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CHIEF JUSTICE ROBERTS'S INDIVIDUAL MANDATE: THE LAWLESS MEDICINE OF *NFIB V. SEBELIUS*

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INTRODUCTION

The Supreme Court's decision in *National Federation of Independent Business v. Sebelius*[1] (*NFIB*) shocked the legal world. Many observers predicted the decision's central holding: that Congress in the Patient Protection and Affordable Care Act[2] (PPACA) had proper constitutional authority to impose the Act's "individual mandate," which requires that all Americans purchase health insurance if they can afford it. Almost everyone expected the Court's four more liberal Justices to vote to uphold the Act and at least three of the Court's conservatives to vote to strike most or all of it down. Chief Justice Roberts's lead opinion, however, produced a cascade of surprises. The conservative Chief Justice joined the Court's liberals in upholding the individual mandate; he reached that conclusion based on Congress's taxing power, rather than its powers under the Commerce Clause or the Necessary and Proper Clause; he nonetheless declaimed at length about how those other powers did not support the mandate; and he struck down a key element in the Act's expansion of Medicaid. Meanwhile, the Court's four other conservative Justices filed a jointly authored dissent that conspicuously failed to endorse even those aspects of the Chief Justice's opinion on which all five conservatives agreed, while two of the Court's liberals—Justices Breyer and Kagan—joined the Chief Justice, without comment, in weakening the Medicaid expansion.

Chief Justice Roberts's leadership in upholding the individual mandate left conservatives fuming, liberals beaming, and commentators falling over one another to praise the Chief Justice's courage, resistance to partisanship, and embrace of judicial restraint. "For bringing the Court back from the partisan abyss," wrote Jeffrey Rosen in a representative paean, "Roberts deserves praise not only from liberals but from all Americans who believe

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[1] 132 S. Ct. 2566 (2012).

[2] Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26, 42 U.S.C.).

that it's important for the Court to stand for something larger than politics."[3] Echoed Linda Greenhouse: "[The Chief Justice] spoke for the country. His decision . . . saved the Supreme Court from the stench of extreme partisanship that has hung over the health care litigation . . . ."[4] Harvard Law School Dean Martha Minow wrote that Chief Justice Roberts's opinion served to "revive respect for the judiciary" at a politically divisive moment by "signal[ing] a commitment to separating the judiciary from politics in method, tone, and results."[5]

This Essay challenges that heroic narrative. Chief Justice Roberts's legal analysis in *NFIB* runs from inadequate to improper, leaving the nation with a profoundly lawless resolution of a singularly important legal controversy. I share the prevalent assumption that the Chief Justice voted to uphold the individual mandate out of a deeply held concern for the Court's institutional reputation. I also agree with most of the Chief Justice's cheerleaders that the PPACA is both a constitutionally proper enactment and good (though in my view not nearly optimal) public policy. Even so, I believe the Chief Justice's idiosyncratic resolution of *NFIB*—his own individual mandate—will do the Court, and the nation, far more harm than good. To call a judicial opinion "lawless" can mean two things: either the opinion literally contains no law, which leaves it lawless in what I will call a descriptive sense; or it reflects an active contempt for law as properly understood, which makes it lawless in what I will call a normative sense. The Chief Justice's opinion manages to exemplify both senses of lawlessness, failing to provide sufficient legal justification for any of his major conclusions while violating fundamental norms of constitutional judicial review.

I. THE INDIVIDUAL MANDATE ANALYSIS: BURNING THE STATUTE IN ORDER TO SAVE IT

The most prominent target of the legal challenge to the PPACA, the individual mandate, requires people who can afford insurance to purchase it or else pay a penalty to the federal government.[6] The government posited three alternative sources of constitutional authority for the mandate: the power to regulate interstate commerce;[7] the Necessary and Proper Clause,[8]

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[3] Jeffrey Rosen, *Welcome to the Roberts Court: How the Chief Justice Used Obamacare to Reveal His True Identity*, NEW REPUBLIC (June 29, 2012), http://www.tnr.com/blog/plank/104493/welcome-the-roberts-court-who-the-chief-justice-was-all-along.

[4] Linda Greenhouse, *A Justice in Chief*, N.Y. TIMES (June 28, 2012, 5:19 PM), http://opinionator.blogs.nytimes.com/2012/06/28/a-justice-in-chief.

[5] Martha Minow, *Affordable Convergence: "Reasonable Interpretation" and the Affordable Care Act*, 126 HARV. L. REV. 117, 148 (2012).

[6] *See* I.R.C. § 5000A (Supp. V 2012).

[7] U.S. CONST. art. I, § 8, cl. 3.

[8] *Id.* cl. 18.

as an adjunct to the commerce power; and, based on the penalty option, the taxing power.[9] Chief Justice Roberts, in a portion of his opinion joined by no other Justice, but echoed by the four joint dissenters (Justices Scalia, Kennedy, Thomas, and Alito), thoroughly and emphatically rejected the government's reliance on the commerce power and the Necessary and Proper Clause. This portion of the Chief Justice's opinion indulges in needless constitutional analysis while creating no legally binding precedent. As such, it is both normatively and descriptively lawless. Then, in the most practically significant portion of his opinion, the Chief Justice wrote for a 5–4 majority (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan) in upholding the mandate under the taxing power. This portion of the opinion relies on two crucial legal premises that it fails to defend, rendering it descriptively lawless.

A. Advice We Don't Need

The PPACA's individual mandate is a novel provision in federal law. Never before has the federal government required citizens to purchase a good in the private marketplace.[10] The Act maintains our health care system's reliance on private insurance, but it imposes several new regulatory constraints on private insurers.[11] The individual mandate offsets these requirements by forcing lower risk people into the insurance pool, requiring everyone to purchase private insurance or pay a penalty to the government. The government in *NFIB* primarily defended the mandate on the ground that it directly regulated the interstate market in medical insurance. In the alternative, the government argued that the remainder of the PPACA properly regulated interstate commerce—a premise no one seriously disputes—and the mandate was a necessary and proper measure to effectuate that regulation.

Chief Justice Roberts spends fifteen pages of his opinion refuting these contentions.[12] The Chief Justice begins by adding to the Court's Commerce Clause jurisprudence a novel distinction between regulation of commercial action and regulation of commercial "inaction."[13] He rejects the commerce power as a basis for the individual mandate because the mandate "does not regulate existing commercial activity [but] instead compels individuals to

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[9] *Id.* cl. 1.

[10] *See* Nan D. Hunter, *Health Insurance Reform and Intimations of Citizenship*, 159 U. PA. L. REV. 1955, 1977 (2011) ("There seems to be little dispute that this precise form of federal mandate—that individuals must purchase certain private goods or pay a penalty—is unprecedented.").

