
AFFORDABLE CONVERGENCE:
“REASONABLE INTERPRETATION” AND
THE AFFORDABLE CARE ACT

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The constitution of the United States is to receive a reasonable interpretation of its language, and its powers, keeping in view the objects and purposes, for which those powers were conferred. By a reasonable interpretation, we mean, that in case the words are susceptible of two different senses, the one strict, the other more enlarged, that should be adopted, which is most consonant with the apparent objects and intent of the constitution

— Joseph Story (1833)¹

That the Court was sharply divided was not a surprise. The contrasting briefs — including a record 136 from amici — laid out the dispute.² Over the extraordinary six hours of oral argument, the Justices actively interrupted the advocates, with Justices Ginsburg, Breyer, Sotomayor, and Kagan directing considerably more words to the challengers, and Chief Justice Roberts and Justices Scalia, Kennedy, and Alito the mirror image, directing far more of their words to the government.³ So it was not a surprise to find that the Justices produced two starkly warring opinions. One would strike down as un-

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¹ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 419 (Boston, Hillard, Gray & Co. 1833).

² Greg Stohr, *Record Number of Amicus Briefs Filed in Health Care Cases*, BLOOMBERG NEWS (Mar. 15, 2012, 12:55 PM), <http://go.bloomberg.com/health-care-supreme-court/2012-03-15/record-number-of-amicus-briefs-filed-in-health-care-cases/>.

³ See David Lauter, *Bad Omen for Healthcare Law: Many Comments from the Justices*, L.A. TIMES (Mar. 30, 2012), <http://articles.latimes.com/2012/mar/30/news/la-pn-bad-omen-for-health-care-law-many-comments-from-the-justices-20120329>; *Breakdown of the Justices' Discussions*, L.A. TIMES (Mar. 30, 2012), <http://www.latimes.com/news/nationworld/nation/wire/la-pn-bad-omen-for-health-care-law-many-commen-002,0,1291809.photo> (displaying statistical data compiled by Professor Michael Evans); see also Adam Liptak, *Reviewing the Health Care Arguments, Laugh Count Included*, N.Y. TIMES, June 26, 2012, at A14, available at http://www.nytimes.com/2012/06/26/us/sidebar-courts-arguments-on-health-care-by-the-numbers-and-the-laugh.html?_r=2 (noting that the Justices spoke significantly more than usual, but not detailing the targets of their questions); “*Verrilli, Slapped Silly, Recovers Willy-Nilly*” *Revisited*, XPOSTFACTOID (June 27, 2012, 8:56 PM), <http://xpostfactoid.blogspot.com/2012/06/verrilli-slapped-silly-recovers-willy.html> (discussing both the high rate of interruptions and the targets of the Justices’ questions).

constitutional the entire Patient Protection and Affordable Care Act,⁴ and another would entirely uphold the same law;⁵ the two opinions embodied distinctive approaches to the issues at hand, to constitutional interpretation, and indeed, to how to view the world.

The unexpected further, controlling opinion authored by Chief Justice Roberts was historic not only in its bottom line (upholding most of the law but under the federal taxing power, after finding no power under the Commerce Clause), but also in its staking out a third position, outside the two warring camps.⁶ Leaving to others speculative debate about the motivations and intentions of Chief Justice Roberts,⁷ this Comment argues that this third opinion transcended the polarized political debates surrounding the legal challenge to President Barack Obama's signature domestic policy initiative through analytical convergence, not political compromise. Although pundits called it a compromise, something else was at work.⁸ Here, Chief Justice Roberts followed Justice Joseph Story's view of "reasonable interpretation."⁹ Seeing the decision as one of law, not just of politics, demonstrates the power of arguments and explanations rather than sheer outcomes or advantage. The reasons and interpretations exchanged in this case — not just the votes and the result — amplify the Supreme Court as a symbol of the rule of law. And, because it was a legal ruling, there

⁴ Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified as amended at scattered sections of 26 and 42 U.S.C.); see *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2642–43 (2012) (joint dissent) (declaring unconstitutional all of 124 Stat. 119). Although Justice Thomas's separate dissent staked out still another position, he joined the joint dissent.

⁵ See *NFIB*, 132 S. Ct. at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). Given the view of Chief Justice Roberts, Justice Ginsburg's opinion joined his remedy for the constitutional violation he identified — with a total of seven Justices in agreement on that violation. *Id.* at 2642.

⁶ *Id.* at 2577–80 (majority opinion).

⁷ See, e.g., Jonathan Chait, *John Roberts Saves Us All*, N.Y. MAG. (June 28, 2012, 11:33 AM), <http://nymag.com/daily/intel/2012/06/john-roberts-saves-us-all.html> (speculating that the Chief Justice may have sought to avoid a crisis, which would have jeopardized the Court's and his own reputations); Nina Totenberg, *Did Roberts Flip on the Health Care Decision?*, NPR (July 3, 2012, 7:04 PM), <http://www.npr.org/blogs/itsallpolitics/2012/07/03/156201552/did-roberts-flip-on-the-health-care-decision>. For scholarly consideration of the strategic analysis of judicial decisionmaking, see Lee Epstein & Tonja Jacobi, *The Strategic Analysis of Judicial Decisions*, 6 ANN. REV. L. & SOC. SCI. 341 (2010). In this area of research, scholars treat as judges' primary motivation the desire to issue judgments reflecting their own political values while also securing respect and compliance from others. *Id.* at 344.

⁸ See, e.g., David Von Drehle, *The Upholder: How John Roberts Vindicated the Virtue of Compromise*, TIME, July 15, 2012, at 1, 30. David Von Drehle argues that Chief Justice Roberts "vindicated the virtue of compromise in an era of Occupiers, Tea Partiers and litmus-testing special interests." *Id.* at 41. Yet, consistent with the argument of this Comment, Von Drehle also emphasizes that Chief Justice Roberts "didn't seek some nonexistent middle ground halfway between irreconcilable poles" and "did not betray his own firmly held beliefs." *Id.*

⁹ See 3 STORY, *supra* note 1, § 419.

will be repercussions for legal doctrines and for the actual scope of governmental powers for years to come.¹⁰ Or so I will argue here.

In the political debates over national health care, which have recurred periodically in the United States over the past 100 years,¹¹ advocates have disagreed over whether markets or governments offer better solutions and whether or how public incentives or subsidies should be designed.¹² While other countries installed varied versions of compulsory insurance, tax-funded health care, or single-payer programs,¹³ the United States refrained from a federal policy for all, even as the federal government provided specific programs for individuals living in poverty, elderly people, and federal employees and offered incentives for provision by private employers. Observers knowledgeable about other nations wonder what explains this pattern of American exceptionalism.¹⁴ Some United States presidents vowed to end it.¹⁵

¹⁰ For early efforts to predict the potential repercussions for health care and health insurance markets, for employers and for patients, as well as for American politics, see Trudy Lieberman, *Spinning the Supreme Court's Healthcare Decision*, COLUM. JOURNALISM REV. (July 5, 2012, 2:42 PM), http://www.cjr.org/swing_states_project/spinning_the_supreme_courts_he.php?page=all; Nadia Masri & Sharon F. Fountain, *Health Care Reform: What the Employer Mandate Means*, 31 TAX MGMT. WKLY. REP. (BNA) 897 (July 2, 2012); James A.J. Revels, *What Effect Will Health Reform Law Have on Businesses and the U.S. Economy?*, PHYSICIANS NEWS DIG. (Aug. 21, 2012), <http://www.physiciansnews.com/2012/08/21/what-effect-will-health-reform-law-have-on-businesses-and-the-u-s-economy/>; and Mark Trumbull, *Health-Care Reform Law: How Supreme Court Ruling Affects Families*, CHRISTIAN SCI. MONITOR (June 27, 2012), <http://www.csmonitor.com/USA/DC-Decoder/2012/0627/Health-care-reform-law-How-Supreme-Court-ruling-affects-families>.

¹¹ See generally STUART ALTMAN & DAVID SHACTMAN, POWER, POLITICS, AND UNIVERSAL HEALTH CARE (2011); PAUL STARR, REMEDY AND REACTION (2011).

¹² Compare MICHAEL F. CANNON & MICHAEL D. TANNER, HEALTHY COMPETITION (2005) (arguing that competitive markets offer better solutions), with Karen E. Lasser, David U. Himmelstein & Steffie Woolhandler, *Access to Care, Health Status, and Health Disparities in the United States and Canada: Results of a Cross-National Population-Based Survey*, 96 AM. J. PUB. HEALTH 1300 (2006) (arguing that Canada's single-payer system offers better results than competitive health care insurance).

¹³ See WORLD HEALTH ORG., THE WORLD HEALTH REPORT: HEALTH SYSTEMS FINANCING: THE PATH TO UNIVERSAL COVERAGE 41–47 (2010) (discussing problems with direct-payment systems and various ways in which countries have moved away from that model).

¹⁴ See generally PAMELA BEHAN, SOLVING THE HEALTH CARE PROBLEM (2006); PAUL V. DUTTON, DIFFERENTIAL DIAGNOSES (2007); SUSAN GIAIMO, MARKETS AND MEDICINE (2002); HOW TO CHOOSE? (Robert Chernomas & Ardeshir Sepehri eds., 1998); Victor G. Rodwin, *American Exceptionalism in the Health Sector: The Advantages of "Backwardness" in Learning from Abroad*, 44 MED. CARE REV. 1 (1987), available at <http://www.nyu.edu/projects/rodwin/american.html>.

¹⁵ Karen S. Palmer, A Brief History: Universal Health Care Efforts in the US, Address at the Physicians for a National Health Program (Spring 1999), available at <http://www.pnhp.org/facts/a-brief-history-universal-health-care-efforts-in-the-us> (describing unsuccessful efforts by Presidents Theodore Roosevelt, Franklin Delano Roosevelt, Harry Truman, and Lyndon Baines Johnson).

The recent political fight, ultimately producing a bill, passed largely along party lines and logging in at over 900 pages,¹⁶ generated considerable media attention — devoted much more to political maneuvers and controversy than to the substance of the legislation.¹⁷ In the view of commentators, the political fight continued in the lawsuits — filed by twenty-six states as well as private parties — and judicial decisions leading up to the Supreme Court's consideration.¹⁸ As intriguing as it seems to treat the Court as simply another political arena where calculation of political advantage, ideology, and power plays rule,¹⁹ a deeper understanding recognizes the distinctive legal norms, practices, and significance that the Court can and does represent.

¹⁶ See Library of Congress, *Bill Summary & Status: Patient Protection and Affordable Care Act*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR03590:@@R> (last visited Sept. 29, 2012) (Senate vote, 60–39). The House vote approving Senate changes was 219–212, with all 178 Republicans voting against it. U.S. House of Representatives, *Final Vote Results for Roll Call 165*, OFFICE OF THE CLERK (Mar. 21, 2010, 10:49 PM), <http://clerk.house.gov/evs/2010/roll165.xml>. The law includes a provision, known as the individual mandate, that requires most adults not already covered by an employer or government-sponsored insurance plan to obtain and keep health insurance coverage or else pay a penalty. The law bars insurance companies from increasing premiums based on preexisting conditions, and was intended to expand coverage to thirty million uninsured and increase Medicaid coverage to include adults with incomes up to 133% of the federal poverty level. 5 Pub. L. No. 111-148, 124 Stat. 119 (2010).

