

MORE LAW THAN POLITICS:

THE CHIEF, THE “MANDATE,” LEGALITY, AND STATESMANSHIP

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In *National Federation of Independent Business v. Sebelius (NFIB)*,¹ Chief Justice Roberts concluded for himself that the Affordable Care Act’s (ACA)’s minimum coverage provision—the so-called individual mandate—was beyond the scope of Congress’s power to regulate interstate commerce. He further concluded that the provision was unjustified by Congress’s power to pass laws that are necessary and proper to carrying into execution other concededly valid regulations of interstate commerce, such as the ACA’s requirement that insurers cover individuals with pre-existing conditions.² Pivoting dramatically, however, the Chief Justice then held for the Court that the minimum coverage provision was a permissible exercise of Congress’s tax power.³ As Roberts pivoted, so changed the fate of the most consequential piece of American social welfare legislation in nearly half a century.⁴

Some defenders of the ACA’s constitutionality responded by praising the Chief Justice’s judicial statesmanship, political savvy, and personal courage. For example, Jeffrey Rosen reported in *The New Republic* that “liberals found themselves in the unexpected position of applauding Roberts for his act of judicial statesmanship,” as “he set aside his ideological preference to protect the Court from a decision along party lines that would have imperiled its legitimacy.”⁵ Jeffrey Toobin, writing in *The New Yorker*, celebrated “a singular act of courage” of “a professional Republican” who “was disappointing those closest to him.”⁶ David Von Drehle of *Time Magazine*, invoking King Solomon’s offer to split the baby, wrote that Roberts had “vindicated the virtue of compromise in an era of Occupiers, Tea Partyers and litmus-testing special interests.”⁷

Constitutional critics of the ACA were less congratulatory. Some responded by condemning Roberts's legal infidelity, political motivation, and personal cowardice. For instance, Randy Barnett wrote in *The Washington Examiner* that Roberts's "maneuvers made constitutional law worse, even if they did save this law in hope of avoiding political attacks on the court." James Taranto, writing in *The Wall Street Journal*, acridly wondered whether Roberts had acted "as a finger-to-the-wind politician" basking in the "strange new respect" of liberals.⁸ Taranto counseled Roberts "to reflect on . . . just how respectful it is to think of the chief justice of the Supreme Court [sic] as an easily bullied politician."⁹ Mark Thiessen declared in *The Washington Post* that Roberts had "effectively redrafted the statute, making the mandate a tax in order to declare it constitutional."¹⁰ He accused Roberts of "the kind of sophistry we expect from liberals," and opined that conservatives "need jurists who have not only a philosophy of judicial restraint but the intestinal fortitude not to be swayed by pressure from the *New York Times*, the Georgetown cocktail circuit and the legal academy."¹¹

The assessments of such constitutional defenders and critics differed significantly in obvious ways. Yet there was subtle and substantial agreement lurking beneath the normative dissensus: Roberts's defenders and critics appeared to share the belief that his decisive vote to uphold the ACA's minimum coverage provision is best understood on non-legal grounds. Conservative critics eagerly claimed the mantle of legality for themselves, and some liberal defenders were quick to concede it. Thus Toobin, while lavishing praise upon Roberts and four of his colleagues for doing "the right thing in one of the most important cases they will ever decide," dismissed the Court's tax-power rationale as "[f]rankly . . . not a persuasive one," but "good enough for Roberts" because "[a]ny port will do in a constitutional storm."¹² Similarly, Rosen wrote that "[i]t would be easy, of course, to question the coherence of the combination of

legal arguments that Roberts embraced, but it would also be beside the point,” because “Roberts’s decision was above all an act of judicial statesmanship.”¹³

Claims that Roberts acted politically (in either a bad or a good sense) in upholding the minimum coverage provision appear to go to his motives—to his reasons for deciding the case the way that he did. So conceived, the question of whether Roberts’s opinion is law or politics is impossible to answer. None of us knows why Roberts wrote the opinion that he wrote, and thus none of us can demonstrate that he was (or was not) politically motivated in whatever sense of “political” one has in mind. If, however, acting politically means acting without adequate legal justification, then it is possible to assess Roberts’s performance.

