
THE DISDAIN CAMPAIGN

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You run one time, you got yourself a set of chains. You run twice you got yourself two sets. You ain't gonna need no third set, 'cause you gonna get your mind right. And I mean RIGHT. Take a good look at Luke. Cool Hand Luke?

— The Captain, Cool Hand Luke¹

In her Foreword,² Professor Pamela Karlan offers a quite remarkable critique of the conservative Justices on the Supreme Court. She faults them not so much for the doctrines they purport to follow, or outcomes they reach, but for the attitude they allegedly manifest toward Congress and the people. “My focus here is not so much on the content of the doctrine but on the character of the analysis.”³ She describes Chief Justice Roberts’s opinion of the Court as “a thinly veiled critique of Congress: the fools couldn’t even figure out how to structure section § 5000A to render it constitutional.”⁴ And of the Chief Justice’s attitude, she says that “[h]e conveyed disdain even as he upheld the Act.”⁵ In her conclusion, she asks, “if the Justices disdain us, how ought we to respond?”⁶ This question echoes how she begins her provocative piece: “The Court’s dismissive treatment of politics raises the question whether, and for how long, the people will maintain their confidence in a Court that has lost its confidence in them.”⁷

Although she also offers insightful observations comparing the Roberts Court with the Warren Court, her principal theme is reflected in these passages and the very title of her piece: “Democracy and Disdain.” According to Karlan, in addition to whatever may be wrong with their principles and doctrines, the conservative Justices simply have a bad attitude. To paraphrase the Captain in Cool Hand Luke, they don’t have their “minds right.” It is this quite distinctive thesis I

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¹ *Cool Hand Luke* (1967), FILMSITE MOVIE REV., <http://www.filmsite.org/cool3.html> (last visited Oct. 30, 2012).

² Pamela S. Karlan, *The Supreme Court, 2011 Term — Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1 (2012).

³ *Id.* at 44.

⁴ *Id.* at 50.

⁵ *Id.*

⁶ *Id.* at 71.

⁷ *Id.* at 13.

wish to examine here. For, as it happens, the left knows a thing or two about disdain.

The left began a campaign of disdain toward conservative and libertarian jurists when Robert Bork was nominated to the Supreme Court. The first shot was launched by Senator Edward Kennedy within an hour of the nomination in his now-famous floor speech before any hearings were held:

Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of the Government, and the doors of the Federal courts would be shut on the fingers of millions of citizens.⁸

While then-Senate Judiciary Committee Chairman Joseph Biden presided over a fair and substantive confirmation hearing, Kennedy's campaign of disdain was largely conducted in the media. When Bork was defeated, the campaign was credited with having worked. This was just the beginning.

The campaign of disdain was next launched against Justice Thomas. Although it failed to prevent his confirmation, it did not let up. After he became a Justice, he was subjected to an endless barrage of criticism questioning his honesty,⁹ intelligence, and independence.¹⁰ Although in recent years, the epithet of "Scalia's clone" has begun to abate,¹¹ as we shall see, it lies just beneath the surface whenever the campaign of disdain is launched against the conservative Justices who managed to survive the vetting process and make it onto the Court.

Once the conservatives attained a majority under Chief Justice Rehnquist, the campaign of disdain was aimed at the Court itself. In 1995, the conservative majority in the Rehnquist Court was met with disdain when it found a limit to the Commerce Clause and invalidated the Gun-Free School Zones Act of 1990 in *United States v. Lopez*.¹² During the litigation over the Patient Protection and Affordable Care Act¹³ (ACA), some on the left touted the distinction between economic and noneconomic activity established in that case as proof that it too

⁸ James Reston, *Kennedy And Bork*, N.Y. TIMES, July 5, 1987, at E15.

⁹ See, e.g., JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE* (1994).