¹⁷ See Chris Cillizza, *The Political Fight on Health Care Is Over. Republicans Won.*, THE FIX (June 20, 2012, 1:40 PM), http://www.washingtonpost.com/blogs/the-fix/post/the-political-fight-on-health-care-is-over-republicans-won/2012/06/20/gJQAz6CdqV_blog.html; *What Americans Learned from the Media About the Health Care Debate*, PEW RES. CTR. (June 19, 2012), http://www.journalism.org/commentary_backgrounder/how_media_has_covered_health_care_debate.

¹⁸ See *Health Care Reform Fight Shifts from Congress to the Courts*, FOX NEWS (Mar. 20, 2010), <http://www.foxnews.com/politics/2010/03/22/health-care-reform-fight-shifts-congress-courts/>; Adam Serwer, *The Fight over Health-Care Reform Is More Political than Legal*, THE PLUM LINE (Feb. 1, 2011, 10:56 AM), http://voices.washingtonpost.com/plum-line/2011/02/the_fight_over_the_aca_is_more.html.

¹⁹ Insightful accounts pursuing external understandings of the Supreme Court, using the tools of political science and other studies of political and psychological behavior, include LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); and BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2009). For considerations of possible political motivations at work in *NFIB*, see Jan Crawford, *Discord at Supreme Court is Deep, and Personal*, CBS NEWS (July 8, 2012, 10:31 AM), http://www.cbsnews.com/8301-3460_162-57468202/discord-at-supreme-court-is-deep-and-personal/; and John Yoo, *Chief Justice Roberts and His Apologists*, WALL ST. J., July 1, 2012, at A15. Particularly given reports of lobbying of Chief Justice Roberts by others on the Court and reports that he changed his position during the Court's deliberations, the case has spawned more than a little speculation that politics of some sort were at work. 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-switched-views-to-uphold-health-care-law/. Whatever may have happened here, the discussion seems oddly to imply a problem with a judge who changes views during consideration of a case. A change in one's views while considering arguments in a pending case is at least as likely to indicate being open to reason as being vulnerability to political considerations.

The Supreme Court's *National Federation of Independent Business v. Sebelius*²⁰ (*NFIB*) is a case in point.

I. TWO OPINIONS, TWO LEGAL WORLDVIEWS

Reading the two opinions, reflecting the views of eight of the nine Justices on key issues, is a bit like traveling between two countries speaking different languages. The joint dissent proceeded from a clear conception of the Constitution as a document limiting the powers of the federal government and authorizing the Court to identify less restrictive means to regulate conduct that cast doubt on congressional measures.²¹ Justice Ginsburg's opinion — joined entirely by Justice Sotomayor and in large part by Justices Breyer and Kagan — expressed a consistent conception of Congress as charged with governing effectively and entitled to respect in its choice of tools to address the extraordinary and immense national market for health care products and services.²² Conceding that Congress has the power to remedy the problem of access to health care for Americans who cannot afford it, the joint dissent asserted judicial authority actively to scrutinize the means selected by Congress.²³ The joint dissent stated that the Court must engage in “careful scrutiny” of assertions of power by Congress under the Commerce Clause;²⁴ Justice Ginsburg treated congressional action under the Commerce Clause power as deserving of respect, presumptively constitutional absent a “plain showing” of irrationality.²⁵ Justice Ginsburg's opinion acknowledged that Congress could have pursued other means but found the one chosen to be practical, reasonable, and respectful of the states and private enterprise.²⁶ The joint dissent treated the Commerce Clause as limited not only by the implicit postulates of state sovereignty, but also by the Tenth Amendment's explicit textual command that powers not specifically and expressly enumerated are left to the states and the people;²⁷ Justice Ginsburg interpreted the Commerce Clause as well understood by the Framers to

²⁰ 132 S. Ct. 2566.

²¹ See *id.* at 2647 (joint dissent).

²² See *id.* at 2609–10 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

²³ *Id.* at 2642 (joint dissent).

²⁴ *Id.* at 2646.

²⁵ *Id.* at 2616–17 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting *United States v. Morrison*, 529 U.S. 598, 607 (2000)) (internal quotation marks omitted).

²⁶ *Id.* at 2612–13.

²⁷ *Id.* at 2643, 2646–47 (joint dissent).

require flexibility, practical considerations, and actual experience, enabling Congress to act.²⁸

These differences in view do not reflect reliance on different sources; both opinions used the same texts and decisions. Although it may seem that the joint dissent operated in the world as it existed before the Supreme Court reversed its own prior decisions and upheld New Deal legislation, the joint dissent expressly acknowledged the enlarged scope of the federal power under the Commerce Clause since 1936²⁹ and the power of Congress to prescribe even the price of a commodity affecting interstate commerce.³⁰ And Justice Ginsburg's opinion relied as much on constitutional text and views of the Framers as on post–New Deal interpretations.³¹

Largely, but not entirely, the two opinions differed in method. The joint dissent preferred formalist or strict interpretation of words, turning not only to contemporaneous dictionary definitions,³² but also to the location of a provision under a statutory heading.³³ Abstracting words from context and reflecting a predilection for either/or thinking, the joint dissent rejected the theory that the Patient Protection and Affordable Care Act is authorized by the taxing power of the Constitution because Congress did not use the term “tax” in crafting the law.³⁴ The joint dissent here even criticized language of a heading in the Government's brief for describing the individual mandate as “independently authorized” by Congress's power to tax. Since, in the Justices' view, the provision could not be both a penalty and a tax, the brief should have argued that it was “[a]lternatively . . . not a mandate-with-penalty but a tax.”³⁵ For the joint dissent, the mandate

²⁸ *Id.* at 2615–16 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

²⁹ *Id.* at 2643 (joint dissent).

³⁰ *Id.* at 2648. The joint dissent did seem to treat prior decisions as the absolute outer bounds of congressional power rather than as examples of permitted action that may be succeeded by new permitted action. In this respect, the joint dissent echoed earlier moments in a halting but ongoing effort by many Justices to curb federal power. See, e.g., *Morrison*, 529 U.S. at 602; *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 630 (1999); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 852 (1976).

³¹ *NFIB*, 132 S. Ct. at 2609, 2615–16, 2621 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

³² *Id.* at 2644 (joint dissent) (stating that the meaning of “regulate” is to direct something but not bring it into being).

³³ *Id.* at 2655 (noting that the individual mandate and penalty are located in the Act's “operative core” rather than under the Act's “Revenue Provisions”).

³⁴ *Id.* at 2650–51. The joint dissent also reasoned that the exemption from the penalty for those Americans who earn too little to file income tax does not alter the status of the individual mandate or convert it into a tax. *Id.* at 2654.

³⁵ *Id.* at 2650–53. The joint dissent then expressed skepticism that the provision could be a tax. See *id.* at 2651 (“We have never held that any exaction imposed for violation of the law is an

could be only one thing, read one way. Because the Act links the required individual payment to wrongdoing — failure to purchase insurance — it is a penalty, not a tax.³⁶ And because enactment of a tax is unpopular, it should be Congress that so bears the heat for enacting a tax, not a Court that later renames what Congress enacted using other words.³⁷

Justice Ginsburg’s opinion, in contrast, proceeded historically — attentive to the Court’s own deference to congressional policymaking under the Commerce Clause since 1937 and to the longstanding existence of interstate health insurance and health care markets — and contextually, alert to the continuities between the Affordable Care Act and the prior terms of the Medicaid law, including the law’s reservation of the right to alter and amend any provision. This opinion considered the specific context of health care as an urgent need experienced by individuals and as a set of problems beyond the power of any single state — and therefore as falling within the Commerce Clause power and congressional discretion to choose a policy both within that power and as authorized by the Necessary and Proper Clause in the exercise of that power.³⁸ Justice Ginsburg’s opinion also treated the tax power as independently and fully authorizing the law³⁹ and the mandate as functionally a “toll” constructed by the law as a “tax penalty.”⁴⁰ Although the joint dissent treated identification of the complex and practical problems surrounding health insurance and health care as irrelevant to whether Congress has the power to address them by the means it specifically chose, the opinion of Justice Ginsburg stressed that Congress has authority to cast a wide net where needed to address a specific matter within its power, given changing economic and financial realities.⁴¹

exercise of Congress’ taxing power — even when the statute *calls* it a tax, much less when (as here) the statute repeatedly calls it a penalty.”)

³⁶ *Id.* at 2651–52. The importance of strict interpretation also appeared in the joint dissent’s treatment of the word “shall” in the requirement of minimum essential coverage, which if not followed, triggers the financial payment to the Internal Revenue Service; because the law uses “shall” rather than “may,” the opinion reasoned that it specifies a penalty, not a tax. *Id.* at 2652.

³⁷ *Id.* at 2655.

³⁸ *Id.* at 2611–15, 2625–26, 2628 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

³⁹ *Id.* at 2628–29.

⁴⁰ *Id.* at 2613.

⁴¹ *See id.* at 2618 (explaining that no one knows who will have a medical emergency, so “[t]o capture individuals who unexpectedly will obtain medical care in the very near future, then, Congress needed to include individuals who will not go to a doctor anytime soon”); *id.* at 2625 (seeing the Court’s recognition of congressional power to adapt to changing “economic and financial realities” (quoting *N. Am. Co. v. SEC*, 327 U.S. 686, 705 (1946))); *id.* at 2628 (noting that the various provisions of the Affordable Care Act address the kind of interstate market issues that make the “commerce power central in our federal system”).

The joint dissent's formalism included drawing a sharp distinction between an act and a failure to act,⁴² while Justice Ginsburg's opinion looked behind labels and intuitions about acts versus omissions to trace the actual consumption of health care by those individuals who are not insured as an economic decision affecting the price of health care for all.⁴³ Justice Ginsburg stressed how the Court itself had in the past acknowledged the relationship between current and future conduct, approving of congressional power to address eventual purchases and sales.⁴⁴ "If unwanted today, medical service secured by insurance may be desperately needed tomorrow," commented Justice Ginsburg.⁴⁵ Hence, the individual mandate simply defined terms for paying for goods that will eventually be consumed in interstate commerce.⁴⁶ The joint dissenters resisted this effort to erase the difference between today and tomorrow,⁴⁷ and the distinction between action and inaction.⁴⁸ Those distinctions are the curbs on otherwise limitless federal power. So the joint dissenters accused Justice Ginsburg of "wordplay"⁴⁹ when she described the individual who does not purchase health insurance as engaging in the economic act of "self-insurance"⁵⁰ and asserted that such wordplay threatens all guarantees of individual freedom.⁵¹ The joint dissent saw Justice Ginsburg's Constitution as one of enumerated "federally soluble *problems*" — authorizing "whatever-it-takes-to-solve-a-national-problem"⁵² — while to Justice Ginsburg, the joint dissent's effort to impose categories and rely on strict definitions of words defied the People's decision to replace the unworkable Articles of Confederation with the Constitution and its Commerce Clause.⁵³

⁴² See *id.* at 2642–44, 2646–48 (joint dissent).

⁴³ See *id.* at 2617–18 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); *cf. id.* at 2621 (citing two eminent domain cases to show that the Court does not "toe the activity versus inactivity line"). But see *id.* at 2587 n.5 (opinion of Roberts, C.J.) (finding reliance on these cases unpersuasive).

⁴⁴ *Id.* at 2619 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (discussing *Wickard v. Filburn*, 317 U.S. 111 (1942); *Gonzales v. Raich*, 545 U.S. 1 (2005)).

⁴⁵ *Id.* at 2620.

⁴⁶ *Id.*

⁴⁷ See *id.* at 2642–43 (joint dissent).

⁴⁸ See *id.* at 2649.

⁴⁹ *Id.*

⁵⁰ *Id.* at 2622 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

⁵¹ *Id.* at 2649–51, 2656 (joint dissent) (arguing that with this wordplay, "[c]ommerce becomes everything").