[11] *See* 42 U.S.C. § 300gg (Supp. V 2012) ("community-rating" provision); *Id.* §§ 300gg-1, -3, -4(a) ("guaranteed-issue" provision).

[12] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2585–93 (2012) (opinion of Roberts, C.J.).

[13] *See id.* at 2586–87.

become active in commerce by purchasing a product . . . ."[14] Validating the mandate as a Commerce Clause regulation "would justify a mandatory purchase to solve almost any problem"[15] and, more broadly, would "permit[] Congress to reach beyond the natural extent of its authority . . . ."[16] The Chief Justice dismisses the government's claim that the uninsured affect the health care market because they will inevitably use health care services: "[W]e have never permitted Congress to anticipate . . . [commercial activity] in order to regulate individuals not currently engaged in commerce."[17]

The Chief Justice's rejection of the Commerce Clause theory sets up his rejection of the government's alternative theory that the Necessary and Proper Clause authorizes the individual mandate. He maintains that letting Congress regulate commercial inactivity in the service of the power to regulate actual commerce would "vest[] Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power."[18] Thus, while Congress may have considered the mandate "necessary" for effectuating its Commerce Clause authority to regulate the interstate market in health care services, the Chief Justice finds that the mandate was not a "proper" means of doing so.[19] The joint dissent echoes and elaborates the Chief Justice's conclusions about the commerce power and the Necessary and Proper Clause,[20] but none of the joint dissenters join any part of his opinion. Justice Ginsburg's separate opinion, in contrast, lacerates Chief Justice Roberts's analyses of the Commerce Clause and the Necessary and Proper Clause.[21]

Perhaps the individual mandate's distinctive requirements will limit the significance of the Chief Justice's analysis for future challenges to federal programs. Nonetheless, his restrictive analysis takes by far the Court's most aggressive posture against federal power since the Justices struck down core elements of the New Deal seventy-five years ago.[22] The Chief Justice's action–inaction distinction has the potential to undermine any federal mandate that requires regulated entities to take new actions.[23] In addition, as

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[14] *Id.* at 2573.

[15] *Id.* at 2588.

[16] *Id.* at 2589.

[17] *Id.* at 2590.

[18] *Id.* at 2592.

[19] *See id.*

[20] *See id.* at 2644–50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

[21] *See id.* at 2615–29 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[22] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down the Bituminous Coal Conservation Act as exceeding congressional authority under the Commerce Clause).

[23] Indeed, the Chief Justice suggests that federal commands to act may only survive constitutional review if grounded in "constitutional provisions other than the Commerce Clause." *NFIB*, 132 S. Ct. at 2586 n.3 (opinion of Roberts, C.J.).

Justice Ginsburg points out, both the Chief Justice and the joint dissent appear to harbor within their federal power arguments an economic substantive due process theory, under which the mandate really offends the Constitution by undermining economic liberty.[24] Chief Justice Roberts, channeling widespread political anxiety about the mandate, frets that "[a]ccepting the Government's theory would give Congress . . . license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government."[25] Taken to its logical extreme, a substantive due process analysis of the PPACA could reanimate the *Lochner* era's constitutionalization of laissez-faire economics.[26]

But at present, none of what Justice Ginsburg sharply calls "the Chief Justice's Commerce Clause essay"[27] means anything at all for the law. In both a descriptive sense and a deeper normative sense, this portion of his opinion is profoundly lawless. The Chief Justice's analysis of the commerce power and the Necessary and Proper Clause announces no legal holding of the Court. No other Justice joined or concurred in this portion of his opinion; it represents the Chief Justice's solitary view. Why did the four joint dissenters, who echo the Chief Justice's restrictive federal power analysis, decline even to concur in his judgment? Presumably because this part of the Chief Justice's opinion announces no judgment in which to concur. The commerce power and Necessary and Proper Clause analyses are entirely unnecessary to the Chief Justice's ultimate judgment upholding the individual mandate.

The descriptive absence of law in Chief Justice Roberts's cramped analysis of federal power points toward the sense in which this portion of his opinion is also normatively lawless. Why, if the discussion of the commerce power and the Necessary and Proper Clause forms no part of the Court's ultimate judgment, does the Chief Justice discuss those issues at all? His attempted justification, responding to criticism by Justice Ginsburg,[28] states that

> the statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it. It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question. And it is only because we have a

[24] *See id.* at 2623 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[25] *Id.* at 2589 (opinion of Roberts, C.J.).

[26] *See* Lochner v. New York, 198 U.S. 45 (1905) (finding strong constitutional protection for a right to contract). This is not the first time that critics of the Roberts Court's conservative majority have noted echoes of *Lochner* in its opinions. *See* Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2685 (2011) (Breyer, J., dissenting) (contending that the majority's extension of First Amendment protection to commercial data mining repeats the error of *Lochner*).

[27] *NFIB*, 132 S. Ct. at 2629 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[28] *See id.* at n.12.

> duty to construe a statute to save it, if fairly possible, that [the individual mandate] can be interpreted as a tax. Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction.[29]

In essence, the Chief Justice tells us that, when a court considers a constitutional challenge to federal authority that the government defends on several alternative grounds, the court should first organize the government's justifications along a spectrum from most to least intuitively "natural" and then fully analyze and pronounce a legal holding on each of those constitutional justifications, in order of "naturalness," until (a) the court finds one of them straightforwardly persuasive or (b) it rejects all justifications save the last one. If the court reaches the last justification, it should construe the statute if possible to support that justification, leaving all its foregoing constitutional pronouncements in place and in force.

Chief Justice Roberts's methodology radically departs from well-established norms of constitutional judicial review. Justice Brandeis, concurring in *Ashwander v. Tennessee Valley Authority*,[30] offers the classic formulation of what we now call the canon of constitutional avoidance. Two distinct but related elements of that canon matter for assessing *NFIB*. First, a court that reviews a constitutional challenge to a statute must determine whether some independent ground for decision obviates the need to decide the constitutional question at all.[31] Second, if compelled to address the statute's constitutionality, the court must construe the statute, if possible, in a manner that avoids the need to declare the statute unconstitutional.[32]

The government in *NFIB* offered three alternative constitutional grounds—the Commerce Clause, the Necessary and Proper Clause, and the Taxing Clause—as justifications for the individual mandate. In order to strike down the mandate, the Court would have had to render a constitutional judgment that each of the three alternative grounds failed as a basis for congressional authority.[33] To uphold the mandate, the Court needed only to render a decision that one of the three alternative grounds supported the mandate. Upholding the mandate might or might not have entailed a sympathetic construction under the second *Ashwander* principle. What the Court had no need to do, under any scenario, was render a constitutional judgment about more than one of the three alternative

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[29] *Id.* at 2600–01 (opinion of Roberts, C.J.). For a discussion of the Chief Justice's taxing power analysis, see *infra* Part I.B.

