-political/> (quoting Yale professor Akhil Amar saying that “[i]f they decide this by 5-4, then yes, it’s disheartening to me, because my life was a fraud. Here I was, in my silly little office, thinking law mattered, and it really didn’t.”).

75. BICKEL, *supra* note 49, at 199.

76. *Id.* at 25–26.

77. *Id.* at 26.

78. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2585–93 (2012) (Roberts, C.J.).

79. *See id.* at 2648 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (“[T]o say that the failure to grow wheat or the refusal to make loans affects commerce, so that growing and lending can be federally compelled, is to extend federal power to virtually everything.”).

80. *Id.* at 2598 (Roberts, C.J.) (concluding that the mandate “need not be read to do more than impose a tax. That is sufficient to sustain it.”).

jarring for two reasons. First, because the opinion initially held that the Anti-Injunction Act was *inapplicable* because the shared responsibility payment was not a tax for Anti-Injunction Act purposes.⁸¹ Second, because judges and academics roundly dismissed this argument.⁸²

Congress, Roberts explained, can elevate form over substance when it comes to its own statutes, but for constitutional purposes, the Court decides whether something is actually a tax.⁸³ And then Roberts' efforts were still strained. Drawing on *Bailey v. Drexel Furniture Co.*,⁸⁴ the Chief Justice merely gestured towards three criteria mentioned in that opinion without explaining why those criteria controlled or were even especially relevant.⁸⁵ Further, Roberts' choice to uphold the mandate created questions about his disquisition on the commerce power. Was it simply dicta? The Chief Justice said not, but his reasons were not very convincing.⁸⁶ What does it matter under which power the mandate seemed a more comfortable fit? Once the Court has found one under which it fits, what the Court might have to say about other powers that would not authorize it is beside the point.

In addition, reliance on the taxing power courted additional controversy by raising the question whether the mandate was a "direct tax" that the Constitution requires to be apportioned by population.⁸⁷ The term—whose precise meaning eluded the Framers

81. *Id.* at 2584 (Roberts, C.J.) ("The Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the Anti-Injunction Act. The Anti-Injunction Act therefore does not apply to this suit, and we may proceed to the merits.").

82. *But see* Brian Galle, *Conditional Taxation and the Constitutionality of Health Care Reform*, 120 YALE L.J. ONLINE 407 (2010) (arguing that the mandate was a constitutionally valid tax); *see also* Robert D. Cooter & Neil Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195 (2012) (describing a theory upholding the mandate similar to that used in *Sebelius*).

83. *Sebelius*, 132 S. Ct. at 2594 (Roberts, C.J.) (noting that while "penalty" label was sufficient to avoid application of the Anti-Injunction Act, "it does not determine whether the payment may be viewed as an exercise of Congress's taxing power").

84. 259 U.S. 20 (1922) (invalidating tax on profits of companies employing child labor).

85. *Sebelius*, 132 S. Ct. at 2595 (Roberts, C.J.).

86. *Id.* at 2600 (Roberts, C.J.) ("[T]he 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.").

87. U.S. CONST. art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.").

themselves and continues to bedevil scholars⁸⁸—and questions about whether the mandate was a direct tax were again dismissed briefly and, to some, unconvincingly⁸⁹ by the Chief Justice. In essence, he wrote that while direct taxes applied to everyone just by existing, some people are exempt from the payment of the mandate tax; therefore, the mandate tax cannot be a “direct tax” for constitutional purposes.⁹⁰

The opinion’s odd construction, and the curious refusal of the dissenters to sign on to the Commerce Clause portion of the Chief Justice’s opinion, among other things,⁹¹ suggested some last minute, behind-the-scenes maneuvering. On cue, the opinion’s release was immediately followed by a flood of stories that the Chief Justice had changed his vote after initially siding with conservatives to strike it down.⁹² Moreover, the story broken by Jan Crawford alleged Roberts did so in response to the mounting pressure on the Court to uphold the Act.⁹³ The allegations outraged conservatives⁹⁴ and contributed to the debate over the meaning of the recent decline in the Court’s public approval ratings.⁹⁵

88. Compare Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 52–56 (1999), with Erik M. Jensen, *The Apportionment of “Direct Taxes”: Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334 (1997); see also Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct Tax Clauses*, 15 J.L. & POL. 687 (1999).