In this chapter, I will inquire whether the various parts of Roberts’s opinion on the minimum coverage provision are legally justifiable. I will focus on what Roberts decided, not why he decided it that way. I will therefore not opine on whether or why Roberts switched his vote, which is open to different interpretations and may turn substantially on which part(s) of his opinion one finds persuasive. Nor will I focus on the Medicaid portion of Roberts’s opinion. The question of when, if ever, a federal financial incentive to the states tips from permissible temptation into unconstitutional coercion is sufficiently difficult that I will reserve my answer for future work.

I believe that law is fully adequate to explain the Chief Justice’s vote to uphold the minimum coverage provision as within the scope of Congress’s power “[t]o lay and collect Taxes.”¹⁴ Roberts embraced the soundest constitutional understanding of the Taxing Clause. He also showed fidelity to the law by applying—and not just giving lip service to—the deeply entrenched presumption of constitutionality that judges are supposed to apply when federal laws are challenged on federalism grounds.

Roberts's opinion was unpersuasive in concluding that the minimum coverage provision was beyond the scope of the Commerce and Necessary and Proper Clauses. Roberts failed to apply the modern doctrine of "constitutional avoidance," thereby needlessly deciding these questions. What is more, he decided them wrongly. Fortunately, the doctrinal consequences of this portion of his opinion will likely (although by no means certainly) prove insignificant.

In the final part of this chapter, I move from the internal perspective of the faithful legal practitioner to the external perspective of the analyst of the constitutional system. I ask what Roberts may have accomplished in responding to *NFIB* as he did. By prohibiting Congress from requiring Americans to purchase products against their will, Roberts partially expressed new popular and professional constitutional arguments—arguments developed by those who had mobilized against the prevailing view among legal experts that the minimum coverage provision is constitutional. By upholding the minimum coverage provision under the Taxing Clause, he validated the values of the ACA's supporters and respected the post-New Deal convention that the Court should uphold momentous social welfare legislation. By partially validating the sincerely held moral beliefs of both sides, Roberts may have succeeded in sustaining some measure of social solidarity amidst intense disagreement over health care reform, thereby enhancing the public legitimacy of constitutional law.

Roberts may or may not have intended to practice judicial statesmanship, and his statesmanship may not be enough to justify his contradictions of sound legal reasoning.¹⁵ But statesmanship probably provides the most persuasive way to try to justify his analyses of the Commerce and Necessary and Proper Clauses. Such a defense, however, would require the application of criteria that are difficult to justify as legal from the internal point of view.

I. GOOD LAW

I will first consider the portion of the Chief Justice's opinion that upheld the ACA's minimum coverage provision as within the scope of Congress's power to tax. He wrote this part for the Court.

A. The "Mandate" Is a Condition Attached to a Tax

Exhibit A for commentators who interpret Roberts's opinion in political terms is his allegedly implausible conclusion that the minimum coverage provision and shared responsibility payment were within the scope of Congress's tax power. Such commentators wonder how that could be. Congress not only referenced a "Requirement" to maintain minimum coverage and provided that every applicable individual "shall" obtain it,¹⁶ but also used the "penalty" label many times to describe the required payment for going without insurance.¹⁷

This objection emphasizes the seemingly mandatory language that Congress used in drafting the minimum coverage provision. One possible response is that the provision nonetheless expresses a tax, not a penalty. For example, Congress placed the required payment provision in the Internal Revenue Code, called individuals who must make the payment "taxpayers," and calculated the amount of the payment in part based on the taxpayer's household income for the taxable year. Moreover, the statute requires taxpayers to indicate whether they have health insurance on their tax returns, and instructs the Internal Revenue Service to include the amount owed in the taxpayer's tax return liability.¹⁸ Thus, Congress also used the language of taxation in drafting the minimum coverage provision.