[30] 297 U.S. 288 (1936).

[31] *See id.* at 347–48 (Brandeis, J., concurring).

[32] *Id.* at 348.

[33] *Cf.* United States v. Morrison, 529 U.S. 598 (2000) (holding that neither the Commerce Clause nor the Fourteenth Amendment supported the civil damages provision of the Violence Against Women Act).

grounds if it found any of those grounds sufficient to support the mandate.[34] But that is exactly what Chief Justice Roberts's opinion does. He argues, in effect, that he needed to eviscerate the first *Ashwander* command—make no unnecessary constitutional decisions—in order to fulfill the second: construe a statute, where possible, in a manner that renders it constitutional. Never before has a Supreme Court Justice pronounced these two principles, articulated by Justice Brandeis as complementary elements in a scheme of judicial restraint, mutually exclusive.

The canon of constitutional avoidance invites the criticism that avoidance enables the Court to send a strong signal about a constitutional issue without expending the institutional capital to make an actual decision.[35] We do not want the Court to influence the development of constitutional law under cover of a doctrine meant to avert unnecessary constitutional decisions.[36] Chief Justice Roberts's analyses of the commerce power and the Necessary and Proper Clause manage to double down on the canon's troubling allowance for sub rosa constitutional decisionmaking, even as they flout its dictates. The Chief Justice renders a legally unnecessary constitutional decision that limits federal power, as a necessary predicate—he tells us—for a tenuous saving construction imposed to avoid having to render a constitutional decision that limits federal power. From the government's standpoint, this approach yields the worst of both constitutional worlds: the Chief Justice explicitly weakens two sources of government power on his way in the door and implicitly weakens a third on his way out.

A judge with any commitment to judicial restraint would treat the government's justifications for the mandate not as a sequential obstacle course but as analytic elements of a single problem. She might conclude, in reasoning through the case, that the commerce power and the Necessary and Proper Clause could not sustain the mandate. But if she further concluded that the taxing power supported the mandate, the constitutional avoidance canon would properly lead her to write an opinion that discussed only that outcome-determinative theory. Which theory the judge found most natural would make no difference in how the judge wrote her opinion. Likewise, the determination to employ a saving construction, if the judge found that step necessary to validate the government's most persuasive theory, would

[34] Courts sometimes state two alternative legal conclusions in support of a result. That sort of decision can cause difficulty in identifying which conclusion forms the controlling legal basis for the court's holding. *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1037–38 (1983) (discussing the problem of determining which of two independent, adequate legal grounds for a lower court decision the Court should recognize as controlling). Chief Justice Roberts in *NFIB* deviates even further from sound judicial practice because he announces legal conclusions that have no claim to relevance for his ultimate holding.

[35] *See* Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 86–88.

[36] *See id.* at 88–89 (arguing that rational legislators will treat the tacit constitutional judgments that constitutional avoidance entails as authoritative).

simply become part of the background analysis that she performed before writing. Chief Justice Roberts's methodology, in contrast, requires a judge to show all the work he performs en route to his result, making conclusive legal pronouncements about discarded alternative theories. A more destructive inversion of constitutional avoidance is hard to imagine.

This Essay does not object on substantive federalism grounds to Chief Justice Roberts's reasoning in *NFIB*.[37] Rather, my charge of normative lawlessness rests entirely on a procedural objection: the Chief Justice did not need to write a word about the Commerce Clause or the Necessary and Proper Clause in order to reach his legal conclusion. A legal positivist might assert that, if the Chief Justice of the United States portrays what he writes as legally necessary, then it is legally necessary. But anyone who values "a government of laws, and not of men"[38] should condemn the flimsy pretext under which Chief Justice Roberts in *NFIB* denigrates congressional power. The Chief Justice's mischief skirts the far edge of the Article III command that federal courts may render judgments only about "Cases" and "Controversies."[39] His discussion of the commerce power and the Necessary and Proper Clause reads very much like an impermissible advisory opinion.[40] It is advice we don't need and should disregard.

B. A Tax by Any Other Name

Having rejected the government's justifications for the individual mandate under the commerce power and the Necessary and Proper Clause, Chief Justice Roberts's opinion turns to the mandate's final hope: Congress's power to impose taxes. The argument that the taxing power supports the mandate rests on the PPACA's allowance that persons whom the Act requires to carry private medical insurance may, in lieu of purchasing insurance, pay a penalty to the IRS.[41] The argument presented a

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[37] Elsewhere I have sketched the grounds for a substantive objection. *See* Gregory P. Magarian, *Toward Political Safeguards of Self-Determination*, 46 VILL. L. REV. 1219, 1224–36 (2001) (critiquing conventional justifications for protecting state prerogatives in constitutional law). Other scholars have criticized *NFIB* on this basis. *See, e.g.*, Robin West, *Exit Rights: Roberts' Conception of America in the ACA Decision*, JURIST F. (July 25, 2012), http://jurist.org/forum/2012/07/robin-west-aca-roberts.php (critiquing the Chief Justice's opinion as validating a strongly individualist, atomistic political philosophy).

[38] John Adams, *To the Inhabitants of the Colony of Massachusetts Bay, March 6, 1775*, *in* NOVANGLUS, AND MASSACHUSETTENSIS; OR POLITICAL ESSAYS 78, 84 (Boston, Hews & Goss 1819) (1775) (emphasis removed).

[39] U.S. CONST. art. III, § 2, cl. 1.

[40] *Cf.* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2006 (1994) (suggesting that "statements a judge makes knowing them to have no direct precedential weight, but which she nevertheless hopes will be influential . . . in some sense . . . violate[] the rule against advisory opinions").

[41] *See* I.R.C. § 5000A(b)(1) (Supp. V 2012).

distinctive structural problem. The Anti-Injunction Act (AIA) bars taxpayers from challenging the legality of any tax prior to paying the tax.[42] Because the individual mandate does not become effective until 2014, no one has yet had to pay a penalty pursuant to the mandate. Accordingly, a conclusion by the Court that the mandate amounted to a tax would have seemed to require dismissal of the immediate challenges to the mandate, subject to reconsideration of the mandate's validity once someone in 2014 paid the penalty and sued to recover the payment.