¹⁰ See, e.g., Jeffrey Toobin, *Partners: Will Clarence and Virginia Thomas Succeed in Killing Obama's Health-Care Plan?*, NEW YORKER (Aug. 29, 2011), http://www.newyorker.com/reporting/2011/08/29/110829fa_fact_toobin ("The silent Justice is said to be an intellectual nonentity, a cipher for his similarly conservative colleague, Antonin Scalia.")

¹¹ *Id.* ("[T]hose who follow the Court closely find this stereotype wrong in every particular."); *id.* ("In several of the most important areas of constitutional law, Thomas has emerged as an intellectual leader of the Supreme Court.")

¹² 514 U.S. 549 (1995).

¹³ Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

believes in limits to the Commerce Clause. Back then, though, the left was fulminating about “conservative judicial activism” for finding any limit on congressional power other than some, but not all, of the enumerated rights plus the right of privacy.¹⁴

In 2000, the left’s disdain hit hysterical heights when the five conservative Justices voted in *Bush v. Gore*¹⁵ to suspend the vote counting in Florida after seven Justices had found an equal protection problem with the way the recount was being conducted. The left’s disdain for the conservative majority was in full force when, in 2008, the majority voted to protect the Second Amendment’s individual right to keep and bear arms,¹⁶ and was on display when, in 2010, the majority found that the right applied to the states via the Due Process Clause of the Fourteenth Amendment.¹⁷

One thing all these and other so-called “New Federalism” cases had in common was a continuing opposition to each of these rulings by a rigidly resolute voting block of four Justices. Even after each of these decisions was reached, none of these dissenters later accepted these cases as precedent. Each consistently urged their limitation or reversal. (Arguably, writing for the majority in *Gonzales v. Raich*,¹⁸ Justice Stevens accepted the holding of *Lopez* in finding the backyard cultivation of marijuana for medical use was “economic” activity, but attracting the vote of Justice Kennedy is a more likely explanation for its reasoning.) In their persistent resistance, the dissenting opinions of the more progressive Justices fed, and continue to feed, the left’s campaign of disdain.

This is not to suggest that the more progressive Justices have themselves manifested disdain for their more conservative colleagues. To the contrary. While some dissenting opinions may be sharper than others, the persistent collegiality of the Rehnquist and Roberts Courts has been quite admirable. But the adamant refusal of the four progressive dissenters to acquiesce in and follow these New Federalism cases has fed the campaign of disdain by critics of the conservative Justices. Because of this sustained campaign, thirty years of judicial decisions await the switch of just one vote to be swept away.

The campaign continued after the conservative Justices in *Citizens United v. FEC*¹⁹ upheld the free speech rights of American citizens

¹⁴ In 2001, an entire symposium held at the University of Colorado Law School was devoted to this topic. See Symposium, *Conservative Judicial Activism Conference*, 73 U. COLO. L. REV. 1139 (2002). For my contribution, see Randy E. Barnett, *Is the Rehnquist Court an “Activist” Court? The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275 (2002).

¹⁵ 531 U.S. 98 (2000).

¹⁶ *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

¹⁷ *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

¹⁸ 545 U.S. 1 (2005).

¹⁹ 130 S. Ct. 876 (2010).

who chose to associate as labor unions or as limited liability corporations. Indeed, on January 27, 2010, just six days after the case was decided, the President of the United States used his State of the Union address to upbraid the Justices for their decision:

With all due deference to separation of powers, last week, the Supreme Court reversed a century of law to open the floodgates for special interests — including foreign corporations — to spend without limit in our elections. Well I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities.²⁰

The disdain was not just in the words themselves but also in the context of their delivery, as the Justices were seated before the President in the well of the House surrounded by his partisans who stood and cheered the condemnation of their week-old decision.²¹ The lack of respect was underscored by the President's pro forma disclaimer, "with all due respect to the separation of powers."

To be clear, presidents are perfectly entitled to criticize the Justices and their rulings, as I often do. The issue is the discourtesy of lodging a criticism of the Justices without warning as they were forced to sit passively while predictably surrounded by standing, applauding, and cheering members of the President's own party.