⁵² *Id.* at 2650.

⁵³ See *id.* at 2615 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

For the joint dissent, congressional power to mandate individuals to purchase health care insurance launched a parade of horrors,⁵⁴ as Congress next could compel people to enter “the new-car or broccoli markets,”⁵⁵ and the Commerce Clause could enable government to act as a “hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor sacred nor profane.”⁵⁶ Implicitly acknowledging media discussions that analogized the health care mandate to being forced to buy broccoli, Justice Ginsburg rejected what she named concern for “the broccoli horrible” as depending on implausible and unacceptable inferences, as well as subject to sufficient oversight by other constitutional provisions and ordinary politics.⁵⁷ For Justice Ginsburg, these fears were unwarranted given limitations already articulated and enforced by the Court, prohibiting Congress from regulating “noneconomic conduct that has only an attenuated effect on interstate commerce and is traditionally left to state law.”⁵⁸ “When

⁵⁴ On origins and uses of the term, “parade of horrors,” see Ben Zimmer, *New England, Home of the Horribles*, BOSTON GLOBE, July 1, 2012, at K1, tracing the phrase to satiric commentary about the Massachusetts Ancient and Honorable Artillery Company, dubbed “the antiques and horrors.”

⁵⁵ *NFIB*, 132 S. Ct. at 2650 (joint dissent). Being forced by government to buy — and eat — broccoli became a widely circulated concern in the context of media coverage of the health care mandate. See James B. Stewart, *How Broccoli Landed on the Supreme Court Menu*, N.Y. TIMES, June 14, 2012, at A1, available at http://www.nytimes.com/2012/06/14/business/how-broccoli-became-a-symbol-in-the-health-care-debate.html?_r=1. Perhaps efforts to shape individual preferences — through government programs and private marketing — raise no legal concerns although they potentially affect liberty. See Andrew Adam Newman, *Making Children Hunker to Eat Broccoli and Carrots*, N.Y. TIMES, July 6, 2012, at B3, available at <http://www.nytimes.com/2012/07/06/business/media/making-children-hunker-to-eat-broccoli-and-carrots.html>. The government’s brief explained that “[h]ealth insurance is not purchased for its own sake like a car or broccoli; it is a means of financing health-care consumption and covering universal risks.” Reply Brief for Petitioner at 19, *Dep’t of Health and Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398). This explanation did not satisfy Chief Justice Roberts. *NFIB*, 132 S. Ct. at 2591 (opinion of Roberts, C.J.) (“[C]ars and broccoli are no more purchased for their ‘own sake’ than health insurance. They are purchased to cover the need for transportation and for food.” (quoting Reply Brief for Petitioner, *NFIB*, 132 S. Ct. 2566 (No. 11-398))).

⁵⁶ *NFIB*, 132 S. Ct. at 2623 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting THE FEDERALIST NO. 33, at 202 (Alexander Hamilton) (Clinton Rossiter ed., 1961)) (internal quotation mark omitted).

⁵⁷ *Id.* at 2624 (internal quotation marks omitted). Here, her opinion noted that to permit a broccoli-buying mandate, the Court would have to conclude “that a vegetable-purchase mandate was likely to have a substantial effect on the health-care costs borne by lithe Americans,” and that those individuals forced to buy the vegetable would eat it, prepare it in a healthy fashion and cut back on unhealthy foods, and not be overcome by lack of sleep or exercise — the kind of inference pile-up rejected by the Court in prior decisions. *Id.* Justice Ginsburg’s phrase, “broccoli horrible,” suggests a new brand name and also evokes the historic use of “horrible” as a noun to refer to a horrible thing or person. See generally Zimmer, *supra* note 54.

⁵⁸ *NFIB*, 132 S. Ct. at 2623–24 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citing *United States v. Lopez*, 514 U.S. 549 (1995) (rejecting Congress’s effort to criminalize possession of a gun in a local school zone); *United States v. Morrison*, 529 U.S. 598 (2002) (rejecting federal regulation of gender-motivated violence)).

contemplated in its extreme, almost any power looks dangerous,” commented Justice Ginsburg.⁵⁹ The worries about a slippery slope lack any empirical basis and betray a lack of confidence in the capacity of Congress and the Courts to act rationally and sensibly in the future.⁶⁰ Her opinion noted how health care and insurance markets uniquely create problems of free-riding because by law and professional practice, health care will be provided even to the uninsured with emergency needs.⁶¹ The joint dissent expressly acknowledged the contrast in worldviews at work and observed that these differences “make a very good argument by [Justice Ginsburg’s] own lights, since they show that the failure to purchase health insurance, unlike the failure to purchase cars or broccoli, creates a national, social-welfare problem . . . that the Constitution authorizes the Federal Government to solve.”⁶² However imperfect a restriction the act-omission distinction may create, it sets some curbs on the powers of the government and requires advocates to muster the political will to pursue other solutions. For the joint dissenters, this combination of Court-enforced restrictions on Congress and realities of politics provided better assurance for liberty — putting appropriate burdens on individuals, private enterprise, and state governments to take responsibility for tough problems.

To no small extent, this difference in treating an act versus an omission reflects a different attitude toward time. For Justice Ginsburg, the ability to forecast a future act made current inaction part of a larger pattern or dynamic that is itself subject to regulation.⁶³ An individual’s lack of insurance now becomes consumption of health care later, driving up costs for everyone; a young and healthy person today could become in dire need of health care in twenty-four hours.⁶⁴ Costs and benefits “[v]iewed over a lifespan” even out.⁶⁵ Her opinion treated as reasonable congressional attention to a long-term perspective such as five, ten, or more years.⁶⁶ If the time frame is expanded,

⁵⁹ *Id.* at 2625.

⁶⁰ For an elaboration of Justice Ginsburg’s point, see Leon Wieseltier, *Two Sentences*, NEW REPUBLIC, Aug. 2, 2012, at 48 (“Ginsburg exposed the speciousness of the panic. Against the conservatives, she wickedly cited an admonition about slippery slope arguments by Robert Bork. Hysteria, she correctly suggested, is just a perspective. . . . Ginsburg’s sentence rehabilitated the modulated nature of national action,” meaning power “controlled by reason and balanced between efficacy and legitimacy.”).

⁶¹ See *NFIB*, 132 S. Ct. at 2611, 2619–20, 2623 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

⁶² *Id.* at 2650 (joint dissent).

⁶³ *Id.* at 2619–20 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

⁶⁴ *Id.* at 2618–19 & n.5.

⁶⁵ *Id.* at 2620.

⁶⁶ *Id.* at 2619.

inaction can be recast as action;⁶⁷ a failure to take a precaution like purchasing insurance becomes a predicate for financial disaster when medical bills arrive; someone not in the market for health care today will be in the market within five years.⁶⁸ For the joint dissent, present time was all that mattered; people who do not currently want health care insurance or health care should be viewed as of today, when they are not found in the market, even though the dissenters acknowledged that they could be so found “by the simple device of defining participants to include all those who will, later in their lifetime, probably purchase the goods or services covered by the mandated insurance.”⁶⁹ Because health care and health insurance are not purchased today by these individuals, “physician office visits, emergency room visits, hospital room and board, physical therapy, durable medical equipment, mental health care, and substance abuse detoxification” should be viewed simply as “unwanted.”⁷⁰ The time slice confined to this moment defined all for the joint dissent while patterns over time mattered for Justice Ginsburg’s opinion.

This attitude about time extended to the stance toward individuals; rather than seeing two static groups of young and old, Justice Ginsburg saw that “today’s young and healthy will become society’s old and infirm.”⁷¹ Costs and benefits of both groups paying into insurance pools will even out,⁷² and an individual’s own lifetime includes phases of youth and agedness, health and infirmity. The joint dissent saw the young and healthy as a distinct group,⁷³ presumed healthy yet “impressed into service” to “offset the undesirable consequences of the regulation,”⁷⁴ and unfairly converted into market participants “by the simple device of defining participants to include all those who will, later in their lifetime, probably purchase the goods or services covered by the mandated insurance.”⁷⁵ Justice Ginsburg noted that even a “healthy young person may be a day away from need[ed] health care.”⁷⁶

⁶⁷ See *id.* at 2620.

⁶⁸ *Id.* at 2618 (noting that nearly ninety percent of those without insurance will visit a hospital or doctor’s office within five years). The long-term framework also informed this opinion’s analysis of state reliance on federal funds. See *id.* at 2641.

⁶⁹ *Id.* at 2648 (joint dissent).

⁷⁰ *Id.* at 2648 n.2.

⁷¹ *Id.* at 2620 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

⁷² *Id.*

⁷³ See *id.* at 2645 (joint dissent).

⁷⁴ *Id.* at 2646.

⁷⁵ *Id.* at 2648.

⁷⁶ *Id.* at 2619 n.5 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justice Ginsburg’s attentiveness to the impact of the inevitable passage of time resonates as well with alertness to the inevitable historical shifts following a constitution’s

Justice Ginsburg's opinion stepped outside of the moment and viewed events over time even pertaining to the Court's own behavior. Hence, she stepped back from the elevation of the act-omission distinction by the challengers to the Act in this case by considering how, in the past, judicial efforts to rely on categories like action and inaction did not work.⁷⁷ She predicted such distinctions would not work in the future, given the fluidity of economic and commercial markets.⁷⁸ In addition, contrary to the claim that failure to purchase health insurance leaves nothing to be regulated, health insurance and health care markets are themselves the "something to be regulated," regardless of whether an individual has already purchased insurance or health care.⁷⁹ Here, Justice Ginsburg's distinction pertained to the unique guarantees of health care — assured even to those who do not pay for it⁸⁰ — rather than, as implied by the joint dissent, relying on a special government role in fixing the health care problem. It is fair to see, as the joint dissent noted, divergent starting points for the two groups of Justices. For the joint dissent, the starting point was individual freedom, which is to be guarded against federal regulation except when clearly and expressly authorized. For those who endorse the Commerce Clause analysis offered by Justice Ginsburg, the Court itself must, in a democracy, have limits on its actions and hence should give presumptive deference to Congress to develop realistic responses to complex national issues, which are unwieldy for private or state-level solutions.

The two opinions also contrasted in their stances toward standard economic analysis and use of probabilities. Justice Ginsburg wholly embraced the terms and analysis of economics; her opinion explained the reasonableness of the congressional strategy by discussing the problem of adverse selection,⁸¹ the way that consumption of health services by the uninsured drives up prices by shifting the cost to those who do pay,⁸² the need for incentives for people to obtain insurance,⁸³ and the effect of free-riders on costs.⁸⁴ Here, Justice Ginsburg did not position the Justices as independent policymakers but as reviewers of the reasonable analysis of Congress, and her opinion underscored this

enactment — just as the joint dissent's focus on the time slice of the present matches a conception of a constitution to be interpreted solely in line with what was known at the time of its drafting.

⁷⁷ *Id.* at 2622.

⁷⁸ *See id.* at 2622–26.

⁷⁹ *Id.* at 2621.

⁸⁰ *See supra* p. 126.

⁸¹ *NFIB*, 132 S. Ct. at 2614 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

⁸² *Id.* at 2617.

⁸³ *Id.* at 2613–14.