To most observers' surprise, the taxing power formed the sole basis for Chief Justice Roberts's decisive vote to uphold the individual mandate and, with it, the rest of the PPACA. The Chief Justice's taxing power discussion bifurcates his statutory and constitutional analyses of the mandate. As a statutory matter, the Chief Justice emphasizes that the Act clearly identifies the mandate as a "penalty."[43] That identification, he explains, authoritatively places the mandate outside the protection of the AIA, allowing the Court to consider the substantive constitutional challenge immediately.[44] As a constitutional matter, the Chief Justice construes the mandate as a proper enactment under the taxing power. The PPACA's penalty language, though conclusive on the AIA question, does not constrain the Court's inquiry whether, and how, the Constitution authorized Congress to enact the mandate.[45] Indeed, the Chief Justice notes, the Court in past cases has sustained under the taxing power measures not labeled *taxes*.[46] Payments pursuant to the individual mandate will raise revenue for the government, helping to offset the cost of providing medical services to people who refuse to buy insurance. Based on several factors—the payment cannot exceed the cost of private medical insurance, the mandate contains no scienter requirement, the Act empowers the IRS to collect the payment by ordinary means, and the conduct that triggers the payment need not be classed as unlawful—the Chief Justice concludes that the Court can fairly uphold the mandate under the taxing power.[47]

In contrast to Chief Justice Roberts's analysis of the commerce power and the Necessary and Proper Clause, his taxing power analysis makes law, insofar as it holds that the Constitution gave Congress the power to enact the individual mandate. Justice Ginsburg, writing for the Court's four liberal Justices, joined the Chief Justice's taxing power analysis, providing

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[42] I.R.C. § 7421(a) (2006).

[43] *See* I.R.C. §§ 5000A(b), (g)(1).

[44] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2582–84 (2012).

[45] *See id.* at 2594–95; *see also* Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948) ("The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.").

[46] *See id.* at 2595.

[47] *See id.* at 2595–97.

the only outright majority for any aspect of his opinion.[48] The legal basis for the Chief Justice's disposition, however, remains elusive. The conclusion that the taxing power saves the mandate rests on two critical premises that he fails to defend in any substantial way. That absence of legal support renders the Chief Justice's taxing power analysis descriptively lawless.

First, Chief Justice Roberts posits that Congress in the PPACA waived the AIA's protection by declining to label the individual mandate a tax. "The Anti-Injunction Act and the Affordable Care Act," he explains, "are creatures of Congress's own creation. How they relate to each other is up to Congress . . . ."[49] When the Court inquires into that relationship, "the best evidence of Congress's intent is the statutory text."[50] Those propositions make sense, as far as they go. Congress must have power to waive the AIA's protection explicitly.[51] When Congress makes no explicit statement, the Court should make a text-based inquiry into Congress's intent. The Chief Justice, however, provides no additional legal grounding for his analysis; and beyond those starting points, difficult questions quickly arise. Should not the AIA's purpose of shielding revenue measures from premature legal challenges—a purpose that serves both the government's interest in not defending overzealous lawsuits and the judiciary's interest in not adjudicating them—lead the Court to inquire, in determining whether Congress intended the AIA to shield a given revenue measure, whether or not the measure *in effect* imposes a tax?[52] Even if the Court should not make such a substantive inquiry, is any evidence beyond the fact that Congress happened to call a measure a *tax* or a *penalty* relevant to the AIA inquiry, or must Congress recite the word *tax* to avoid waiving the AIA's protection? The task of determining whether or not the AIA barred the *NFIB* challenge should have prompted thoughtful consideration of these questions. Instead, the Chief Justice simply reduces his examination of "Congress's intent" to a

[48] Justice Ginsburg, writing for herself and Justice Sotomayor, also concurred in the portion of Chief Justice Roberts's judgment that severs the unconstitutional spending condition in the Act's expansion of Medicaid, although she vigorously disputes the underlying constitutional judgment. *See id.* at 2641–42 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). For a discussion of the Medicaid expansion, see *infra* Part II.

[49] *Id.* at 2583 (opinion of the Court).

[50] *Id.*

[51] The Chief Justice goes so far as to suggest that Congress may secure the AIA's protection for any measure it labels a *tax*, even if the Court concludes that the measure is not a tax at all. He supports that proposition with a single citation to a ninety-year-old case. *See id.* (citing Bailey v. George, 259 U.S. 16 (1922)). The idea that Congress may implicate the Court in a categorical charade would seem to demand a more thorough defense, but the Chief Justice shows no interest in scrutinizing a notion that points toward the conclusion he wants to reach.

[52] *Cf.* Bob Jones Univ. v. Simon, 416 U.S. 725, 740 (1974) (finding, in concluding that the AIA barred a pre-enforcement suit against revocation of a tax exemption, "no evidence that [the revocation] does not represent a good-faith effort to enforce the technical requirements of the tax laws," and emphasizing that the challenger "has not shown that the [Internal Revenue] Service's action is without an independent basis in the requirements of the [Tax] Code").

robotic word search, follows that approach to his preferred outcome, and leaves a void where legal analysis belongs.[53]

Second, Chief Justice Roberts concludes, after positing that the Taxing Clause authorizes only taxes and not penalties, that the individual mandate falls on the proper side of the divide.[54] The Court for decades has taken a highly lenient posture toward the taxing power, treating any measure that raises revenue as a tax.[55] But the Chief Justice, startlingly, revives the long-interred proposition that the Taxing Clause does not empower Congress to impose penalties. He even holds up the notorious restrictive analysis of the *Child Labor Tax Case*[56] as his exemplar of judicial review under the Taxing Clause.[57] He does not define the universe of impermissible penalties, but he expends considerable energy to establish that the individual mandate is not one. The four joint dissenters, in contrast, carry the Chief Justice's indulgence of the tax–penalty distinction all the way home. They insist that the Court has never upheld under the taxing power any law that imposes "[a] penalty for constitutional purposes,"[58] and they argue vigorously that the mandate is just such a penalty.

The Chief Justice's response to the joint dissenters' argument boils down to a single precedent: *United States v. Sotelo*,[59] which validated a penalty for nonpayment of taxes as a nondischargeable tax within the meaning of the Bankruptcy Code.[60] But *Sotelo*, as the joint dissenters easily respond, did not present an issue about the constitutional authority for any congressional enactment.[61] In fact, the issue in that case closely resembled the AIA question in *NFIB*, requiring the Court to decide only whether the penalty at issue fit within another *statutory* definition of *tax*. The Chief Justice's rejoinder—that both *Sotelo* and *NFIB* are statutory construction

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[53] The joint dissent, which also purports to consider the AIA question, reaches the same conclusion as the Chief Justice based on even shallower analysis. *See NFIB*, 132 S. Ct. at 2655–56 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

[54] *See id.* at 2596–97 (opinion of the Court).

[55] *See* Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2200–04 (2004) (describing the wide range of revenue measures that the Court has permitted under the taxing power).