In political campaigns, the object of negative broadsides is often to sway the moderate swing voter. So too with the most recent campaign of disdain launched by the left against the conservative Justices who had the temerity during oral argument in the health care challenge to take seriously the legal arguments made by the Attorneys General of twenty-six states and the National Federation of Independent Business. The skeptical tenor of the oral arguments stunned many supporters of the ACA, and there arose from their ranks a veritable rage at the impertinence of the conservative Justices.

Not content to go to their neutral corners after the case was argued and submitted, the left intelligentsia, led by the President himself, publicly went on the offensive. On March 28, 2012, the day before the Friday conference vote, *Washington Post* columnist E.J. Dionne was quick to express his disdain for the conservative "judicial activist" Justices by ridiculing their questions from the bench before moving to the implications of invalidating the ACA. If the "conservative justices . . . strike down or cripple the health-care law," he concluded, "a

²⁰ Remarks by the President in State of the Union Address, THE WHITE HOUSE (Jan. 27, 2010, 9:11 PM), <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

²¹ See TheDailyBeastVideo, *SOTU: Justice Alito Shakes Head at Obama*, YOUTUBE (Jan. 27, 2010), http://www.youtube.com/watch?v=_mTCto9qXik&feature=related. In its choice of title, notice the *Daily Beast's* adoption of the disdainful reaction of the left, not to the President's disrespectful treatment of the Justices seated before him, but to the propriety of Justice Alito's silently mouthing "not true" in response.

court that gave us *Bush v. Gore* and *Citizens United* will prove conclusively that it sees no limits on its power, no need to defer to those elected to make our laws. A Supreme Court that is supposed to give us justice will instead deliver ideology.”²²

On Monday, April 2, following the Friday conference at which — it has been reported²³ — a majority of the Justices voted 5–4 that the individual insurance mandate was unconstitutional, the President offered his comments on the deliberations then in progress. He complained “that for years what we’ve heard is the biggest problem on the bench was judicial activism or a lack of judicial restraint, that an unelected group of people would somehow overturn a duly constituted and passed law.”²⁴

The President’s remarks unleashed a deluge of disdainful punditry aimed at the conservative Justices. From her perch at the *New York Times*, the venerable Maureen Dowd accused the Court of squandering “even the semi-illusion that it is the unbiased, honest guardian of the Constitution. It is run by hacks dressed up in black robes.”²⁵ Making her target clearer, she wrote that “[a]ll the fancy diplomas of the conservative majority cannot disguise the fact that its reasoning on the most important decisions affecting Americans seems shaped more by a political handbook than a legal brief.”²⁶

Her column neatly summarized the left’s campaign of disdain for the conservative Justices. Reaching back twelve years to *Bush v. Gore*, she fumed:

In 2000, the Republican majority put aside its professed disdain of judicial activism and helped to purloin the election for W. . . . Just as Scalia voted to bypass that little thing called democracy and crown W. president, so he expressed ennui at the idea that, even if parts of the health care law are struck down, some provisions could be saved. . . .²⁷

Then reaching back twenty years, she impugned Justice Thomas for not expressing his skepticism about the government’s argument: “Inexplicably mute 20 years after he lied his way onto the court, Clarence

²² E.J. Dionne, Jr., *Judicial Activists in the Supreme Court*, WASH. POST (Mar. 28, 2012), http://www.washingtonpost.com/opinions/activist-judges-on-trial/2012/03/28/gIQAKdE2gS_story.html.

²³ See Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 1, 2012, 1:29 PM), http://www.cbsnews.com/8301-3460_162-57464549/roberts-switchedviews-to-uphold-health-care-law/.

²⁴ Adam Aigner-Treworgy, *President Obama: Overturning Individual Mandate Would Be “Unprecedented, Extraordinary Step,”* CNN (Apr. 2, 2012, 3:55 PM), <http://whitehouse.blogs.cnn.com/2012/04/02/president-obama-overturning-individual-mandate-would-be-unprecedented-extraordinary-step/>.