89. See, e.g., Ilya Shapiro, *We won everything but the case*, SCOTUSBLOG, (June 29, 2012, 9:38 AM), <http://www.scotusblog.com/2012/06/we-won-everything-but-the-case/>.

90. *Sebelius*, 132 S. Ct. at 2598–99 (2012) (Roberts, C.J.).

91. For example, the joint dissent refers to Justice Ginsburg’s opinion concurring in part and dissenting in part as the “dissent.” See, e.g., *Sebelius*, 132 S. Ct. at 2648–49 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (referring to “the dissent”). Of course that might be explained by a sort of shorthand; Justice Scalia refers to Justice Ginsburg’s “dissent on the issue of the Mandate” in the context of the joint dissent’s discussion of the commerce power. *Id.* at 2648.

92. Jan Crawford, *Roberts switched views to uphold health law*, CBS NEWS (July 1, 2012, 1:29 PM) http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/.

93. *Id.*

94. See, e.g., Ilya Shapiro, *Chief Justice Roberts Sold Out the Constitution for Less Than Wales*, CATO AT LIBERTY, (July 2, 2012, 2:19 PM), <http://www.cato-at-liberty.org/chief-justice-roberts-sold-out-the-constitution-for-less-than-wales/>.

95. See Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits Just 44% in New Poll*, N.Y. TIMES, June 7, 2012, at A1 (describing polling done prior to the health care decision). Following the decision, and the revelations about possible vote changes, public opinion fell further. See Brett LoGiurato, *Poll: The Supreme Court’s Approval Rating Plunges After the Obamacare Decision*, BUS. INSIDER, (July 1, 2012, 12:57 PM), <http://www.businessinsider.com/supreme-court-approval-obamacare-decision-ruling-health-care-2012-7>.

What those revelations won't do, any more than the opinion did, is quell the debate over the Act's legitimacy. This is bad, because we *do* need a mechanism for settling (at least temporarily) disputes over the legitimacy and constitutionality of governmental action. As Black realized, moreover, that mechanism needs to be seen at least as *nonpartisan*, if not apolitical. At a minimum, a nonpartisan tribunal should not be susceptible to partisan campaigns waged by the sides to a controversy—this is one of the benefits a lack of accountability and insulation is supposed to confer. Losers can at least leave thinking they got a “fair shake.” If, however, losers in constitutional cases merely think they've lost a rigged game, they're either going to be less likely to play, less likely to respect the outcome, or both.

It is possible that hashing these controversies out in the political sphere instead of in the Supreme Court would be a desirable outcome,⁹⁶ but that possibility ignores the fact that the U.S. political system has come to rely on judicial review⁹⁷—and, to some extent, judicial supremacy⁹⁸—to perform valuable settlement and legitimation functions. Were the Supreme Court to lose its ability to settle questions of constitutionality and legitimacy in the eyes of political actors and the public generally, so that the answers to these controversies had to await election outcomes, the stakes of those elections would rise dramatically.⁹⁹ Rule of law would then be replaced by a more Hobbesian (electoral) might-makes-right regime.

Whatever the merits of such a system, it is not ours, and hasn't been for quite a while. We have come to expect courts not only to check, but also to confer legitimacy. To do that credibly, however, courts—the Supreme Court in particular—need to be seen as performing the judicial function in good faith. The run-up to (and revelations following) *Sebelius* have made people wonder. The Court simply cannot afford to have its integrity called into question regularly and still retain the power to legitimate.

96. See *infra* notes 101–103 (discussing the views of James Bradley Thayer). See also MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

97. See generally Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35 (1993) (describing how political branches turn to courts to resolve issues when ruling coalitions are unable to do so).

98. See generally Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 *HARV. L. REV.* 1359 (1997) (justifying judicial supremacy on settlement function grounds).

99. See generally Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346 (2006) (arguing that judicial review is anti-democratic and disputes over rights should be hashed out by political branches).