[56] Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20, 38 (1922) (striking down a tax on goods produced by child labor as a penalty not authorized by the taxing power).

[57] *See NFIB*, 132 S. Ct. at 2595.

[58] *Id.* at 2651 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

[59] 436 U.S. 268 (1978).

[60] *See id.* at 273–75. The Chief Justice cites other cases that either declined to extend the taxing power to measures that Congress labeled *taxes* or upheld under the taxing power measures that Congress did not label *taxes*. *See NFIB*, 132 S. Ct. at 2594–95. Only in *Sotelo*, however, did the Court treat as a *tax* what Congress labeled (and the Court acknowledged as) a *penalty*.

[61] *See id.* at 2651 n.5 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting). The joint dissenters similarly might have pointed out that another case the Chief Justice cites for the proposition that categorical labels should not govern taxing power analysis, *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), does not involve Congress's taxing power at all but rather strikes down a state tax under the Commerce Clause. *See NFIB*, 132 S. Ct. at 2595.

cases[62]—is either amateurish or disingenuous, and he is no amateur. His taxing power analysis strongly suggests a renewed legitimacy for the tax–penalty distinction; but he neglects to develop that suggestion into a functional legal analysis, while also failing to explain how the supposed distinction spares the individual mandate.[63] These failings produce descriptive lawlessness.

II. THE MEDICAID EXPANSION ANALYSIS: AN OFFER STATES COULDN'T REFUSE?

The second primary object of the constitutional challenge to the PPACA was the Act's expansion of Medicaid, the longstanding federal program that provides medical assistance to the poor. Most significantly, the Act makes every person under age sixty-five with an income up to 133% of the federal poverty level eligible for Medicaid.[64] The practical complication of the expansion is that Medicaid has always been an exercise in "cooperative federalism," under which the federal government imposes broad policy directives, provides the majority of funding, and oversees the program, while the states decide on numerous aspects of implementation, provide substantial funding, and administer the program.[65] To ensure that states would effectuate Congress's changes to Medicaid, the Act contained a leverage provision that allowed the Secretary of Health and Human Services to withhold up to 100% of Medicaid funding from any state that refused to implement the expansion.[66] Chief Justice Roberts—joined without comment and perhaps opportunistically by Justices Breyer and Kagan[67] and substantively supported by the four joint dissenters—held this condition on federal funding unduly coercive, in violation of Congress's constitutional authority to spend money.[68]

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[62] *See id.* at n.7.

[63] For an effort both to justify reviving the tax–penalty distinction and to explain why that distinction should not doom the individual mandate, see Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195 (2012). Professors Cooter and Siegel express strong approval of Chief Justice Roberts's tax analysis in *NFIB*, *see id.* at 1247–52, but they deserve credit for trying to fill the analytic holes the Chief Justice left gaping.

[64] 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (Supp. V 2012). The Act also extends certain minimum coverage provisions of Medicaid to the newly eligible beneficiaries. *See id.* §§ 1396a(k)(1), 1396u-7(b), 18022(b).

[65] *See* Nicole Huberfeld, *Federalizing Medicaid*, 14 U. PA. J. CONST. L. 431, 444–49 (2011) (discussing the genesis of Medicaid and the program's division of authority between the federal government and the states).

[66] *See* 42 U.S.C. § 1396c (2006).

[67] Justices Breyer and Kagan's complicity in this part of the Chief Justice's opinion might enable them to argue credibly in a later case that the Court should resolve the opinion's ambiguities in a more permissive manner for congressional spending conditions.

[68] *See* U.S. CONST. art. I, § 8, cl. 1 (granting Congress "Power . . . to pay the Debts and provide for the . . . general Welfare of the United States").

The Court's leading decision on the spending power as a regulatory lever, *South Dakota v. Dole*,[69] provides what scant authority exists for the Chief Justice's spending power analysis. The Court has long held that the spending power allows Congress to achieve, through spending leverage, policy outcomes that it might lack power to achieve under the Commerce Clause.[70] *Dole* specifies several criteria that Congress must satisfy when imposing conditions on grants to states,[71] none of which anyone seriously accused the PPACA's Medicaid condition of failing. After making its major points, the *Dole* Court notes in passing "that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[72] The *Dole* Court does not elaborate on that single sentence. It offers no description of what might constitute undue coercion, no indication that Congress has ever crossed the line, and no suggestion of what remedy the Constitution might authorize the Court to impose if Congress ever did so.

Chief Justice Roberts's treatment of the Medicaid expansion dwells on the Court's decisions that bar Congress from "commandeering" state institutions to implement federal policy.[73] But he does not hold that the expansion commandeered the states. The Chief Justice also foregrounds *Steward Machine Co. v. Davis*,[74] which upheld against charges of undue coercion the Social Security Act's abatement of payroll taxes for employers that paid money into federally certified state unemployment programs.[75] But he understandably rests no conclusions on *Steward Machine*, whose factual context differs markedly from that of *NFIB*. Instead, the Chief Justice parlays the *Dole* Court's one-sentence anticoercion dictum into a severe constraint on the PPACA's Medicaid expansion. The Chief Justice calls the Act's allowance for the federal government to withhold all Medicaid funding from a state that fails to comply with the Medicaid expansion "a gun to the head."[76] He emphasizes the leverage provision's massive stakes for states, citing statistics that federal Medicaid funding accounts for over twenty percent of most state budgets.[77] The Chief Justice proclaims that the

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[69] 483 U.S. 203 (1987).

[70] *See* United States v. Butler, 297 U.S. 1, 66 (1936) (endorsing Alexander Hamilton's view that Section 8's authorization to spend for the "general welfare" enables regulation beyond the commerce power).

[71] *See Dole*, 483 U.S. at 207–08.

[72] *Id.* at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

[73] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602–03 (2012) (opinion of Roberts, C.J.) (discussing Printz v. United States, 521 U.S. 898 (1997) (barring commandeering of state executive branch officials), and New York v. United States, 505 U.S. 144 (1992) (barring commandeering of state legislatures)).

[74] 301 U.S. 548 (1937).

[75] *See NFIB*, 132 S. Ct. at 2603 (opinion of Roberts, C.J.).

[76] *Id.* at 2604.

[77] *See id.*

Act's Medicaid expansion does not, in fact, expand Medicaid. Instead, the Act "enlist[s] the States in a new health care program."[78] Congress could not possibly have authority to hold federal funding for an existing program hostage to ensure implementation of a new program. To remedy this coercion, the Chief Justice fully excises the leverage provision from the PPACA.[79] *NFIB* leaves the Act's substantive changes to Medicaid intact, but the federal government now lacks any mechanism to ensure that states implement them.