²⁵ Maureen Dowd, *Men in Black*, N.Y. TIMES, Apr. 4, 2012, at A21.

²⁶ *Id.*

²⁷ *Id.*

Thomas didn't ask a single question during oral arguments for one of the biggest cases in the court's history."²⁸ Dowd's conclusion?

Scalia, Roberts, Thomas and the insufferable Samuel Alito were nurtured in the conservative Federalist Society, which asserts that 'it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.' But it isn't conservative to overturn a major law passed by Congress in the middle of an election. The majority's political motives are as naked as a strip search.²⁹

On April 5, in the *Philadelphia Inquirer*, columnist Dick Polman accused the conservative Justices of being "too busy practicing ideological politics."³⁰ He disdainfully characterized the conservative "brethren" as

behav[ing] like tea-partying Fox News commentators (worrying that the government will make us eat broccoli) and political ward heelers (Antonin Scalia, on the advantage of throwing out the whole law: 'You're not going to get 60 votes in the Senate to repeal the rest'). Since when is it Scalia's business to count Senate votes?³¹

On April 9, writing in *The New Yorker*, Jeffrey Toobin disdainfully claimed that:

[T]he Supreme Court acts as a sort of supra-legislature, dismissing laws that conflict with its own political agenda. This was most evident in the 2010 case *Citizens United v. Federal Election Commission*, when the five-Justice majority eviscerated the McCain-Feingold campaign-finance law (not to mention several of its own precedents), because Congress showed insufficiently tender regard for the free-speech rights of corporations.³²

For Toobin, "[t]he question now is whether those same five Justices will rewrite — or erase — the health-care law on which Barack Obama has staked his Presidency."³³

As the Justices were writing their opinions, progressive law professors lent their voices to the campaign. University of California at Irvine School of Law Professor Richard Hasen was widely quoted as saying "the court's legitimacy would suffer in ways which we have never seen."³⁴ On April 13, Harvard Law School Professor Lawrence Lessig bemoaned a decision invalidating the mandate. "[I]f Obamacare falls, it will have struck down the most important social legisla-

²⁸ *Id.*

²⁹ *Id.*

³⁰ Dick Polman, *The American Debate: Think Supreme Court Will Be Dispassionate on Obamacare? Think Again*, PHILLY.COM (Apr. 5, 2012), http://articles.philly.com/2012-04-05/news/31294596_1_high-court-obamacare-richard-hasen.

³¹ *Id.*

³² Jeffrey Toobin, *Heavy Burden*, NEW YORKER (Apr. 9, 2012), http://www.newyorker.com/talk/comment/2012/04/09/120409taco_talk_toobin.

³³ *Id.*

³⁴ See Polman, *supra* note 30.

tion advanced by the Democratic Party in a generation,” he wrote in *The Atlantic*.³⁵ “When the Frieds, or Tribes (or Lessigs) of the world want to insist that ‘it’s not all just politics,’” he continued, “the cynics (including most forcefully, our students) will insist the facts just don’t support the theory. Even I would have to concede the appearance that it’s just politics, even if I don’t believe I could ever believe it.”³⁶

On April 24, in *Slate*, Dahlia Lithwick and New York University School of Law Professor Barry Friedman compared a prospective ruling invalidating the individual insurance mandate to *Dred Scott*.³⁷ They then advised the deliberating Justices to ignore polling that consistently showed that the ACA was unpopular:

Here’s the risk for the court: The public may not like the mandate, but when it becomes apparent the choice was mandate or rejection for pre-existing condition (or any other provision of the law the public adores), Johnny and Janie may be really angry at whoever took their health care away.³⁸