IV. Take Four: Thayer's Revenge

Nineteenth-century constitutional theorist James Bradley Thayer is something of a hero to many conservative believers in “judicial restraint.”¹⁰⁰ It was Thayer’s view that courts should strike down laws on constitutional grounds only in cases of clear mistake.¹⁰¹ The first defense of the Constitution, he believed, came from the conscience of elected officials and the supervision of voters. Judicial intervention, he feared, would cause those functions to atrophy:

The people of the States, when making new constitutions, have long been adding more and more prohibitions and restraints upon their legislatures. The courts, meantime, in many places, enter into the harvest thus provided for them with a light heart, and too promptly and easily proceed to set aside legislative acts. The legislatures are growing accustomed to this distrust, and more and more readily incline to justify it, and to shed the consideration of constitutional restraints—certainly as concerning the exact extent of these restrictions—turning that subjects over to the courts; and, what is worse, they insensibly fall into a habit of assuming that whatever they can constitutional do they may do—as if honor and fair dealing and common honesty were not relevant to their inquiries.

The people, all this while, become careless as to whom they send to the legislature; too often they cheerfully vote for men whom they would not trust with an important private affair, and when those unfit persons are found to pass foolish and bad laws, and the courts step in and disregard them, the people are glad that these few wiser gentlemen on the bench are so ready to protect them against their more immediate representatives. . . . It should be remembered that the exercise of it, even when unavoidable, is always

100. See generally Symposium, *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. i (1993).

101. See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (articulating his rule of clear mistake).

attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors.¹⁰²

Thayer added that courts could, by focusing on exactly what legislatures have done, “fix the spot where responsibility lies, and to bring down on that precise locality, the thunderbolt of popular condemnation.”¹⁰³

Set against Thayer’s approach, this passage from Chief Justice Roberts’ opinion has considerable resonance:

Our permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Nation’s elected leaders. “Proper respect for a coordinate branch of the government” requires that we strike down an Act of Congress only if “the lack of constitutional authority to pass [the] act in question is clearly demonstrated.” 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. Those decisions are entrusted to our Nation’s elected leaders, who can be thrown out of office if the people disagree with them. *It is not our job to protect the people from the consequences of their political choices.*¹⁰⁴

Thayer’s judicial minimalism was popular among conservative critics of the Warren Court’s expansive approach to judicial review; set against a Supreme Court willing to enter into political thickets that earlier courts had feared to part, it seemed appealingly humble. There is no question that Thayer’s fears that elected officials would come to regard “constitutional” as synonymous with “whatever we

102. James Bradley Thayer, *The Working of Our System of Constitutional Law*, in PHILIP KURLAND, JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES AND FELIX FRANKFURTER ON JOHN MARSHALL 85–87 (1967).

103. *Id.* at 88.

104. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2579 (2012) (emphasis added).

can get away with” have largely come to pass. Roberts comes from a generation of Federalist Society members who were heavily exposed to such theories of judicial restraint, via thinkers such as Robert Bork and Alexander Bickel.¹⁰⁵ It seems quite likely that the echo of Thayer in his opinion was entirely conscious and intentional. In light of this, how successful is Roberts’ opinion as a Thayerian effort?

On the one hand, Roberts did bring the question of the Affordable Care Act front-and-center in the presidential (and congressional) election process, with numerous candidates taking stands on repealing the Act (or not) almost as soon as the opinion was announced.¹⁰⁶ Thayer would have approved, presumably, of the increased political awareness brought about after the decision—and

105. See, e.g., BICKEL, *supra* note 49, at 34–46 (discussing Thayer); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) (espousing Thayer-like judicial minimalism). See also Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519 (2012) (describing Thayer’s influence and followers).

106. *ObamaCare Repeal Bill Passes House*, HUFFINGTON POST (July 11, 2012, 4:21 PM), http://www.huffingtonpost.com/2012/07/11/obamacare-repeal_n_1665772.html?utm_hp_ref=elections-2012. And for a particularly Thayerite response, see James V. Smith, Jr., *Obamacare Repeal? It’s Up To You, People*, GREAT FALLS TRIBUNE, July 15, 2012, <http://www.greatfallstribune.com/article/20120715/OPINION/207150306/Obamacare-repeal-s-up-you-people?odyssey=navlhead>:

You are not helpless just because you only have one vote come November.