Beyond Chief Justice Roberts's inflation of a sketchy dictum into a pillar of Spending Clause doctrine, his analysis and disposition of the Medicaid expansion reflect two critical ambiguities that render his opinion on this issue legally incomprehensible, and thus descriptively lawless. First, because the Medicaid Act explicitly authorizes Congress to expand or alter the program,[80] the Chief Justice's holding depends on his treatment of "existing Medicaid" and "new Medicaid" as two separate federal programs. But his bifurcation of Medicaid has no basis in law or logic. By the Chief Justice's reasoning, every time the government purports to expand a cooperative federalism program beyond its initial scope, it actually creates a new program. With critical distance, the problem gets much worse. As Justice Ginsburg emphasizes, Congress has in fact substantially changed and expanded Medicaid on numerous occasions over the years.[81] What makes this expansion any different? The Chief Justice can offer no better response than his semantic assertion that "[this] Medicaid expansion . . . accomplishes a shift in kind, not merely degree."[82] The PPACA also applies longstanding Medicaid procedures to the new beneficiaries.[83] Does new Medicaid somehow incorporate the numerous salient provisions of existing Medicaid by reference? What constitutional principles would govern congressional prerogatives if a state balked at applying an existing-Medicaid procedure to a new-Medicaid beneficiary or to a mixture of new and preexisting beneficiaries? At a broader level, should we now understand the *Dole* anticoercion dictum as forbidding the government to withhold funds from any existing program in order to ensure compliance with any new federal requirement? Such a bar would upend the holding of *Dole* that a spending condition must simply relate to some federal project or

[78] *Id.* at 2606.

[79] *See id.* at 2607.

[80] *See* 42 U.S.C. § 1304 (2006).

[81] *See NFIB*, 132 S. Ct. at 2631–32, 2638–39 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[82] *Id.* at 2605 (opinion of Roberts, C.J.).

[83] *See id.* at 2635 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

program.[84] The Chief Justice's failure to provide any grounding for his cleavage of Medicaid suggests that its only justification is convenience.

Second, Chief Justice Roberts's reasoning about coercion and disposition of the Act's leverage provision may—or may not—suffer from a crucial disconnect. The Chief Justice emphasizes that Congress should not be able to withhold *all* of a state's funding under a government program in order to encourage a state's compliance with a federal policy, especially when the funding amounts to a large portion of the state's overall revenues.[85] Although that argument has only the barest basis in precedent and rests on the dubious premise that states may credibly claim detrimental reliance on federal funds, it at least makes a comprehensible claim. But the Chief Justice proceeds to hold that Congress may not withhold *any* of a state's Medicaid funding to ensure compliance with the PPACA's expansion.[86] That holding may simply reflect the Act's architecture: striking the entire leverage provision may have been the only way for the Court to remedy the provision's excessive, constitutionally impermissible possibilities. That remedial explanation, however, ignores the plausible alternatives of imposing a limiting construction on the leverage provision or waiting to entertain as-applied challenges to actual federal withholding of Medicaid funds. The remedial explanation for the Chief Justice's "all"–"any" disconnect also soft-pedals his objection to the leverage provision as a "retroactive condition[],"[87] an objection that suggests he might reject federal power to impose even de minimis penalties for states' noncompliance with the expansion. The Chief Justice, however, refuses to wrestle or even engage with the question of how much coercion is too much: "It is enough for today that wherever that line may be, this statute is surely beyond it."[88]

The *Dole* anticoercion dictum has proved notoriously difficult for lower courts to administer, leading many courts and commentators to treat the anticoercion principle as nonjusticiable.[89] Chief Justice Roberts, in giving the dictum serious legal effect for the first time, had a responsibility to provide guidance to Congress should it seek to repair or replace the PPACA's leverage provision. May Congress pass a new authorization for the Secretary to withhold up to, say, 5% of noncompliant states' Medicaid

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[84] *See* South Dakota v. Dole, 483 U.S. 203, 207–08 (1987).

[85] *See NFIB*, 132 S. Ct. at 2604–05 (opinion of Roberts, C.J.).

[86] *See id.* at 2607.

[87] *Id.* at 2637 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 25 (1981)).

[88] *Id.* at 2606.

[89] *See, e.g.*, Lynn A. Baker & Mitchell N. Berman, *Getting off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 485 (2003) (calling the anticoercion principle "at best, ill-suited for judicial administration and, at worst, incoherent").

funds? If not, why not?[90] The Chief Justice's failure to provide any legal insights as to these essential questions completes his *NFIB* opinion's catalog of descriptive lawlessness.

III. THE CHIEF JUSTICE'S INSTITUTIONAL STEWARDSHIP: A QUESTIONABLE PLAN, BADLY EXECUTED

Perhaps my analysis to this point has judged Chief Justice Roberts's opinion in *NFIB* too harshly by ignoring his complex and noble motives. At critical moments in the past, the Supreme Court has compromised its legal analysis of constitutional issues in order to defuse potentially explosive political conflicts and safeguard the Court's institutional authority. Two prominent examples from the Rehnquist Court are *Planned Parenthood of Southeastern Pennsylvania v. Casey*[91] and *Dickerson v. United States*.[92] Each of those decisions reaffirmed a controversial precedent—*Roe v. Wade*[93] in *Casey*; *Miranda v. Arizona*[94] in *Dickerson*—for which public support appeared to have decreased over time. Each decision imposed or indulged significant constraints on the challenged precedent, vindicating the Court's institutional authority while simultaneously adjusting to changed political norms.[95] Both decisions dialed down, to some extent and for some years, legal controversy about the precedents at issue. *NFIB* arguably shares key characteristics with *Casey* and *Dickerson*. The Court has long promoted an expansive vision of federal power; however, a majority of the public, at the time the Court handed down *NFIB*, opposed the PPACA.[96] Chief Justice

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[90] Sam Bagenstos argues that reading several distinct strands of Chief Justice Roberts's anticoercion rhetoric as conjunctive requirements for a coercion claim might render the Court's anticoercion holding in *NFIB* manageable. *See* Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After* NFIB, 101 GEO. L.J. 861 (2013). As with the Chief Justice's deficient analysis of the tax–penalty distinction, *see supra* note 63, the fact that a top-flight legal scholar can devise reasoning to explain a legal opinion does not make the opinion itself legally coherent.

[91] 505 U.S. 833 (1992) (affirming the constitutional right to abortion, upholding some state restrictions on abortion, and rejecting others).

[92] 530 U.S. 428 (2000) (affirming the constitutional status of *Miranda* warnings and striking down a federal statute as inconsistent with *Miranda*).

[93] 410 U.S. 113 (1973) (holding that the Due Process Clause protects a woman's right to have an abortion).