At the very time that the Chief Justice began to waiver (according to *CBS News*³⁹), George Washington University Law School Professor Jeffrey Rosen trained his fire specifically on Chief Justice Roberts. In a May 4 column that appeared in *The New Republic*, Rosen began by praising the “judicial restraint” favored by some conservatives.⁴⁰ But he then threatened that the campaign of disdain would focus on Chief Justice Roberts should he decide to invalidate the ACA. “This, then, is John Roberts’s moment of truth: In addition to deciding what kind of chief justice he wants to be, he has to decide what kind of legal conservatism he wants to embrace.”⁴¹ Were “the Roberts Court” to strike “down health care reform by a 5–4 vote, then the chief justice’s stated goal of presiding over a less divisive Court will be viewed as an irredeemable failure.”⁴² Not only that, but “by voting to strike down Obamacare, Roberts would also be abandoning the association of legal

³⁵ Lawrence Lessig, *Why Scalia Could Uphold Obamacare*, THE ATLANTIC (Apr. 13, 2012), <http://www.theatlantic.com/national/archive/12/04/why-scalia-might-uphold-obamacare/255791/>.

³⁶ *Id.*

³⁷ Barry Friedman & Dahlia Lithwick, *Justice by the Numbers: When it Comes to Deciding the Future of Obamacare, the Supreme Court Should Ignore Public Opinion*, SLATE (Apr. 24, 2012), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/the_supreme_court_and_obamacare_the_justices_should_be_careful_not_to_let_public_opinion_guide_their_decision_s_.html.

³⁸ *Id.*

³⁹ See Crawford, *supra* note 23.

⁴⁰ Jeffrey Rosen, *Second Opinions: Obamacare Isn't the Only Target of Conservative Judges*, NEW REPUBLIC (May 4, 2012), <http://www.tnr.com/article/politics/103090/magazine/conservative-judges-justices-supreme-court-obama#>.

⁴¹ *Id.*

⁴² *Id.*

conservatism with restraint — and resurrecting the pre–New Deal era of economic judicial activism with a vengeance.”⁴³

On May 14, Rosen’s theme was taken up by Senate Judiciary Committee Chair Patrick Leahy, who admonished the Chief Justice to “do the right thing.”⁴⁴ In a Senate floor speech, the Senator claimed to “trust that he will be a chief justice for all of us and that he has a strong institutional sense of the proper role of the judicial branch.”⁴⁵ But he warned, “[t]he conservative activism of recent years has not been good for the court. Given the ideological challenge to the Affordable Care Act and the extensive, supportive precedent, it would be extraordinary for the Supreme Court not to defer to Congress in this matter that so clearly affects interstate commerce.”⁴⁶

On June 21, Yale Law School Professor Akhil Amar was quoted in the *Washington Post* as saying, “If 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. What mattered was politics, money, party, and party loyalty.”⁴⁷ (As it happens, a 5–4 decision upholding the ACA has not elicited a similar objection.)

Apart from the fact that this campaign was launched after the case had been submitted to the Court, what all these and other commentaries share is a warning to the Chief Justice that his legacy, and the legacy of “the Roberts Court,” would be in jeopardy should it invalidate the “signature” legislation of the President. In jeopardy of what? In jeopardy of being held in disdain by the legal intelligentsia — by the majority of constitutional law professors who previously voiced their view that the constitutional challenges to the individual insurance mandate were frivolous. “Nice little Supreme Court you’ve got here; too bad if something were to happen to it.”

If the Chief Justice’s reported switch in time was motivated by this concern, he may well end up disappointed by the result. To be sure, as one might expect, Rosen began working overtime in *The New Republic* to praise the “Big Chief” for having followed Rosen’s advice and to defend him from criticism by conservative and libertarian observers.⁴⁸

⁴³ *Id.*

⁴⁴ Bill Mears, *Leahy Urges High Court to ‘Do the Right Thing,’ Keep Health Care Law*, CNN (May 15, 2012), <http://www.cnn.com/2012/05/15/politics/health-care-reform/index.html>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Ezra Klein, *Of Course the Supreme Court Is Political*, WASH. POST (June 21, 2012), <http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/06/21/of-course-the-supreme-court-is-political>.