Sure, that vote may not rock the Constitution in the same way that Chief Justice John Roberts did, if he actually did switch his vote at the 11th hour from striking down Obamacare to upholding it, as the pundits allege.

But in reading the majority decision, the Chief lectured you and me about the importance of our vote when he said, “It is not our job to protect the people from the consequences of their political choices.”

You can read that to be neutral, as in: “Obamacare is not our fault, so don’t blame the Supreme Court.” That’s a tempting interpretation, too. Because you have to go a long way to find anybody in Washington, D.C., to take responsibility for anything. You could lose an eye walking around the nation’s Capitol with all the finger-pointing going on every day.

But I’m gonna go with a different interpretation: “If you’re going to continue voting for these boneheaded politicians, stop whining about it when they give you a boneheaded government with boneheaded laws — it’s your own danged fault.”

Thayer would be pleased.

even, perhaps, of some politicians' willingness to note that a statute may be constitutional without also being a good idea.¹⁰⁷

On the other hand, Roberts' Thayerism was rather partial. Though his finding that the Act fell within Congress' power to tax embodies a "Thayerish" degree of caution and humility, what of his treatment of Congress' Commerce Power? The opinion's treatment of the Commerce Clause, while in our eyes entirely reasonable, was perhaps not absolutely compelled to the point that what Congress did could be described as a "clear mistake"—at least not if the "mistake" were to be determined by reference to the Court's post-New Deal jurisprudence on the subject.

For Thayerism to achieve the desired effect of encouraging responsibility by the political branches, those branches have to know with a high degree of certainty that the Court will let them have enough constitutional rope to hang themselves—and cannot be depended upon to save them by intervening or taking the blame. But does the opinion in *Sebelius* send that message?

And even if it does, what of the Court's other opinions? One may approve or disapprove of, say, the *Citizens United* opinion,¹⁰⁸ but Thayerian it is not. A Supreme Court that follows Thayer's precepts consistently might encourage political responsibility. But what about a Court that follows Thayer's precepts capriciously? Such an approach seems unlikely to foster either political accountability among the political branches, or a higher degree of legitimacy for the Court.

In what is perhaps an apt analogy, Thayerism may be compared to a low-carbohydrate diet: if followed scrupulously, both may result in improvements. But occasional bouts of restraint, alternating with nonrestraint, are unlikely to produce improvement, whether one is mixing judicial approaches, or piling bacon on top of doughnuts because "it's low-carb." In either case, disciplined consistency is required if the approach is to succeed.

Such consistency is difficult enough for individual dieters, as America's ballooning waistlines demonstrate. But can a Supreme Court composed of nine justices of differing approaches and predilections, entirely independent of one another, achieve such

107. See, e.g., Robert Ehrlich, Jr., *Obamacare: Constitutional, But Contemptible*, BALTIMORE SUN, July 8, 2012, http://articles.baltimoresun.com/2012-07-08/news/bs-ed-ehrllich-obamacare-20120708_1_supreme-court-s-obamacare-tax-mandate.

108. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 50 (2010).

discipline on a consistent basis?¹⁰⁹ Perhaps *some* court could, against a background of shared social and professional values that encouraged it to do so. But it seems unlikely that the present Supreme Court, or likely any Supreme Court in the foreseeable future, will do so.

One might argue, of course, that judicial capriciousness itself might inspire responsibility elsewhere: with the Supreme Court not to be counted on, because of its unpredictability, the political branches might be forced to think things through. One might also argue—and, in fact, one of us has so argued¹¹⁰—that unpredictable Supreme Court decisions may have other constitutional virtues. Whatever the merits of such arguments, they are not particularly Thayerian.

V. Take Five: The Umpire^{III} Strikes Back? *Sebelius* and the Future of Judicially Enforced Federalism

To this point we have been quite critical of the Chief Justice's opinion. In our final take on *Sebelius*, we consider the possibility that Roberts is genuinely committed to the principle of limited government and, moreover, is eager to see the Court play a role in enforcing that principle. In this light, his opinion might appear to be not the product of an opportunistic or risk-averse trimmer,¹¹² but rather a shrewd opening gambit by someone playing a long game.