While the ACA's defenders are right to stress this point, the ACA's opponents still have the stronger argument regarding the expressive form of the provision. The statutory language is closer to that of a penalty than a tax for two main reasons. First, Congress used the words

“Requirement” and “shall.” Second, Congress repeatedly called the exaction for noninsurance a “penalty” after labeling it a “tax” in earlier versions of the bill.¹⁹

However one resolves this debate about expressive form, the ACA’s required payment for going without insurance is still a tax for purposes of the Taxing Clause, not a penalty. To see why, it is most important to focus on the anticipated effects of the exaction.²⁰ Ordinarily, the effects of an exaction are determined more by its material characteristics than by its expressive form.²¹ The material characteristics of the ACA’s required payment provision are plainly those of a tax, not a penalty. First, the payment is less than the cost of insurance for many people—indeed, for almost everyone. By 2016, the annual exaction for noninsurance will be the greater of \$695 or 2.5 percent of income, but not more than the average yearly premium for the minimum level of health insurance specified in the ACA.²² Second, there is no scienter requirement; and third, the amount of the penalty does not go up each month or year that an individual goes without insurance. Thus, an individual does not have to pay at an increasing rate for intentional or repeated failures to obtain health insurance.²³

Because of these material characteristics—Roberts called them “practical characteristics”²⁴—the required payment will reduce the number of people who go without insurance without preventing such conduct, thereby raising several billion dollars in revenue each year. The non-partisan Congressional Budget Office (CBO) estimates that four million people each year will choose to make the shared responsibility payment instead of obtaining coverage.²⁵ The CBO further predicts that the statute’s payment provision will produce \$54 billion in federal revenue from 2015 to 2022.²⁶

If the ACA had required a yearly payment of, say, \$15,000 per uninsured person, then the payment would be a penalty, not a tax. A \$15,000 exaction would prevent almost everyone from

going without insurance, and thus would raise little or no revenue. Such an exaction would raise even less revenue if its amount went up by \$5,000 each year that an individual remained uninsured. Likewise, an initial “tax” of \$25,000 on carrying a firearm in a school zone (with enhancements for intentionality and recidivism) would prevent such behavior and raise minimal revenue.²⁷ In distinguishing a tax from a penalty, the effect of a payment to the federal government on individual behavior matters most. The so-called individual mandate is a modest financial incentive, not a coercive regulation. It is not a pure tax in light of its expressive form, but it is a tax equivalent in light of its material characteristics and anticipated consequences.²⁸ Thus, it lies within Congress’s tax power.

Constitutional text, structure, history, and precedent all indicate that it is constitutionally irrelevant whether Congress primarily intended to raise revenues or to regulate behavior in enacting the minimum coverage provision.²⁹ The Constitution gives Congress the power to tax in order to “provide for the common Defence and general Welfare.”³⁰ Providing for the general welfare through taxation sometimes involves regulatory objectives. Indeed, many federal exactions have long been intended to both raise revenues and regulate behavior, from the federal tax on imports at the time of the Founding to cigarette taxes today.³¹ Thus the modern Court has referenced approvingly “mixed-motive taxes that governments impose both to deter a disfavored activity and to raise money.”³²

Moreover, it is not decisive for purposes of the tax power whether Congress calls a required payment a tax.³³ The Court has long de-emphasized the constitutional significance of the label that Congress uses to describe such payments.³⁴ Just as Congress does not gain a power that it lacks by calling it a power that it has, so too does Congress not lose a power that it has by calling it a power that it lacks. The expressive form of a required payment matters only to the

extent that it affects individual behavior.³⁵ To reiterate, the expressive form of the ACA's shared responsibility payment as more a penalty than a tax will not tip the practical operation of the exaction from a tax to a penalty. The amount imposed is sufficiently modest that many Americans are expected to pay it.