⁴⁸ See Jeffrey Rosen, *Big Chief: How to Understand John Roberts*, NEW REPUBLIC (July 13, 2012), <http://www.tnr.com/article/politics/magazine/104898/john-roberts-supreme-court-aca>; Jeffrey Rosen, *Welcome to the Roberts Court: How the Chief Justice Used Obamacare to Reveal His*

And *Time Magazine* featured a flattering story entitled “Roberts Rules,” complete with a flattering cover picture.⁴⁹ “For legal buffs, the virtuoso performance of Chief Justice John Roberts in deciding the biggest case of his career was just that sort of jaw dropper, no matter how they might feel about Obamacare. Not since King Solomon offered to split the baby has a judge engineered a slicker solution to a bitterly divisive dispute.”⁵⁰

But writing in *The New Yorker*, Toobin derided “the key section of Roberts’s opinion” as “seemingly inspired more by Ayn Rand than by John Marshall.”⁵¹ In *Jurist*, my colleague Professor Robin West amped up this critique by attributing to Toobin the view that Chief Justice Roberts’s opinion was like an “Ayn Rand screed,”⁵² though Toobin does not use that even more disdainful word.

So far, Toobin and West’s critical reactions have been more representative of progressive law professors than has Rosen’s praise. Sure, the left is happy that the ACA was upheld, and Chief Justice Roberts obviously avoided their fury. But as evidenced by Karlan’s Foreword, he has not avoided their disdain.

As the quotations above show, Karlan is not content to demand that the conservative Justices vote correctly by deferring to the majoritarian branches (when she thinks the majoritarian branches are doing the right thing). No, like Cool Hand Luke, they must also get their “mind[s] right.” They must think and write about Congress with a respectful attitude. It is not enough that Chief Justice Roberts upheld what we were repeatedly told was the President’s “signature” legislation. He should have done so freely and ungrudgingly like the four progressive Justices.

Instead, Karlan acknowledges that Chief Justice Roberts provided a fifth vote for the fundamental constitutional claim of the challengers: the requirement to purchase health insurance was beyond the powers of Congress under both the Commerce and Necessary and Proper Clauses.⁵³ After doing so, he then offered a “saving construction” that eliminated the “requirement” or mandate from the statute, leaving only the penalty, which standing alone could be upheld as a tax because it

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>.

⁴⁹ David von Drehle, *Roberts Rules: What the Health Care Decision Means for the Country*, TIME (June 29, 2012), <http://swampland.time.com/2012/06/29/roberts-rules-what-the-health-care-decision-means-for-the-country>.

⁵⁰ *Id.*

⁵¹ Jeffrey Toobin, *To Your Health*, NEW YORKER (July 9, 2012), http://www.newyorker.com/talk/comment/2012/07/09/120709taco_talk_toobin.

⁵² Robin West, *Exit Rights: Roberts’ Conception of America in the ACA Decision*, JURIST (July 26, 2012), <http://jurist.org/forum/2012/07/robin-west-aca-roberts.php>.

⁵³ See Karlan, *supra* note 2, at 47.

was low enough to preserve the option or choice of whether or not to buy health insurance.⁵⁴ Contrary to what he observed to be the “more natural[]” reading of the statute, Chief Justice Roberts ruled that anyone who did not have to pay the penalty would have no legal duty to get insurance.⁵⁵ “The Federal Government does not have the power to order people to buy health insurance. Section 5000A would therefore be unconstitutional if read as a command.”⁵⁶

In sum, in the ACA, the mandate was called an “individual responsibility requirement.”⁵⁷ To “save” the rest of Obamacare, the Chief Justice essentially deleted the “requirement” part. So the *mandate* qua mandate is gone. What is left is a tax. It was because he did away with the individual mandate by means of a “saving construction” that Chief Justice Roberts found the “penalty” to be constitutional as a tax. While the individual insurance “requirement” was unconstitutional under any power, *including the tax power*, the noncoercive penalty could be upheld standing alone.