When we last assayed the future prospects for a robust, judicially enforced federalism following *Gonzales v. Raich*,¹¹³ we were not very

109. See Glenn Harlan Reynolds, *Chaos and the Court*, 91 COLUM. L. REV. 110 (1991) (arguing Supreme Court behavior may be inherently unpredictable by doctrinal scholarship).

110. *Id.* See also Glenn Harlan Reynolds, *Is Democracy Like Sex?*, 48 VAND. L. REV. 1635 (1995) (arguing unpredictability in government can reduce special interest influence).

111. The reference is to Chief Justice Roberts' confirmation hearing analogy between judging and umpiring. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of Judge John G. Roberts, Jr.). See also *id.* at 55 ("Judges are like umpires. Umpires don't make the rules, they apply them."). The analogy did not originate with Roberts. For an exploration of the analogy, see Aaron Zelinsky, Essay, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, 119 YALE L.J. ONLINE 113 (2010).

112. See Cass R. Sunstein, *Trimming*, 122 HARV. L. REV. 1049, 1053 (2009) ("The term comes from the seventeenth-century Trimmers, who tended to reject the extremes and to borrow ideas from both sides in intense social controversies. Trimmers believed it important to steer between the polar positions and to preserve what is deepest and most sensible in competing positions.").

113. 545 U.S. 1 (2005).

optimistic.¹¹⁴ In fact, we proposed the result in *Raich*, along with backtracking by the Court in other areas,¹¹⁵ suggested the vaunted federalism revolution of the Rehnquist Court was “zombie federalism”: a doctrine that “wandered aimlessly for a while, killing off the occasional federal statute drafted with no thought as to constitutionality (akin to the usual horror movie zombie victims who wander away from the group), but which, in the end, was pretty easy to kill”¹¹⁶ Specifically, we noted that, after *Raich*, it looked as if “*Lopez* and *Morrison*, not *Raich*, . . . [were] the outliers.”¹¹⁷ We also noted that the Court had not exhibited “any appetite [for strengthening] *Dole*’s rather flaccid constraints on conditional spending requirements”¹¹⁸

Despite upholding the individual mandate as a “tax,” Roberts’ opinion is notable for three things that suggest the *Sebelius* “nth death of federalism” meme might be premature. First, *seven* justices (including Justices Breyer and Kagan) imposed, for the first time, an outer limit on conditional spending. While we suspect opinions might differ substantially among the Justices as to what is “coercive” in the future, that the line exists somewhere can no longer be denied.¹¹⁹ Second, whatever *Sebelius*’ precedential value might be, five Justices are clearly on record as opposing any attempt to use the Commerce Clause to dragoon people into a national program. *Activity*, then, is a precondition for regulation under the commerce power. Had it been otherwise, it would be difficult—perhaps impossible—for a future court to invalidate congressional action as exceeding Congress’ power under the Commerce Clause.

Finally, the Chief Justice’s opinion rejected the Government’s argument that the Necessary and Proper Clause could support the

114. Reynolds & Denning, *What Hath Raich Wrought?*, *supra* note 2, at 927–32.

115. *Id.* at 928–32.

116. *Id.* at 932.

117. *Id.* at 931.

118. *Id.* at 928.

119. The “coercion” limit on conditional spending is what one of us elsewhere has termed an “anti-evasion doctrine” that prevents officials from complying with constitutional requirements in form, but subverting them in substance. They usually take the form of standards that backstop rule-like decision rules. *See generally* Brannon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. __, __ (forthcoming 2013) (discussing the function of anti-evasion decision rules framed as standards that make it difficult for officials to avoid rule-like decision rules); *see also* Brannon P. Denning & Michael B. Kent, Jr., *Anti-anti-evasion in Constitutional Law*, 41 FLA. ST. U. L. REV. __, __ (forthcoming 2014) (discussing significance of Court’s creation of anti-evasion doctrine in *NFIB*).

mandate. “Each of our prior cases upholding laws under the Clause,” he wrote, “involved exercises of authority derivative of, and in service to, a granted power. . . . The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.”¹²⁰

[S]uch a conception of 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 activity 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. *Even if the individual mandate is “necessary” to the Act’s insurance reforms, such an expansion of federal power is not a “proper” means for making those reforms effective.*¹²¹

This is a far cry from prior decisions whose scrutiny of congressional claims of necessity was less than rigorous.¹²²

But “what about the taxing power?” you might ask. This is where we think the Chief Justice was at, perhaps, his most clever. His

120. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2592 (2012) (Roberts, C.J.).