[94] 384 U.S. 436 (1966) (requiring arresting officers to advise arrestees formally of specific constitutional procedural rights).

[95] *See* Neal Devins, *How* Planned Parenthood v. Casey *(Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318, 1325–30 (2009) (describing *Casey* as the Court's effort to reconcile the right to abortion with prevailing public ambivalence about abortion); Donald A. Dripps, *Constitutional Theory for Criminal Procedure:* Dickerson, Miranda, *and the Continuing Quest for Broad-but-shallow*, 43 WM. & MARY L. REV. 1, 35 (2001) (contending that *Dickerson* compromised the force of *Miranda* by accommodating "inconsistent and unprincipled" intervening cases that had weakened the *Miranda* rule).

[96] *See* Peter Baker, *For Obama, a Signature Issue That the Public Never Embraced Looms Large*, N.Y. TIMES (June 29, 2012), http://www.nytimes.com/2012/06/30/us/politics/health-care-overhaul-is-still-no-hit-with-public.html (describing the unpopularity of the PPACA and noting polling data shortly before *NFIB* that found public support for the Act at 34%).

Roberts's opinion, by its defenders' account, manages to vindicate the Court's established constitutional judgment, make reasonable concessions to changed public norms, and safeguard the Court's institutional authority.[97]

To the extent Chief Justice Roberts in *NFIB* abdicated legal analysis in order to address political threats to the Court's institutional interest, his opinion embodies lawlessness in the normative sense. Even so, his defenders seek to justify that normative lawlessness on institutional grounds. I share their premise that constitutional law overlaps substantially and inevitably with politics, such that courts cannot and should not bar certain political considerations from constitutional adjudication. I also agree that the Court has a responsibility to safeguard its institutional authority, and my antipathy toward much of the substantive reasoning in *Casey* and *Dickerson* does not prevent me from viewing those decisions as properly having taken public perceptions of the Court's precedents into account. Finally, I agree that the Chief Justice of the United States has a distinctive responsibility to guard the Court's institutional authority, and the notion that such an institutional concern substantially motivated Chief Justice Roberts's lead opinion in *NFIB* seems reasonable. Measured against that goal, however, his opinion fails to justify his disregard for legal analysis.

NFIB differs materially from *Casey* and *Dickerson*. Those two decisions involved divisive political issues—abortion and coerced confessions—that the Supreme Court had recently chosen to constitutionalize. Both issues continued to figure prominently in public political debates after the Court's intervention. The Court in *Casey* and *Dickerson* made or validated politically beneficial concessions on the underlying legal issues in order to preserve, at least nominally, the challenged precedents' essential holdings. In contrast, while the federal–state balance of power has inspired strong political disagreements throughout our history, federal courts from the beginning have mediated federalism disputes.[98] The constitutional law of federal power has stayed remarkably stable for the past seventy-five years, with public opposition to the Court's doctrine concentrated in the debased precincts of the Jim Crow South. The *NFIB* Court did not confront the difficult balance between adherence to precedent and attention to changed political norms that characterize *Casey* and *Dickerson*. The Justices merely faced the danger that, should they choose to depart from their own precedents by limiting federal power, opponents of the result would accuse the Court of judicial activism.

But even if that danger—a perennial occupational hazard of constitutional judging—somehow justified the same sort of departure from ordinary norms of adjudication seen in *Casey* and *Dickerson*, Chief Justice

[97] *See, e.g.*, Rosen, *supra* note 3 (claiming that "Roberts' decision was above all an act of judicial statesmanship" and that "Roberts chose to place institutional legitimacy front and center").

[98] *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

Roberts's *NFIB* opinion would earn low marks for institutional self-defense. Consideration of three possible varieties of judicial activism complaints exposes his failure.

First, in the difficulty most closely tied to the federalism issues at the heart of *NFIB*, the Court ran the risk of appearing unduly activist for broadly moving toward a more restrictive view of federal regulatory power. Chief Justice Roberts's *NFIB* opinion pours rocket fuel on that fire. Although the Chief Justice's discussion of the commerce power and the Necessary and Proper Clause makes no actual law,[99] that deficit reflects no lack of effort. The Chief Justice, as enthusiastically as the joint dissenters, veers far out of his way to craft the "action–inaction" distinction as a brand-new constraint on the commerce power. His attack on congressional power ranges beyond the Commerce Clause to the Necessary and Proper Clause, the spending power, and—given his apparent revival of the tax–penalty distinction[100]—even the taxing power. Analytical deficiencies aside, his opinion mounts the most comprehensive assault on federal authority in the Court's history. His one departure from a restrictive reading of federal power, upholding the individual mandate under the Taxing Clause, comes off as rhetorically halfhearted, legally narrow, and shakily persuasive at best.[101] Five Justices now stand on record as eager to reopen federalism battles long thought settled. Activism accomplished.

Second, critics might have charged the Court with judicial activism for striking down a momentous piece of federal social policy legislation and thus transgressing the separation of powers. The Chief Justice's supposed effort to avoid this charge still managed, by excising the funding penalty from the Act's Medicaid expansion, to engineer the Court's most important weakening of a federal statute since the early years of the New Deal.[102] Several conservative governors seized on the Court's decision as a basis for refusing to implement the Medicaid expansion.[103] The Congressional Budget Office estimates that such recalcitrance will thwart the PPACA from delivering insurance to three million people.[104] The governors' resistance represents a startling rebellion against congressional action in a sphere of undeniably national scope, orchestrated by Chief Justice Roberts. The mandate's survival thus represents only a marginal victory for judicial

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[99] *See supra* notes 27–40 and accompanying text.

[100] *See supra* notes 54–63 and accompanying text.

[101] *See supra* Part I.B.

[102] *See supra* note 22 and accompanying text.

[103] *See* Manny Fernandez, *Perry Declares Texas' Rejection of Health Care Law "Intrusions,"* N.Y. TIMES (July 9, 2012), http://www.nytimes.com/2012/07/10/us/politics/perry-says-texas-rejects-health-law-intrusions.html (discussing several Republican governors' refusal to participate in the Medicaid expansion).

[104] *See* Robert Pear, *Court's Ruling May Blunt Reach of the Health Law*, N.Y. TIMES (July 24, 2012), http://www.nytimes.com/2012/07/25/health/policy/3-million-more-may-lack-insurance-due-to-ruling-study-says.html.

deference to Congress, and how substantial is even that marginal victory? Judicial restraint ordinarily entails robust deference to elected officials' judgment. In this case, the Chief Justice upheld the individual mandate only after savaging Congress's professed basis for enacting it and wanly embracing a narrower justification that the government pressed with little enthusiasm. The PPACA remains alive, but it rests on a hollow legal foundation.