And this is one reason why Chief Justice Roberts’s swing opinion about the Commerce Clause cannot be dictum. Even the four more progressive Justices joined Part III-C, which states that “[t]he Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity.”⁵⁸ The progressives would have upheld the statute as written under the Commerce Clause, the Necessary and Proper Clause, *and* under the tax power. Chief Justice Roberts’s reasoning was far narrower, upholding a tax to induce activity, provided that the amount is not so great to be punitive. Under his reasoning, in the future Congress may not impose penalties including imprisonment on those who do not purchase health insurance, as it could have had the mandate been upheld as an exercise of the commerce power.⁵⁹

But upholding the President’s signature legislation is not good enough. “[B]oth Chief Justice Roberts’s opinion and the joint dissent,” Karlan writes, “although they reach[] different bottom lines, . . . manifest[] a pervasive disrespect for, and exasperation with,

⁵⁴ Nat’l Fed’n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2601 (2012) (opinion of Roberts, C.J.).

⁵⁵ *Id.* at 2600.

⁵⁶ *Id.* at 2601.

⁵⁷ Patient Protection and Affordable Care Act, 42 U.S.C. § 18091(1) (2006 & Supp. IV 2010) (emphasis added).

⁵⁸ *NFIB*, 132 S. Ct. at 2599.

⁵⁹ For anyone who still does not see the difference, imagine that the Controlled Substances Act was enacted under Chief Justice Roberts’s theory rather than under the Commerce Clause. We would have to empty the jails of any drug offenders, except those who refuse to pay a modest tax on their consumptive activity.

Congress.”⁶⁰ Why? Because instead of simply voting “5–4 to uphold the minimum coverage provision as a permissible exercise of Congress’s taxing power,” as the four progressive Justices had urged, Chief Justice Roberts “issued an opinion that . . . was probably the most grudging opinion ever to uphold a major piece of legislation.”⁶¹ In the end, Karlan objects not to the Chief Justice’s decision, but to his bad attitude. He was “grudging” and “expressed a basic distrust of Congress.”⁶² It is revealing, however, that Karlan then challenges the Chief Justice to continue to manifest this same bad attitude this Term when hearing the challenge to the Defense of Marriage Act (DOMA). “It will be interesting to see whether the Chief Justice’s suspicions carry over to the 2012 Term, when the Court is likely to take up the constitutionality of the federal Defense of Marriage Act, . . . where Congress, for the first time, created a federal definition of marriage.”⁶³ I take it she thinks that such suspiciousness would be a *good* thing. Fair enough. Let’s be consistently skeptical of Congress. But then why should the left not be held to its professed respect for Congress when it passed DOMA, which was signed into law by President Clinton? Or its respect for the people of California when it enacted Proposition 8 denying the status of “marriage” to same-sex couples?

One suspects that it is restraint for thee, but not for me. Which is where discussions of judicial restraint typically end. So too with judicial disdain. Disdain is okay, so long as it is directed at the five conservative Justices on the Supreme Court when the four progressive ones are opposing them.

Indeed, disdain is a weapon to be wielded like the dogs in *Cool Hand Luke* to bring conservative Justices to heel. It is not enough for the Chief Justice to yield to the political branches. He must also have his mind right.

Boss Paul: You got your mind right, Luke?

Luke: Yeah. I got it right. I got it right, boss. (He grips the ankles of the guard)

Boss Paul: Suppose you’s [to] back-slide on us?

Luke: Oh no I won’t. I won’t, boss.

Boss Paul: Suppose you’s to back-sass?

Luke: No I won’t. I won’t. I got my mind right.⁶⁴

⁶⁰ Karlan, *supra* note 2, at 44.

⁶¹ *Id.* at 47.

⁶² *Id.*

⁶³ *Id.* at 48 n.289.

⁶⁴ See *Cool Hand Luke* (1967), *supra* note 1.

Until Chief Justice Roberts does — or until the conservative Justices lose their slim majority — the disdain campaign will continue.