⁸⁴ *Id.* at 2620.

division of functions by emphasizing that the Court should leave the definition of the relevant market to Congress.⁸⁵ Each of these steps was resisted by the joint dissent, which argued that however cross-subsidies and cost-shifting may work, Congress cannot regulate by forcing those not in a market to join it.⁸⁶ The joint dissent did not fail to follow the legislature's economic reasoning behind the scheme, but instead rejected the initial premise that any conduct existed to trigger the regulatory power. Indeed, in arguing for the need to guarantee the limits it advanced, the joint dissent identified the economic similarities between many different kinds of markets (for cars, foods, and health care) and between the costs imposed on any regulated industry that cannot sell to different classes of people at different prices.⁸⁷ The joint dissent, again in defense of limiting federal governmental power, rejected regulation on the basis of probabilities (for example, that someone not now in the health insurance market probably will purchase health care or health insurance in the future).⁸⁸ Justice Ginsburg's opinion, in contrast, treated analysis of probabilities as one key to what made the congressional action reasonable.⁸⁹

Superficially, the two opinions differed in their attitude toward the new. The joint dissent treated as weighty the statements, "we have never"⁹⁰ and "never before,"⁹¹ while Justice Ginsburg's opinion recognized the role for new tools to address big problems⁹² — and that new and old regulations can be seen as continuous or analogous.⁹³ The joint dissent distinguished the health care law, an "expansion of the federal power to direct a broad new field," from regulation of marijuana (where new federal law built on prior bans on growing and possession).⁹⁴ Justice Ginsburg's opinion stressed that the Affordable Care Act regulates something — interstate health insurance and health care markets — that already existed, while the joint dissent saw and objected to the law as something new and dangerous to liberty. Both opinions relied on precedents, while reading them differently, but Jus-

⁸⁵ *Id.* at 2619.

⁸⁶ *See id.* at 2645–46 (joint dissent).

⁸⁷ *Id.* at 2645.

⁸⁸ *Id.* at 2647–48.

⁸⁹ *Id.* at 2610–12, 2617–20 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

⁹⁰ *Id.* at 2653 (joint dissent).

⁹¹ *Id.* at 2649. *See also id.* at 2651 ("[W]e have never held — *never* — that a penalty imposed for violation of the law was so trivial as to be in effect a tax."); *id.* at 2653 ("[W]e have never — *never* — treated as a tax an exaction which faces up to the critical difference between a tax and a penalty, and explicitly denominates the exaction a 'penalty.'")

⁹² *See id.* at 2612–13 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

⁹³ *Id.* at 2612, 2616.

⁹⁴ *Id.* at 2646–47 (joint dissent).

tice Ginsburg's opinion emphasized its application of the recent judicially prescribed and specific "tests" for applying the Commerce Clause to challenged legislation,⁹⁵ while the joint dissent relied on recent cases to identify a general concern for scrutinizing and restricting congressional power.⁹⁶ The joint dissent treated the Affordable Care Act's individual mandate and Medicaid expansion as radical departures from the past; Justice Ginsburg's opinion viewed each Congress as empowered to appropriate funds anew.

Yet the methodological contrast was not as stark as this discussion may suggest.⁹⁷ Rather than adhering to a strict textual reading, the joint dissent's concern about individual liberty read into the Commerce Clause — or the Necessary and Proper Clause — extra protectiveness that was not specified by the text. Strikingly, Justice Ginsburg cautioned that the newly heightened judicial protection against government regulation was less in keeping with Commerce Clause analysis than with the kind of Due Process Clause analysis usually rejected by the Justices in the joint dissent.⁹⁸ And when it came time to consider whether the strings attached to the federal grants amounted to an impermissible coercion of the states, the opinions switched methodological approaches. The joint dissent turned to practical considerations of burdens and "reality,"⁹⁹ directing courts to assess what a state could resist or what burdens may be weighty,¹⁰⁰ and to consider the practical implications should a state decline the funds and then be

⁹⁵ *Id.* at 2616 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("[W]e ask only (1) whether Congress had a 'rational basis' for concluding that the regulated activity substantially affects interstate commerce, and (2) whether there is a 'reasonable connection between the regulatory means selected and the asserted ends.'" (quoting *Hodel v. Indiana*, 452 U.S. 314, 323–24 (1981))).

⁹⁶ *Id.* at 2646 (joint dissent).

⁹⁷ The joint dissent deployed economic terms and analysis in concluding that the Medicaid expansion and individual mandate portions of the law were interdependent and hence could not be severed. *See id.* at 2668–74. Whether best described as flexible or inconsistent, the methodological commitments of individual Justices do not map perfectly onto each opinion across cases. This phenomenon reflects, among other factors, membership on a multiperson Court in which Justices usually do not write separately in every case, and participate in persuading each other over time. This reality of multimember courts may lead to results that are more impartial than the views of any single Justice; it may also lead individual Justices to adhere to certain methodological commitments as a defense against arguments by other Justices. *See* ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* 134–74 (2011).

⁹⁸ *NFIB*, 132 S. Ct. at 2623 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (relying on *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion)); *id.* at 2623 n.8 (noting the contrasting reluctance of Justices in the joint dissent to interpret the Due Process Clause as a guarantee of individual liberty). The joint dissent emphasized that federalism and separation of powers represent the "fragmentation of power" that "is central to liberty, and when we destroy it, we place liberty at peril." *Id.* at 2677 (joint dissent).

⁹⁹ *Id.* at 2661 (joint dissent); *see id.* at 2664. The joint dissent nonetheless asserted, "We do not doubt that States are capable of making decisions when put in a tight spot." *Id.* at 2667.

¹⁰⁰ *Id.* at 2661, 2664.

pressured to compensate for losing all its Medicaid funding or face other difficulties.¹⁰¹ In contrast, Justice Ginsburg’s opinion warned that a vague notion of coercion as a limit on the Spending Clause would involve political judgments rather than guideposts usable by states, lawyers, and judges.¹⁰² Justice Ginsburg’s own analysis stressed that, technically, the states agreed before the enactment of the Affordable Care Act that Congress reserved the “right to alter, amend, or repeal” any provision of the Medicaid Act.¹⁰³ This technical reading, while accurate, limited consideration of the practical burdens states would face given the terms of the Affordable Care Act (though Justice Ginsburg considered how the federal share of the Medicaid expansion — 100% initially, declining to 90% in six years — imposes little new financial expense on the states).¹⁰⁴ Here, Justice Ginsburg’s analysis may seem formalist while the joint dissent is pragmatic and contextual.¹⁰⁵

The contrast ultimately is simple. The joint dissent thought no limits would remain if Congress could enact the individual mandate, the Medicaid expansion, and other features of the Affordable Care Act; Justice Ginsburg’s opinion identified previously defined limits on Congress while finding ample basis for congressional power to act in the unique and complex context of the huge health care and health insurance markets. Noting the failure of the government to provide examples of private conduct that could not be subjected to Commerce Clause regulation under the notion of a general scheme,¹⁰⁶ the joint dissent underscored its overriding concern to protect the liberty of individuals. The Court should therefore have restricted congressional oversight of individuals who have not purchased health insurance.¹⁰⁷ Justice Ginsburg emphasized the uniqueness of the health care context and nearly everyone’s involvement in it, over the long term, and the Court’s duty to respect the decisions of the democratically accountable branches.

¹⁰¹ *Id.* at 2663–64, 2666.

¹⁰² *Id.* at 2640–41 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹⁰³ *Id.* at 2629–30, 2637–39.

¹⁰⁴ *Id.* 2632, 2634–35.

¹⁰⁵ Justice Ginsburg also provided a technical reading of the Act’s directive to the Secretary of Health and Human Services with regard to withholding federal Medicaid funds from states that fail to comply with the law, noting in criticism of the Chief Justice’s opinion that the Act indicates that the Secretary *may* withhold, rather than *must* withhold. *Id.* at 2641 n.27.

¹⁰⁶ *Id.* at 2647 (joint dissent) (noting the failure of the government at oral argument to identify private conduct protected from Commerce Clause regulation under a general scheme — other than conduct already protected by other constitutional provisions).

¹⁰⁷ *See id.* at 2649–51.

II. THE CONTROLLING OPINION

With eight Justices essentially equally divided, Chief Justice Roberts cast the decisive vote — but he did much more than that. He announced the judgment of the Court; he delivered the controlling opinion.¹⁰⁸ The results were complex enough that major news outlets, in their rush to be first, were incorrect in their reports.¹⁰⁹ Yet there is no doubt that Chief Justice Roberts played the crucial role in the decision and wrote what may be his most important opinion thus far. He made clear that he leads the Court.¹¹⁰

A superficial view might suggest that he forged a compromise — departing from principle — but a closer read shows that he instead reached a third position that converges with the two groups of Justices on different issues and methods while traveling his own line of analysis. Aligned with the joint dissent, Chief Justice Roberts rejected the Commerce Clause grounds for the Affordable Care Act,¹¹¹ in accordance with Justice Ginsburg and the three other Justices who joined parts of Justice Ginsburg's opinion, he found the taxing power sufficient to uphold the law.¹¹² Rather than strike down the whole law and rather than uphold all of it, the controlling opinion upheld the law except for the provisions of the Medicaid expansion that conditioned all

¹⁰⁸ *Id.* at 2577 (majority opinion).

¹⁰⁹ See, e.g., Eric Wemple, *CNN and Fox Get It Wrong on Health-Care Ruling*, WASH. POST (June 28, 2012, 10:46 AM), http://www.washingtonpost.com/blogs/erik-wemple/post/cnn-correction-on-health-care-ruling-insane/2012/06/28/gJQAg6w78V_blog.html (displaying incorrect reports and corrections by major news outlets).

¹¹⁰ See Mark Sherman, *More Nuanced View of Roberts After Health Care Law*, ASSOCIATED PRESS: THE BIG STORY (July 1, 2012, 8:08 AM), <http://bigstory.ap.org/article/more-nuanced-view-roberts-after-health-care-law>; Walter Dellinger, *Supreme Court Upholds Obamacare: Why This is Now Roberts' Court*, SLATE (June 28, 2012, 1:13 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/supreme_court_year_in_review/supreme_court_u-pholds_obamacare_why_this_is_now_roberts_court_.html; Laurence Tribe, *Chief Justice Roberts's Ruling Restores Faith in Court's Neutrality*, THE DAILY BEAST (June 28, 2012, 2:39 PM), <http://www.thedailybeast.com/articles/2012/06/28/chief-justice-john-roberts-ruling-restores-faith-in-the-court-s-neutrality.html>. It is true that Chief Justice Roberts did not secure many votes from his colleagues for his opinion, but his opinion did more than supply the deciding vote. It framed the terms of debate and demonstrated his stewardship of the Court. It staked out further judicial monitoring and restraint of Congress under not only the Commerce Clause but also the Spending Clause, while underscoring the restraint the Court should itself exercise in reviewing congressional action. The decision left largely in place the most significant effort by Congress to tackle the complex national problem of access to health care and health insurance and affected the key legislative legacy of President Barack Obama and the terms of the debate over whether he should be reelected. But the decision itself showed “John Glover Roberts Jr. is in command.” *Deliverance or Disaster? Four Former Solicitors General Weigh in on Roberts' Ruling*, TIME, July 16, 2012, at 42, 45 (comments of Ken Starr, Solicitor General under President George H.W. Bush); see Von Drehle, *supra* note 8, at 41 (“After seven terms as Chief Justice, he finally put the *Roberts* in the Roberts court.”).

¹¹¹ *NFIB*, 132 S. Ct. at 2585–93 (opinion of Roberts, C.J.).