Finally, critics might have called the Court activist for voting along predictable ideological lines in a politically sensitive case. Here the fanfare for Chief Justice Roberts reaches its crescendo: he courageously broke with his conservative allies to side with the Court's liberals![105] But his opinion breaks with conservative dogma only in a thin sense, upholding the individual mandate on the narrowest available ground while effectively gutting the Medicaid expansion and promulgating a manifesto on the evils of excessive federal power. The bulk of *NFIB*, in fact, breaks down along familiar lines: only the Chief Justice's heavily compromised vote to uphold the individual mandate and Justices Breyer and Kagan's inscrutable acquiescence in weakening the Medicaid expansion depart from the usual partisan script.

In any event, this third sort of complaint about judicial activism—in contrast to the complaints grounded in federalism and the separation of powers—deserves far less attention than the Chief Justice's defenders claim he gave it. If a politically polarized public reads the Court's divisions of legal opinion as mirroring the public's own political divide, so what? Principled Justices should ignore the danger of appearing partisan as surely as they should resist actual partisan motives. Even if we suppose the Chief Justice should vote against his legal convictions in order to counter impressions of a partisan divide, how often should he do so, and why did *NFIB* present the right occasion for falling on his sword? Do the Chief Justice's recent opinion for a 5–4 conservative majority that struck down the preclearance formula of the Voting Rights Act[106] and his dissent from a similarly "party-line" 5–4 decision to strike down the Defense of Marriage Act[107] belie his diplomatic sacrifice in *NFIB*? Or did the supposed sacrifice exacerbate the Court's partisan divide by providing strategic cover for the later, ideologically regular actions?

Chief Justice Roberts's opinion in *NFIB* ultimately resembles *Casey* and *Dickerson* far less than it resembles a case in which the Rehnquist Court reached a very different sort of accommodation between law and politics: *Bush v. Gore*.[108] The comparison may surprise observers who insist

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[105] *See supra* notes 3–4 and accompanying text.

[106] Shelby Cnty. v. Holder, No. 12-96, 2013 WL 3184629, at *4–*18 (U.S. June 25, 2013).

[107] United States v. Windsor, No. 12-307, 2013 WL 3196928, at *17–*20 (U.S. June 26, 2013) (Roberts, C.J., dissenting).

[108] 531 U.S. 98 (2000).

the Chief Justice's decision to uphold the individual mandate transcended politics; but the contrast between *Casey* and *Dickerson*, on one hand, and *Bush v. Gore*, on the other, casts an unflattering light on *NFIB*. In *Casey* and *Dickerson*, the Court attempted to fashion legal rules that would both accommodate political realities and provide meaningful guidance for future cases. In contrast, the Court in *Bush v. Gore* notoriously announced an equal protection holding that bears scant resemblance to prior doctrine, then proclaimed that its holding lacked any precedential force.[109] The Court constructed a Potemkin legal analysis in order to achieve—on the least cynical view of its motives—short-term political stability. The Chief Justice's opinion in *NFIB* uses similar means to achieve a similar end, tossing off unsupported or half-formed arguments to defuse immediate political concerns about the individual mandate. Ironically, public antipathy toward *Bush v. Gore* probably accounted in large part for whatever institutional vulnerability the Court faced in *NFIB*. How could repeating the earlier decision's mistakes do anything, in the long run, but further erode public confidence in the Court?

A coda: No evaluation of Chief Justice Roberts's institutional stewardship in *NFIB* should ignore the horrific optics of the Court's performance. In *Casey*, Justices O'Connor, Kennedy, and Souter filed a joint majority opinion that placed an unprecedented "centrist" coalition behind the Court's qualified reaffirmation of *Roe*. In *Dickerson*, Chief Justice Rehnquist rallied a solid majority of the Court behind his qualified reaffirmation of *Miranda*. In sharp contrast with those decisions, most of Chief Justice Roberts's lead opinion in *NFIB* speaks for him alone, and almost all of it appears to reflect his distinctive reasoning. A few cursory lines from Justice Ginsburg contain the only words of direct support for the Chief Justice's reasoning that any other Justice committed to paper,[110] and Justice Ginsburg spends the rest of her sixty-one-page opinion beating him bloody. Justices Breyer and Kagan, whose votes to limit the Medicaid expansion provide the Chief Justice with his only other alliance across ideological lines, spill not a drop of ink in his defense. The Chief Justice's fellow conservatives, whose bizarre joint dissent echoes much of what he argues, virtually ignore his opinion and decline to join a line of it. The opinion thus imposes on the PPACA the Chief Justice's own individual mandate. Within a few days of the decision, the media was buzzing with conflicting accounts and accusations about the Chief Justice's errant behavior during the deliberations and drafting.[111] These tales told out of

[109] *See id.* at 109 (stating that "[o]ur consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities").

[110] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2629 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[111] The bombshell report that Chief Justice Roberts had changed his vote on the individual mandate and alienated his conservative colleagues in the process came from Jan Crawford, *Roberts Switched*

school do nothing to diminish the decision's legal authority, and they prove nothing even at the level of gossip. Even so, they appear to have leaked from highly placed sources inside the Court, betraying a climate of dysfunction and recrimination.[112] No capable defender of the Court's institutional reputation would foster such mayhem, let alone allow the public to see it splashed across the headlines.

CONCLUSION

In the wake of *NFIB v. Sebelius*, praise has rained down on Chief Justice Roberts for writing the opinion that upholds the PPACA's individual mandate. Whatever one's view about any of the decision's bottom-line results, the adulation is unwarranted. The Chief Justice's opinion exemplifies lawless judicial decisionmaking, in both the descriptive sense of failing to state or justify legal conclusions and the normative sense of violating bedrock legal precepts. History will validate the Chief Justice's pivotal role in *NFIB* only if we ignore his parade of offenses against responsible judicial review and cogent legal reasoning. Liberals who rejoice that the Chief Justice saved the Act, conservatives who welcome his assault on federal power, and centrists who commend him for lifting the Court above crass partisanship should all look past his opinion's rhetoric to its brittle and hazardous core. The Chief Justice's individual mandate in *NFIB* provides an important, troubling model of how the Supreme Court should not make decisions.

Views to Uphold Health Care 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.

[112] *See, e.g.*, Adam Sorensen, *John Roberts, Conservative Outcast, and the Supreme Court's Unprecedented Leak*, TIME (July 2, 2012), http://swampland.time.com/2012/07/02/john-roberts-conservative-outcast-and-the-supreme-courts-unprecedented-leak (arguing that the *NFIB* leaks indicate discord between the Chief Justice and the Court's other conservatives).