121. *Id.* (emphasis added).

122. *See, e.g., Sabri v. U.S.*, 541 U.S. 600, 605 (2004):

Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare, Art. I, § 8, cl. 1, and it has corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars. *See generally McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819) (establishing review for means-ends rationality under the Necessary and Proper Clause).

See also U.S. v. Comstock, 130 S. Ct. 1949, 1956 (2010) (“We have since made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”).

opinion left Congress with a great deal of power where it often has the least room to maneuver: imposing taxes. Given the vehemence with which the Administration initially rejected the characterization of the mandate as a tax,¹²³ it no doubt realized passing the Act would likely have been impossible if opponents could claim the health reform involved a massive tax increase. Roberts honored Congress' "penalty" label to avoid application of the Anti-Injunction Act,¹²⁴ but held it was the *Court* that decided whether the penalty was a "tax" for Article I, section 8 purposes.¹²⁵ Thus, after *Sebelius*, the public, legislators, presidents, and the media are on notice that simply declaring that a particular provision is not a tax doesn't make it so. This might make initiatives like the individual mandate difficult for Congress to repeat in the future because opponents can credibly (and correctly) characterize alleged "penalties" or "payments for choices" as taxes.

The Supreme Court is a coequal branch of government. Whether the issue is the trial of enemy combatants,¹²⁶ the regulation of violent video games,¹²⁷ or the constitutionality of congressional reform of one-seventh of our GDP, the Court does not like to be told that it doesn't have a role to play. Chief Justice Roberts' opinion (and that of the joint dissenters) suggests that judicially enforced federalism has some life yet. For that, perhaps we have Nancy Pelosi's incredulous response ("Are you serious?") to questions about the Affordable Care Act's constitutionality to thank.

Conclusion

Our Five Takes are far from the only possible ones on a case as important—and an opinion as disjointed—as *Sebelius*. The opinions in this case, as in so much of the Supreme Court's modern work, may inspire a degree of nostalgia for the confident clarity of the Marshall Court, which—while sometimes wrong—was seldom unclear or in doubt. (They may also inspire a degree of nostalgia for the

123. Jacqueline Klingebiel, *Obama: Mandate is Not a Tax*, ABC NEWS, (Sept. 20, 2009, 9:00 AM), <http://abcnews.go.com/blogs/politics/2009/09/obama-mandate-is-not-a-tax/>.

124. *Sebelius*, 132 S. Ct. at 2583 (Roberts, C.J.) ("The AIA and the Affordable Care Act . . . are creatures of Congress's own creation. How they relate to each other is up to Congress, and the best evidence of Congress's intent is the statutory text.").

125. *Id.* at 2600 (Roberts, C.J.).

126. *See Boumediene v. Bush*, 553 U.S. 723 (2008).

127. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

comparative brevity of those early opinions, which somehow managed to address issues of tremendous importance to the Republic in far fewer pages than the modern Court.)

A cynic—or a law professor—might protest that these modern characteristics are not bugs, but features, as they simply lay the ground for extensive law review commentary, and, bug or feature, that will certainly be the case with *Sebelius*. But as indicated above, the Court's behavior here fits poorly with many theories of proper judicial decision-making, from Thayer to Black to Bork. Perhaps one final consequence of the Supreme Court's health care decision will be a revival of interest in classic Legal Realism. If the test of a constitutional theory is its ability to explain the Court's actual behavior, then Legal Realism looks pretty good.

In that vein, we will venture one final observation: it is often cynically observed that we don't really know the meaning of a Supreme Court decision until the Supreme Court tells us, in another decision. This is particularly likely to be the case here. Was the Court's Commerce Clause and spending power language the harbinger of greater restraints to come, or was it merely a smokescreen designed to obscure the Court's failure to actually restrain government action? A Legal Realist might say the answer depends on who makes the next few appointments to the Court.