¹¹² *Id.* at 2594–2600 (majority opinion).

of a state's Medicaid grants on the state's acceptance of the new expanded funding and compliance with the new conditions, such as coverage of all individuals with incomes below 133% of the federal poverty line.¹¹³ Finding those conditions unconstitutional coercion beyond the power of Congress under the Spending Clause, Chief Justice Roberts was joined by Justices Breyer and Kagan; given the joint dissent's rejection of the entire statute, the Court as a whole found conditioning all of a state's Medicaid funding on compliance with the Medicaid expansion unconstitutional. Although Justices Ginsburg and Sotomayor disagreed with that conclusion, they joined the remedy identified by Chief Justice Roberts: striking the provision authorizing the Secretary of Health and Human Services to withhold existing Medicaid funds, leaving the states free to accept or decline the new conditioned funds and leaving unaffected the remainder of the Act.¹¹⁴ The result saved most of the Act from invalidation for unconstitutionality, but also marked the first modern rejection of any congressional action as coercive under the Spending Clause.¹¹⁵ With Chief Justice Roberts aligning with the joint dissent on the Commerce Clause, his opinion — notably without an explicit endorsement from the four Justices whose joint dissent in fact concurred — generated five votes for curbing congressional power under the Commerce Clause and directed Congress to steer clear of regulating inactivity under that clause.

The joint dissent was nearly silent about the opinion of the Chief Justice. His opinion, in contrast, fully engaged with the analysis of the joint dissent and also with Justice Ginsburg's analysis.¹¹⁶ If those two other opinions can be viewed as proceeding in different languages, the opinion of the Chief Justice translated and engaged with both of them, even as it articulated its own comprehensive view.

So while the joint dissent emphasized the underlying constitutional commitments to limited government and individual liberty, and Justice Ginsburg's opinion stressed the constitutional plan for an effective Congress capable of tackling important national issues, the opinion of the Chief Justice embraced both priorities as central to the Constitution and underscored the limits on the Court as a key.¹¹⁷ The liberty protected by separation of powers and federalism includes limits on the judiciary, so the Court should be reticent to strike down an act of

¹¹³ *Id.* at 2601–06 (opinion of Roberts, C.J.).

¹¹⁴ *Id.* at 2607–09; *see id.* 2641–42 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹¹⁵ *See id.* at 2630 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹¹⁶ *See id.* at 2595 n.7, 2597 & n.10 (majority opinion); *see also id.* at 2606–07 (opinion of Roberts, C.J.).

¹¹⁷ *Id.* at 2577, 2579, 2598 (majority opinion).

the Congress even while remaining vigilant in enforcing structural constitutional limits.¹¹⁸ This commitment to respecting Congress — the democratically accountable institution — undergirded the effort by the Chief Justice to construe the Affordable Care Act as constitutional. In this vein, the opinion repeatedly stated that the Court does not review the wisdom or soundness of the legislative policies, as those are questions for the elected leaders and for the people.¹¹⁹

This commitment to respect Congress as the democratic branch also explains a puzzle. Before considering whether to construe the Act to operate as a tax, falling within Congress's taxing power, the Court as a whole faced a preliminary argument raised in earlier stages of the case against proceeding at all because the Anti-Injunction Act¹²⁰ bars suits aimed to restrain collection of a tax. For the joint dissent, this argument posed no problem because, throughout, the opinion declined to treat the Affordable Care Act as a tax.

The Chief Justice's deference to Congress explained the seeming tension between treating the Act as a tax for purposes of constitutional power¹²¹ but not as a tax for purposes of the Anti-Injunction Act.¹²² Because Congress used the term "penalty" to define the exaction in the Affordable Care Act and did not specify, as it could, that it should nonetheless be treated as a tax for purposes of the Anti-Injunction Act,¹²³ it falls outside of this bar against litigation that Congress itself created.¹²⁴ This kind of deference to congressional language does not operate, however, when the constitutionality of Congress's action is at issue. "It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress's choice of label on that question. That choice does not, however, control whether an exaction is within Congress's constitutional power to tax."¹²⁵ Instead, in assessing a constitutional challenge to an act of Congress, mere words or labels should not be determinative for the Court,¹²⁶ which should endeavor to uphold congressional action when possible. Like a translator, Chief Justice Roberts could identify multi-

¹¹⁸ *See id.*

¹¹⁹ *Id.* at 2577, 2579, 2598, 2600; *see id.* at 2608 (opinion of Roberts, C.J.).

¹²⁰ 26 U.S.C. § 7421(a) (2006).

¹²¹ *NFIB*, 132 S. Ct. at 2594–2600.

¹²² *Id.* at 2582–84.

¹²³ *Id.* at 2583.

¹²⁴ *Id.* at 2584.

¹²⁵ *Id.* at 2594.

¹²⁶ *Id.* at 2595 ("'Magic words or labels' should not 'disable an otherwise constitutional levy[.]'") (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (1992)); *id.* ("In passing on the constitutionality of a tax law, we are concerned only with its practical operation[,] not its definition or the precise form of descriptive words which may have applied to it." (alteration in original) (quoting *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941)) (internal quotation marks omitted)).

ple possible interpretations of words, but his selection of meanings reflects principles pertaining to the role of the Court in the constitutional scheme.¹²⁷ Deference to congressional word choice should guide the Court when the entire question is what Congress controls; reluctance to strike down congressional action should guide when the Court faces constitutional challenge to what Congress tried to do.

This example offers a window into the methods and sources used by the Chief Justice's opinion. Strict interpretation of words, embraced by the joint dissent, was one tool used by the Chief Justice, but only when called for by the specific question asked and when relevant to the role the Court was asked to play. While the joint dissent stressed the importance of formalist interpretation, categorical rules, and strict distinctions in order to ensure the limits of government crucial to protecting individual liberty,¹²⁸ Chief Justice Roberts acknowledged the possibility of multiple meanings and characterizations of language and actions.¹²⁹ The requirement was that uninsured individuals who could afford to purchase health insurance must either do so or pay the Internal Revenue Service; "it need not be read to declare that failing to do so is unlawful."¹³⁰ The individual mandate admitted of an "alternative reading" as a tax.¹³¹

The choice of meaning is not to be made reflecting the personal preferences of the Justices or their ideas about the wisdom of an underlying policy; instead, the choice should serve the obligation to respect Congress as a coequal branch of government and as democratically accountable, to enforce constitutional limits on federal power and on the power of each federal branch, and to ensure that the Court also limits its role. That the Chief Justice reached a conclusion contrary to his most likely policy preference is especially notable; so is his apparent offering of each step of his thinking process. The individual mandate could not find authorization in the Commerce Clause but could reasonably be viewed as falling under congressional power to tax; the Medicaid expansion conditioning preexisting programs on new terms exceeded the Spending Clause power because of excessive pressure on the states but the remedy could follow Congress's own language about how to sever an offending provision while leaving the rest of the Act intact.¹³² Given the Court's obligation to try to save acts of Congress

¹²⁷ Here, the effort offers an echo of Justice Story's comments. *See supra* note 1.

¹²⁸ *See supra* pp. 122–24 & p. 124.

¹²⁹ *See NFIB*, 132 S. Ct. at 2589, 2593–94 (opinion of Roberts, C.J.).

¹³⁰ *Id.* at 2597 (majority opinion).

¹³¹ *Id.* at 2593 (opinion of Roberts, C.J.). Under this theory, "the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the Government taxes, like buying gasoline or earning income." *Id.* at 2594.

¹³² *Id.* at 2608.

from constitutional challenge, the individual mandate “may reasonably be characterized as a tax.”¹³³ For the Chief Justice, a “fairly possible” interpretation was acceptable if it would save an act of Congress from constitutional challenge.¹³⁴ The use of “shall” in directing that an individual obtain insurance or pay a penalty did not turn a provision into a punishment if reading it as an incentive would save it from constitutional defect.¹³⁵

With candid acknowledgment that different people can read texts and the world differently, the opinion of Chief Justice Roberts explicitly wrestled with the act-omission question. Does it make sense to view those without health insurance as nonetheless “in the health insurance market”¹³⁶ or otherwise engaged sufficiently in commerce to permit Congress to mandate their purchase of insurance? Like someone who is bilingual, Chief Justice Roberts acknowledged different possible translations including the possibilities of casting inaction as action. “To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce.”¹³⁷ Here, the Chief Justice acknowledged the analysis adopted by Justice Ginsburg,¹³⁸ rather than treating it as implausible. He chose not to go down that route, at least for now, in this case, by aligning himself with the Constitution’s Framers on whom “the distinction between doing something and doing nothing would not have been lost.”¹³⁹

At this juncture, the Chief Justice emphasized that the Framers were “practical statesmen,’ not metaphysical philosophers.”¹⁴⁰ In so

¹³³ *Id.* at 2600; *see also id.* at 2608 (“It is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance.”).

¹³⁴ *Id.* at 2594 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

¹³⁵ *Id.* at 2597 (majority opinion).

¹³⁶ *Id.* at 2626 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹³⁷ *Id.* at 2589 (opinion of Roberts, C.J.). Economic analysis was within his toolkit in other parts of the opinion as well. *See id.* at 2585.

¹³⁸ *See supra* pp. 127–28.

¹³⁹ *NFIB*, 132 S. Ct. at 2589 (opinion of Roberts, C.J.).

¹⁴⁰ *Id.* (quoting *Indus. Union Dep’t, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring in the judgment)). By placing “metaphysical philosophers” rather than “economists” as the contrast to “practical statesmen,” Chief Justice Roberts may have been alluding to Chief Justice Rehnquist’s consideration of the brief discussing the act-omission distinction as submitted by moral and political philosophers in *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Vacco v. Quill*, 521 U.S. 793 (1997). *See* Brief for Ronald Dworkin et al. as Amicus Curiae in Support of Respondents at 11, *Glucksberg*, 521 U.S. 702, & *Vacco*, 521 U.S. 793 (Nos. 95-1858, 96-110), available at <http://cyber.law.harvard.edu/bridge/Philosophy/philbrf.txt.htm>. There, philosophers Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thomson argued that it is a “misunderstanding of the pertinent moral principles” to maintain that when physicians prescribe lethal drugs to hasten death, they engage in an act of killing that is morally much more problematic than merely letting a patient die. *Id.* at 11. “Whether a doctor turns off a respirator in accordance with the patient’s request or prescribes

doing, he quoted from an opinion written by then-Justice Rehnquist during the term just before Chief Justice Roberts started as his law clerk.¹⁴¹ When nominated to his post, Chief Justice John Roberts commented about Chief Justice Rehnquist: “I’m very much aware that if I am confirmed, I would succeed a man I deeply respect and admire.”¹⁴² His reference to an opinion by then-Justice Rehnquist carries special significance as it occurred at the pivotal place where Chief Justice Roberts acknowledged an alternative interpretation — but declined to downplay the distinction between action and inaction — and may signal the stance the Chief Justice pursued in his entire opinion. That stance, Chief Justice Roberts explained further, aligns with the Framers who “were not mere visionaries, toying with speculations or theories, but practical men, dealing with the facts of political life as they understood them, putting into form the government they were creating, and prescribing in language clear and intelligible the powers that government was to take.”¹⁴³ Cited here as a reason not to depart from understanding Congress’s Commerce Clause authority as power to regulate commerce rather than to create it, this understanding also informed Chief Justice Roberts’s treatment of the Supreme Court’s decisions and Congress’s behavior over 200 years.¹⁴⁴ Stressing that “[t]here is no reason to depart from that understanding now,” the Chief Justice did not foreclose some future occasion with new reasons potentially justifying a changed interpretation of the Commerce Clause.¹⁴⁵

pills that a patient may take when he is ready to kill himself, the doctor acts with the same intention: to help the patient die.” *Id.* at 12. Apparently rejecting this argument, in a majority opinion written by Chief Justice Rehnquist, the Supreme Court concluded that the Due Process Clause does not protect assistance in terminating one’s own life. See *Glucksberg*, 521 U.S. at 728.

¹⁴¹ *Industrial Union Department AFL-CIO v. American Petroleum Institute* was argued on October 10, 1979, and decided on July 2, 1980, 448 U.S. at 607, and Chief Justice Roberts served as a clerk for then-Justice Rehnquist between 1980 and 1981. *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Sept. 29, 2012). In announcing his nomination of John Roberts to serve as the Supreme Court’s 17th Chief Justice, President George W. Bush remarked: “Twenty-five years ago, John Roberts came to Washington as a clerk to Justice William Rehnquist. In his boss, the young law clerk found a role model, a professional mentor, and a friend for life. I’m certain that Chief Justice Rehnquist was hoping to welcome John Roberts as a colleague, and we’re all sorry that day didn’t come. Yet it’s fitting that a great chief justice be followed in office by a person who shared his deep reverence for the Constitution, his profound respect for the Supreme Court, and his complete devotion to the cause of justice.” President George W. Bush, Nomination of John Roberts as Chief Justice (September 5, 2005), available at <http://www.presidentialrhetoric.com/speeches/09.05.05.html>.

¹⁴² Bush, *supra* note 141.

¹⁴³ *NFIB*, 132 S. Ct. at 2589 (opinion of Roberts, C.J.) (quoting *South Carolina v. United States*, 199 U.S. 437, 449 (1905)) (internal quotation marks omitted).

¹⁴⁴ See *id.*

¹⁴⁵ See *id.* Compare *supra* pp. 129–30 (stance of the joint dissent and Justice Ginsburg’s opinion on departures from the past), with *infra* p. 144 (attitudes of Chief Justice Roberts’s opinion toward departures from the past).

With this practical approach and steady attention to reason, Chief Justice Roberts trained his attention on the consequences of his interpretations of both the Commerce Clause and the taxing power for individual liberty. Chief Justice Roberts turned to a dictionary only to rebut a citation by Justice Ginsburg to an alternate definition.¹⁴⁶ Chief Justice Roberts's opinion treated the health insurance individual mandate as compelling people to make purchases even when they had not on their own entered the market.¹⁴⁷ The Chief Justice accepted tax incentives for this purpose, but not the greater power to sanction with criminal law and stigma that the Commerce Clause might entail.¹⁴⁸ The joint dissent treated the act-omission distinction as the guardrail ensuring limits on the federal government and construed the congressional choice of language as foreclosing characterization of the mandate as a tax;¹⁴⁹ Justice Ginsburg's opinion treated the action-inaction distinction as unimportant given the likelihood that almost everyone will be in the health care market over time;¹⁵⁰ and Chief Justice Roberts adhered to the long-standing distinction between action and inaction for purposes of Commerce Clause power but found sufficient latitude of individual freedom protected by upholding a tax on those who choose not to purchase health insurance.¹⁵¹ Individuals would retain sufficient liberty to forgo health insurance even if they then faced the tax penalty.¹⁵² That the size of the penalty for most people would fall far short of the price of insurance provides practical indication of the sufficient scope for individual choice.¹⁵³ And, reasoned the Chief Justice, the tax power can be used here as it is often used to influence individual conduct.¹⁵⁴ Moreover, taxes on omissions are not a problem given long-standing "capitation" taxation of

¹⁴⁶ See *NFIB*, 132 S. Ct. at 2586–87 n.4 (opinion of Roberts, C.J.).

¹⁴⁷ *Id.* at 2587.

¹⁴⁸ See *id.* at 2587 (opinion of Roberts, C.J.) (characterizing the individual mandate as compelling people to enter the market for health insurance and accepting tax incentives for this purpose); *id.* at 2596 (majority opinion) (same); *id.* at 2597, 2600 (noting that the tax power authorization for the individual mandate does not include criminal sanction).

¹⁴⁹ See *id.* at 2647–50, 2651–55 (joint dissent).

¹⁵⁰ See *id.* at 2620 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹⁵¹ See *id.* at 2600 (opinion of Roberts, C.J.) (finding that the imposition of a tax "nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice"); *id.* at 2600 n.11 ("Those subject to the individual mandate may lawfully forgo health insurance and pay higher taxes, or buy health insurance and pay lower taxes.").

¹⁵² See *id.* at 2600 n.11.

¹⁵³ *Id.* at 2595–96 & n.8 (majority opinion). The scale of dollars involved was also significant in the Chief Justice's approach to addressing whether threatened denial of all Medicaid funds presented coercive use of the spending power, and there the dollars involved — and their percentage of state budgets — proved determinative. See *id.* at 2604–05 (opinion of Roberts, C.J.).

¹⁵⁴ See *id.* at 2596, 2599 (majority opinion).

individuals simply for existing and the bar against use of taxation as punishment.¹⁵⁵

Guided by the stance of a Court obliged to try to save congressional action from constitutional challenge, the Chief Justice emphasized that the labels chosen by Congress itself should not be controlling.¹⁵⁶ He offered precedents and practical examples for both the approach and its application.¹⁵⁷ Central to the opinion's approach is the obligation to save congressional action where possible — while still enforcing the Constitution — as the Chief Justice emphasized when he responded to Justice Ginsburg's doubt that his opinion even needed to reach the Commerce Clause. Her opinion suggested that since the Chief Justice secured assents from four other Justices on his analysis of the taxing power, sufficient to uphold the Act, the discussion of the Commerce Clause was unnecessary to his analysis.¹⁵⁸ Given the modest stance the Chief Justice otherwise took — confining the Court's role to ensure respect for Congress — Justice Ginsburg fairly wondered why his opinion interpreted the Commerce Clause when doing so seemed unnecessary for his analysis.¹⁵⁹ The Chief Justice explained that his Commerce Clause analysis was indeed necessary:

It is only because the Commerce Clause does not authorize [the individual mandate] that it is necessary to reach the taxing power question. And it is only because we have a duty to construe a statute to save it, if fairly possible, that [the individual mandate] can be interpreted as a tax.¹⁶⁰

¹⁵⁵ See *id.* at 2599–2600. The Chief Justice refrained from indicating what amount or weight of a tax penalty converts it into a punishment. See *id.* at 2599. This approach contrasted with his judgment that the amount of Medicaid funding at stake was a key factor in concluding that the Spending Clause did not support authorization for the Secretary of Health and Human Services to withhold Medicaid funds from a state failing to comply with conditions of the Affordable Care Act, although there too the opinion did not specify amounts or a test to determine what is coercive. See *id.* at 2604 (opinion of Roberts, C.J.). Judging by the contrast with the facts of *South Dakota v. Dole*, 483 U.S. 203 (1987) (rejecting a challenge to conditions on federal highway monies), the impermissible coercion arises somewhere between less than half of one percent of a state budget and the ten percent involved in the federal share of average state budgets attributable to Medicaid. See *id.* at 2605.

¹⁵⁶ See *id.* at 2595, 2597–98 (majority opinion).

¹⁵⁷ See *id.* at 2594–95.

¹⁵⁸ See *id.* at 2629 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). Some observers have questioned whether the discussion of the Commerce Clause by Chief Justice Roberts has binding force. E.g., Gideon, *The Language About the Commerce Clause Was Non-Binding Dictum*, DAILY KOS (June 29, 2012, 6:57 AM), <http://www.dailykos.com/story/2012/06/29/1104308/-The-language-about-the-Commerce-Clause-was-non-binding-dictum> (describing the argument that the portion of the Chief Justice's opinion discussing the Commerce Clause is dicta). Only future decisions by the Court will clarify this uncertainty.

¹⁵⁹ See *NFIB*, 132 S. Ct. at 2629 & n.12 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹⁶⁰ *Id.* at 2600–01 (opinion of Roberts, C.J.).

Clarifying that the federal government may not order people to purchase health insurance but may tax people who fail to do so, the opinion enforced limits on the constitutional authority of Congress while confining the Court to a role of respect for it.¹⁶¹

It is tempting to consider that a kind of compromise, rather than legal analysis, explains why Chief Justice Roberts reached the Commerce Clause analysis. The liberals won part of the case with the Affordable Care Act upheld, but the conservatives won part of the case with new limits on the Constitution securing a majority on the Court.¹⁶² Yet the opinion of the Chief Justice reads like an honest statement of how he thought through the issues in the case. He found the Commerce Clause challenge persuasive, and not to say so would be to dissemble; he found the tax power argument sufficient to save the statute, but even the federal government treated it as a final alternative, reached if two Commerce Clause theories did not work. In sharing the steps of analysis in his opinion, the Chief Justice modeled a dialogue with advocates on both sides of the case and with Justices who responded differently to the arguments before them. Demonstrating both craftsmanship and conversation, the opinion showed an effort to exhibit reasons rather than cut a deal.

Like the other opinions, the opinion by Chief Justice Roberts addressed the parade of horrors (including potentially forced broccoli purchases),¹⁶³ conceptions of time's passage for individuals¹⁶⁴ and for the Court, treatment of currently young and healthy individuals, economic analysis and use of probabilities, and attitudes toward the new and unprecedented. In each instance, this opinion indicated awareness of and demonstrated respect for alternative understandings.

The problem with treating the uninsured as in the health care market — eventually — would be opening the door for congressional use of mandates to solve other problems.¹⁶⁵ Then, “Congress could address the diet problem by ordering everyone to buy vegetables.”¹⁶⁶ This possibility was not acceptable, explained the Chief Justice, as it

¹⁶¹ See *id.* at 2601.

¹⁶² Some suggest that here the Chief Justice did not merely offer a consolation prize but instead intensified the Court's restrictions on federal power — the ruling on the Spending Clause is the looming constraint. See, e.g., Pamela S. Karlan, Op-Ed., *No Respite for Liberals*, N.Y. TIMES, July 1, 2012, § SR (Sunday Review), at 1. While the Commerce Clause interpretation joins recent Supreme Court decisions departing from the post-New Deal deference to Congress by limiting the reach of the Commerce Clause, the Chief Justice's analysis is so keyed to the specific features of the individual mandate as to make future rejections of congressional action on this ground unlikely.

¹⁶³ *NFIB*, 132 S. Ct. at 2591 (opinion of Roberts, C.J.).

¹⁶⁴ *Id.*

¹⁶⁵ See *id.* at 2589.

¹⁶⁶ *Id.* at 2588.

was not what the Framers envisioned and would fundamentally “chang[e] the relation between the citizen and the Federal Government.”¹⁶⁷ The opinion recognized that, over time, behaviors change and inactions are replaced by actions but cautioned against turning these possibilities into predicates for use of the Commerce Clause, for that would empower Congress to make decisions about whether or when to act for individuals.¹⁶⁸ Acknowledging the power of forecasting, probabilities, and cross-subsidies, the opinion recognized that including young healthy people in health insurance pools would counter the effect of covering those with greater health needs.¹⁶⁹ The Chief Justice displayed economic analysis in identifying how the Affordable Care Act’s guaranteed-issue and community-rating reforms “sharply exacerbate”¹⁷⁰ the financial difficulties “by providing an incentive for individuals to delay purchasing health insurance until they become sick, relying on the promise of guaranteed and affordable coverage.”¹⁷¹

The opinion nonetheless halted the use of the Commerce Clause here — for the Chief Justice concluded that such use would treat this enumerated power as a general license to regulate individuals “cradle to grave” when the power to regulate potential purchases is instead reserved to the states.¹⁷² The opinion did not resist the possibility of forecasting the future, anticipating cost shifts and the future health needs of the young and healthy; it simply suggested a judgment that the Commerce Clause is not large enough to address these eventualities absent more of a tie to current actions by individuals currently out of the health care and insurance markets.¹⁷³

¹⁶⁷ *Id.* at 2589.

¹⁶⁸ *See id.* The Chief Justice read *Wickard v. Filburn*, 317 U.S. 111 (1942), as allowing Congress to regulate the market for wheat by supporting its price, even by regulating someone producing wheat outside of market exchanges, but not to regulate someone outside of the wheat production market altogether. *See NFIB*, 132 S. Ct. at 2587–88 (opinion of Roberts, C.J.).

¹⁶⁹ *See id.* at 2590.

¹⁷⁰ *Id.* at 2585.

¹⁷¹ *Id.* This analysis followed the opinion’s explanation of the government’s theory of the health care market as a time-shifting problem: “Everyone will eventually need health care at a time and to an extent they cannot predict,” and losses from health care provided to those without insurance are “pass[ed] on . . . to insurers through higher rates” and “to policy holders in the form of higher premiums.” *Id.*

¹⁷² *Id.* at 2591.

¹⁷³ Professor Einer Elhauge argues that Chief Justice Roberts’s tax power analysis applies only to those consumers who are engaged in commerce, because the penalty attaches only to consumers who have earned income; hence he should have found sufficient connection with commerce to justify the individual mandate under the Commerce Clause. Einer Elhauge, *The Fatal Flaw in John Roberts’ Analysis of the Commerce Clause*, NEW REPUBLIC (July 1, 2012), <http://www.tnr.com/blog/plank/104554/the-fatal-flaw-in-john-roberts-analysis-the-commerce-clause>. Elhauge further argues that Chief Justice Roberts dodged the precedent that shipowners and seamen were forced to buy health insurance in the 1790s due to their engagement in shipping only by writing that “most of those regulated by the individual mandate are not currently engaged in any com-

In one crucial place, however, the Chief Justice reflected a view of time as fixed or static. In that way — though not in the specific content — the opinion resembled the joint dissent more than the opinion by Justice Ginsburg. In addressing the Spending Clause challenge to the Medicaid expansion, the opinion of the Chief Justice characterized the Medicaid program prior to the Affordable Care Act as not only an existing program but also one that would continue to exist unchanged despite the amendments introduced by the Affordable Care Act. The Chief Justice then went on to treat the existing program as one to which states remain entitled for the foreseeable future, despite the terms of the Act.¹⁷⁴ Yes, the program had been modified by Congress — even the prior terms of Medicaid prescribed that a state signing on to the program agreed to abide by new terms altering or amending the program — but neither past modification nor the term deeming participation as agreement to future changes supplied sufficient notice or fairness, according to the opinion of the Chief Justice.¹⁷⁵ Fairly characterizing the law’s intent and effect, the Chief Justice here insisted that the revision converted the program from one “to care for the neediest among us” to “an element of a comprehensive national plan to provide universal health insurance coverage.”¹⁷⁶ But to reach his analysis that the terms were coercive and would be cured by removing as unconstitutional the power of the Secretary of Health and Human Services to withhold all Medicaid funding from those states that do not choose to enter the newly revised program, the Chief Justice had to treat the unamended program as “existing Medicaid funding” that would be “tak[en] away” from a state declining to comply with the Affordable Care Act.¹⁷⁷ This reading required halting the clock and the calendar, and treating next year’s Medicaid funding as the same as this year’s.¹⁷⁸ This treatment may well have accorded with how many states view their Medicaid funding, but it required suspending time.¹⁷⁹ Yet the Chief Justice did not suspend or freeze time in his analysis of action and inaction, probability, and shifting the timing of insurance payments. Instead, he acknowledged possible conceptions of time’s

mercial activity *involving health care.*” *Id.* (quoting *NFIB*, 132 S. Ct. at 2590 (opinion of Roberts, C.J.) (emphasis added)) (internal quotation marks omitted).

¹⁷⁴ See *NFIB*, 132 S. Ct. at 2604–05 (opinion of Roberts, C.J.).

¹⁷⁵ See *id.* at 2605–06. Hence, it is not correct to view it as all one program. *Id.*

¹⁷⁶ *Id.* at 2606.

¹⁷⁷ *Id.* at 2607.

¹⁷⁸ The joint dissent similarly treated the new Medicaid funding terms as altering “existing” funds, *id.* at 2667 (joint dissent), although the new terms would apply only to future funding.

¹⁷⁹ *Id.* at 2641 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (arguing that there are no existing funds under Medicaid, just anticipated ones).

passage but reached for restrictions — even in seemingly wooden terms — in order to cabin federal legislative power.¹⁸⁰

The Chief Justice's opinion showed mindfulness of the Court's own place in time and its historic battles over the scope of the Commerce Clause. Hence, his opinion noted: "The path of our Commerce Clause decisions has not always run smooth, but it is now well established that Congress has broad authority under the Clause."¹⁸¹ It is a striking sentence because the affirmation of broad authority appears precisely as the sentence cites the Court's surprising 1995 curb on the Commerce Clause power. That 1995 decision — in *United States v. Lopez*¹⁸² — was itself surprising as it was the first articulated limit since the New Deal struggles. Nonetheless, the Chief Justice swept the new limits within the general affirmation of sweeping congressional authority under the Commerce Clause of the New Deal era.¹⁸³

Not only aware of the past but embracing it, the Chief Justice nonetheless spoke like the joint dissent in casting the Supreme Court as the active monitor of congressional use of the Commerce Clause power and at the same time accorded with Justice Ginsburg's opinion in treating the New Deal struggles as safely in the past. The Chief Justice's opinion thus showed no suggestion of confining New Deal-era precedents any more than the Court already had in recent decisions. It cited *Wickard v. Filburn*¹⁸⁴ — widely seen as the high-water mark of Commerce Clause power — with approval three times¹⁸⁵ before distinguishing the regulation of wheat production outside of commerce permitted there from the mandate that individuals purchase health insurance.¹⁸⁶ It relied on other key Supreme Court decisions upholding New Deal legislation along with notable decisions expressly reversing prior Supreme Court efforts to strike down New Deal initiatives.¹⁸⁷ It

¹⁸⁰ See *supra* pp. 138–39. For a thoughtful analysis of the democratic problems with freezing an existing program and limiting any future conditions, see Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. (forthcoming 2013) (manuscript at 24–30), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128977.

¹⁸¹ See *NFIB*, 132 S. Ct. at 2585 (opinion of Roberts, C.J.) (citation omitted) (citing *United States v. Lopez*, 514 U.S. 549, 552–59 (1995)).

¹⁸² 514 U.S. 549.

¹⁸³ See *NFIB*, 132 S. Ct. at 2585 (opinion of Roberts, C.J.).

¹⁸⁴ 317 U.S. 111 (1942).

¹⁸⁵ See *NFIB*, 132 S. Ct. at 2579 (majority opinion); *id.* at 2586, 2587 (opinion of Roberts, C.J.).

¹⁸⁶ See *id.* at 2587–88 (opinion of Roberts, C.J.) (distinguishing *Wickard*, 317 U.S. 111). Justice Robert Jackson, the author of the Court's opinion in *Wickard*, later explained that the opinion's reasoning was intended to defer to Congress on judgments about what has an effect on interstate commerce. See Letter from Justice Robert Jackson to Judge Sherman Minton (Dec. 21, 1942), quoted in John Q. Barrett, *Wickard v. Filburn* (1942), THE JACKSON LIST 4–6 (June 27, 2012), <http://www.stjohns.edu/media/3/638cd994e8484fd3bdb841f31b11952f.pdf?d=20120626>.

¹⁸⁷ *NFIB*, 132 S. Ct. at 2585–86 (opinion of Roberts, C.J.) (citing *United States v. Darby*, 312 U.S. 100, 118–19 (1941)); *id.* at 2587 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). Similarly, the opinion treats with approval later decisions approving the Commerce

treated the decision before it as one more brick in the wall built from judge-made precedents, not as an occasion for reading the Constitution as if no history had occurred between its enactment and 2012.¹⁸⁸

When it came to the new and unprecedented, the Chief Justice's opinion resonated with the joint dissent's concerns, though rather than emphasize repeatedly what the Court has never done, the opinion called for better reasons before departing from the past.¹⁸⁹ Building continuity with the past of the Framers and the past of the New Deal transformation, the Chief Justice resisted reviving the 1940s fight over the scope of congressional power while also reinforcing the idea, important both to the Framers and to recent conservatives, that structural limits on the federal government ensure individual freedom.

The opinion of the Chief Justice thus embraced both the joint dissent's concern with limiting federal governmental power as a means to protect individual liberty and the commitment to respecting the power Congress needs to address complex problems, as articulated by Justice Ginsburg for the rest of the Court. Like the joint dissent, the opinion of the Chief Justice looked to the Tenth Amendment as well as the Commerce Clause for constitutional limits.¹⁹⁰ Like the opinion of Justice Ginsburg, the Chief Justice's opinion emphasized deference to a congressional power that is flexible and responsive to contemporary and changing challenges.¹⁹¹

The opinion of the Chief Justice, like the joint dissent, remained focused on the freedom of individuals who choose not to purchase health insurance but, breaking with that opinion, found individual freedom sufficiently protected by the option to pay a tax rather than purchase

Clause as a basis for the Civil Rights Act of 1964. *Id.* at 2590 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964)). None of the opinions in *NFIB v. Sebelius* included in their Commerce Clause discussions the Court's treatment of the neighboring Indian Commerce Clause, construed to give Congress "plenary power to legislate in the field of Indian affairs." *United States v. Lara*, 541 U.S. 193, 200 (2004) (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)). The Court has treated the Interstate and Indian Commerce Clauses as serving different functions, *Cotton Petroleum*, 490 U.S. at 192, showing a purposive methodology rejected by both the Chief Justice and the joint dissent in their consideration of the Interstate Commerce Clause in the context of the Affordable Care Act.

¹⁸⁸ In this respect, the opinion of the Chief Justice adhered to the kind of judicial restraint that respects judicial precedents rather than judicial deference to the Constitution alone. See KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 4 (1999). For an elaboration of this contrast, see Joel Alicea, *Chief Justice Roberts and the Changing Conservative Legal Movement*, WITHERSPOON INST. (July 10, 2012), <http://www.thepublicdiscourse.com/2012/07/5889>.

¹⁸⁹ The Chief Justice also disagreed with the joint dissent's claim that the Court had "never" treated an exaction as a tax when it was denominated a penalty. *NFIB*, 132 S. Ct. at 2595 (disagreeing with the joint dissent, *id.* at 2651–53 (joint dissent)).

¹⁹⁰ See *NFIB*, 132 S. Ct. at 2577–78.

¹⁹¹ See *NFIB*, 132 S. Ct. at 2577–78; *id.* at 2591–92, 2593–94 (opinion of Roberts, C.J.).

health insurance. Like the joint dissent, the Chief Justice attended to the freedom of states to decline to participate in a federal program like Medicaid, while nonetheless finding that freedom adequately secured if the states do not have to risk losing their “existing” Medicaid funding if they decline the terms of the Affordable Care Act. Consonant with the opinion of Justice Ginsburg, the Chief Justice’s opinion concluded that Congress has the authority to expand the availability of health care and to condition federal funds on state acceptance of federal terms,¹⁹² even though the two opinions differed on whether inclusion of the Medicaid preexisting program was done with sufficient notice and fairness to participating states.

III. CONVERGENCE, NOT COMPROMISE

Is it simply a compromise decision? In terms of results, it has the hallmarks of a “split-the-baby” solution. The Chief Justice joined the conservative Justices in finding the Affordable Care Act beyond the power of Congress under the Commerce Clause and the liberal Justices in finding it authorized by the taxing power. The Chief Justice ruled the Medicaid expansion a violation of the Spending Clause insofar as it seemed to give the states no choice in complying with its conditions but remedied this violation simply by removing the federal power to withhold all of a state’s Medicaid funds if the state chooses not to comply with conditions newly crafted by the Affordable Care Act. And although the law in the main was upheld, the Court granted challengers new grounds to object to acts of Congress under the Commerce Clause and the Spending Clause — and gained for itself renewed authority to adjudicate such challenges.¹⁹³

In simplest terms, the opinion of the Chief Justice was no compromise because it reflected no negotiated solution of parties surrendering parts of their positions.¹⁹⁴ It was his own separate view, securing explicit endorsement in part by one group of Justices, and legal authority for other parts when observers “count up the votes.”¹⁹⁵ It is fair to say

¹⁹² *Id.* at 2607 (opinion of Roberts, C.J.); *see id.* at 2642 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹⁹³ Professor Bruce Ackerman puts the effect of the decision this way: “Having blown apart the New Deal underpinnings of modern government, [Chief Justice Roberts] then saved the Affordable Care Act by upholding the mandate under the federal government’s taxing power.” Bruce Ackerman, *Roberts Raises the Election Year Stakes*, HUFFINGTON POST (June 29, 2012, 8:43 AM), http://www.huffingtonpost.com/bruce-ackerman/roberts-raises-the-electi_b_1637073.html.

¹⁹⁴ Merriam-Webster Dictionary defines compromise as a “settlement of differences by arbitration or by consent reached by mutual concessions.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 237 (10th ed. 1993).

¹⁹⁵ *Cf.* CLARE CUSHMAN, COURTWATCHERS: EYEWITNESS ACCOUNTS IN SUPREME COURT HISTORY 26 (2011) (describing the early Supreme Court practice of separate opinions by each Justice, requiring observers to “count up the votes” to determine a case’s outcome). Unlike

that all of the other Justices remained in sharp disagreement with the Chief Justice about some or all of his opinion. In this respect, at a minimum, his opinion represented his own independent convergence with parts of the reasoning of other opinions. And rather than expressing a distinctive worldview, the Chief Justice's opinion was catholic in the lowercase sense: inclusive, of use to all, sympathetic to varied views. It was open to and engaged with the competing views of others even when the others did not engage back.¹⁹⁶ Consider two collections of diverging views swirling before and in the Supreme Court. One sees federal governmental power as an encroaching danger to individuals and states, individual liberty as the primary value, change as disturbing, economic and probabilistic reasoning as unimportant to legal analysis, strict interpretation of legal texts removed from context as desirable, and historical context as less important than fundamental principles and texts. Another views complex economic and social problems as deserving federal action, equality and opportunity as important as individual liberty, change as inevitable, economic and probabilistic reasoning as sensible, contextual and functional interpretation of legal texts as crucial, and historical awareness as both humbling and vital. The opinion of Chief Justice Roberts neither picked one of these views nor produced a compromise between them; rather, it reflected all of these considerations.

Yet the contrast between compromise and convergence applies more fundamentally here. Trading and mutual give and take — familiar in political and contract negotiation — have little place in the process of judicial analysis and judgment. Little evidence of compromise appeared in *National Federation of Independent Business v. Sebelius*.¹⁹⁷ Convergence occurs when contrasting views overlap at a

the explicit endorsement of the discussion of the taxing power in the opinion of Justice Ginsburg, the joint dissent made no reference to the opinion of the Chief Justice in its treatment of the Commerce Clause, see *NFIB*, 132 S. Ct. at 2644–50 (joint dissent), and itself simply counted up the votes on the treatment of the Medicaid expansion, see *id.* at 2666–67.

¹⁹⁶ Cf. Frank I. Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 36 (1986) (“[Justice O’Connor’s opinion] directly addresses each of the other four judicial speakers in the case, calling each by name, the only one of the five opinions to do so. It speaks in the voice of colloquy, not authority; of persuasion, not self-justification.” (citing *Goldman v. Weinberger*, 475 U.S. 503, 528–29 (1986) (O’Connor, J., dissenting))).

¹⁹⁷ Some may suggest that in joining the Chief Justice in the holding regarding Spending Clause problems and the Medicaid expansion as a discrete remedy for those problems, Justices Breyer and Kagan gave evidence of a compromise. It is certainly the case that the Spending Clause ruling — securing seven votes — opens a new and serious avenue for challenging and confining federal legislative action. Yet it is difficult to imagine, much less discern, how such a compromise could have proceeded. Surely, the Chief Justice’s analysis of the taxing power did not emerge from a “trade” for the votes of these two on the Medicaid expansion. He had to assess whether the taxing power was sufficient and did so. Moreover, he did not need their votes to achieve the ruling on the Medicaid expansion, given the joint dissent’s conclusion that this por-

point or on an issue rather than a forced trimming or surrendering on a point or an issue.¹⁹⁸

Compromise in the context of principles or norms is especially unappealing as it suggests surrendering or giving in on something that is itself supposed to be sturdy and steadfast. Yet compromise is defensible and even desirable to obtain peace, to reach a business deal, to govern a diverse society, and to accommodate cultural differences among people who need to live together.¹⁹⁹ But in interpreting laws and especially in construing constitutional texts, “compromise” connotes abandonment of the required craft and devotion to principle. It signals dealmaking rather than analysis. For this very reason, Chief Justice Roberts’s opinion in the Affordable Care Act cases showed no signs of compromise.²⁰⁰ Even when the opinion acknowledged multiple possible meanings of terms or actions, it provided reasons for the meanings it endorsed that reflected considered and general views of the Court’s role and obligations.²⁰¹ It embraced and enacted the commitments to enforcing constitutional limits, protecting individual liberty, respecting the role of Congress, and restraining the Court from itself jeopardizing liberty and limited governmental power. It reached positions that would not please anyone moved primarily by substantive views about the merits and demerits of the Affordable Care Act.²⁰²

Not pleasing anyone based on the politics or the substance may not seem a recipe for earning respect. Yet the opinion of Chief Justice Ro-

tion of the Act was unconstitutional. *NFIB*, 132 S. Ct. at 2666 (joint dissent). The unhappy and unusual stories about leaks suggesting that the Chief Justice changed his vote at some time during the Court’s deliberations do not support an explanation of compromise either and instead indicate — if true — the independent judgment of one Justice.

¹⁹⁸ See Martha Minow, *Is Pluralism an Ideal or a Compromise?*, 40 CONN. L. REV. 1287, 1300 (2008) (“[B]etter than compromise would be solutions where no one on competing sides has to give in because each finds common ground without sacrificing principles. That is convergence.”).

¹⁹⁹ See *id.* at 1297 (“Compromises should not always be castigated because they signal the flexibility that is sometimes good. . . . [A]ccommodation is indispensable in a diverse polity and between conflicting nations.”). See generally AMY GUTMANN & DENNIS THOMPSON, *THE SPIRIT OF COMPROMISE* (2012) (arguing that “principles” and ideologies forged in campaigns get in the way of politically needed compromise).

²⁰⁰ The opinion gave reasons for each position and no indication of a trade or alteration of a view in exchange for support by other Justices. That Congress may face more political resistance to proceeding under the tax power than under the Commerce Clause may be a boon to those individuals who seek to restrain congressional action, but this factor played no obvious role in the reasoning of Chief Justice Roberts.

²⁰¹ See *supra* notes 121–31 and accompanying text (discussing treatment of the term “penalty” in interpreting the Act for purposes of the Anti-Injunction Act and in applying the taxing power).

²⁰² This is not to say that no one was pleased by the opinion or its parts. If the decision helped contribute to grounds for respecting the Court as an institution devoted to law, rather than politics, that result would be pleasing to those jurists and observers — including Chief Justice Roberts — who care about judicial authority and respect for the rule of law. See generally Gillian Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83 (discussing “institutionalist” dimensions of the decision).

berts — and the judgment of the Court — wrested a firm ground for respect from a nest of politicized media and legal arguments. Working so assiduously through the arguments, resisting an easy or predictable result in either direction, and yet also patently based on text, precedent, and reasons — not compromise — the judgment is a work of legal craftsmanship. It made choices; it was not inevitable nor was it dictated by the materials at hand. It asserted points of agreement and also points of disagreement with the other opinions.²⁰³ But it worked through the arguments in the distinctive manner of a Court mindful that its own exercise of power was necessary and yet could jeopardize democratic accountability.²⁰⁴ Controversial decisions addressing topics that divide a nation can drain the judiciary of the respect it needs to govern. A third way — converging on otherwise inconsistent positions — can revive respect for the judiciary precisely by resisting the predictions of pundits and the political calculations of those lacking faith in law as its own distinctive enterprise. Hewing to this way, Chief Justice Roberts's opinion in *National Federation of Independent Business v. Sebelius* signaled a commitment to separating the judiciary from politics in method, tone, and results.²⁰⁵

I had the privilege of serving as a law clerk for Justice Thurgood Marshall at the Supreme Court not long after I had worked on a congressional subcommittee staff. The contrast between the two work settings remains vivid. By sheer numbers of staff and policies under

²⁰³ In an old joke, a rabbi hears a disputant tell his story, and comments, "You're right." Then the other party explains his side, and the rabbi replies, "You're right." His wife, listening in, interrupts, "They can't both be right!" The rabbi says, "You're right too." In the health care litigation, Chief Justice Roberts treated the two warring camps as both right about contrasting fundamental constitutional commitments, while also rejecting particular features of their analyses. Critical to his third way is acknowledging competing constitutional values and multiple meanings of terms and concepts while forming judgments based on his conception of the role of the Supreme Court.

²⁰⁴ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–23 (2d ed. 1986).

²⁰⁵ In this respect, Chief Justice Roberts's opinion embodies what some describe as a trend toward moving beyond ideological division at the Court as a whole, even with sharp divisions in a handful of disputes. Adam Liptak, *Supreme Court Moving Beyond Its Old Divides*, N.Y. TIMES, July 1, 2012, at A1. However, it cannot be gainsaid that the decision invites further challenges to congressional action under the Commerce Clause and the Spending Clause — which may produce further fractured opinions. Nor do the reasoning and vote of the Chief Justice in this case foretell what he — or any other Justice — will do in future cases. Some commentators speculate that having ruled with the liberal wing in upholding most of the Affordable Care Act, Chief Justice Roberts now has latitude to rule with the conservatives on upcoming cases involving affirmative action and same-sex marriage. See Richard Socarides, *How Would John Roberts Rule on Gay-Marriage Cases?*, NEW YORKER, July 9, 2012, <http://www.newyorker.com/online/blogs/newsdesk/2012/07/john-roberts-supreme-court-gay-marriage-cases.html>. This speculation is odd, as it implies that a Justice needs permission to rule a given way. In addition, this form of speculation is both outside the scope of this Comment and also alien to its effort to read and respect the reasons given. The meaning of the decision ultimately will rest on the next presidential election and the next appointments to the Supreme Court.

consideration, the principal players — the elected representatives — acted more remotely than staff on many matters. Not so at the Court. The horse-trading on Capitol Hill crossed bills, topics, substantive and procedural issues, and even policy and personal goals. Not so at the Court. In any given discussion in the congressional setting, the ostensible topic was seldom the only and often not even the primary focus of argument and persuasion. At the Court, the Justices read, debated, questioned, argued, wrote, edited, and focused on each case, one by one. So it still seems.