For some observers, however, the tax power rationale for the minimum coverage provision may still seem like a cheat. Hadn't opponents of the ACA framed the public debate in terms of the Commerce Clause? Indeed, the label created by opponents—"individual mandate"—presupposes a regulation backed by a penalty, not a tax. At oral argument, Justice Scalia deemed it "extraordinary" that the Solicitor General would invoke the tax power as an independently sufficient basis for the minimum coverage provision, with the implication that "all the discussion we had earlier about how this is one big uniform scheme and the Commerce Clause . . . really doesn't matter."³⁶

It is bedrock constitutional law, however, that the tax power is an independent source of constitutional authority. The tax power may thus be available to Congress regardless of whether other sources of legislative authority are available, and regardless of how a debate is framed in the political arena. Congress needed only one source of constitutional authority to justify the minimum coverage provision, and three were potentially available: the tax power, the power to "regulate Commerce . . . among the several States,"³⁷ and the power to "make all Laws which shall be necessary and proper for carrying into Execution" other, concededly constitutional provisions of the ACA.³⁸ The challengers, by contrast, had to win all three of their constitutional arguments. The federal government's reliance on the tax power was ordinary, not extraordinary.

What about political accountability? Some argue that the federal government will avoid accountability if it may call an exaction a penalty in the political arena and a tax in court.³⁹ But

political accountability in this context usually depends on who must pay and how much they must pay, not on what Congress calls what they must pay—which most people may not know anyway. Neither President Obama nor the Democrats in the ACA Congress escaped political accountability for supporting the minimum coverage provision, which remains controversial. The expressive form of the ACA’s required payment provision does not appear to compromise political accountability.

More fundamentally, it is far from clear that political accountability is a judicially enforceable constitutional value in this setting. I know of no constitutional authority for the assertion that Congress’s tax power is circumscribed by a requirement of accurate labeling, so that an exaction with the material characteristics and effects of a tax must be deemed a penalty in order to hold Congress accountable. Federal commandeering of states, which the Court has held to violate the Tenth Amendment, is readily distinguishable.⁴⁰ With commandeering, the federal government is requiring states to regulate individuals on its behalf. With a purchase mandate or incentive, the federal government is itself regulating individuals.

Perhaps the Court has declined to impose such a “clear statement” requirement because the consequences would prove severe and destabilizing. For example, many federal statutes have titles and preambles that misstate their contents, whether by labeling civilian spending “military” or by announcing public-regarding purposes for self-serving logrolls. For decades, Congress has hidden tax breaks in the tax code instead of exposing them in the budget.⁴¹ The Court has never hinted that these practices raise constitutional concerns. If the Court were to hold that the tax power justifies an exaction only if Congress calls it a “tax,” other kinds of mislabeling logically should also fall under such a requirement. Policing these practices would

require a massive judicial undertaking, which presumably no member of the Roberts Court wishes to undertake.

B. The Presumption of Constitutionality, Not Unconstitutionality

For the foregoing reasons, the Taxing Clause justifies the minimum coverage provision even without putting a judicial thumb on the scales in favor of acts of Congress. Roberts, though, did not see it this way, which is why he stressed the legal principle of judicial deference to Congress in federalism cases.⁴² This principle requires judges to presume that federal laws are constitutional when they are challenged as beyond the scope of Congress’s enumerated powers, and to practice constitutional avoidance by reading them in ways that render them constitutional if they can reasonably be so read.⁴³ “[I]t is well established,” Roberts wrote in invoking the canon of constitutional avoidance, “that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so.”⁴⁴

Roberts did not just pay lip service to the presumption of constitutionality; he actually applied it in his tax power analysis, construing the minimum coverage provision as a tax because it “may reasonably be characterized as a tax.”⁴⁵ “[B]ecause the Constitution permits such a tax,” he recognized, “it is not our role to forbid it, or to pass upon its wisdom or fairness.”⁴⁶ Roberts appropriately deferred to Congress even though he apparently did not share the political vision that produced the ACA. “It is not our job,” he pointedly wrote, “to protect the people from the consequences of their political choices.”⁴⁷

II. BAD LAW

While Roberts’s analysis of the tax power was legally sound, the same cannot be said of his analyses of the Commerce and Necessary and Proper Clauses. He offered unpersuasive legal

reasoning to justify why and how he was deciding that the minimum coverage provision was beyond the scope of these clauses.

A. Constitutional Avoidance, Not Pursuit

Roberts did not need to decide whether the minimum coverage provision was within the scope of Congress's power to regulate interstate commerce. Nor did he need to decide whether the provision was a constitutionally "necessary and proper" measure to execute other congressional regulations of interstate commerce in the ACA. To reiterate, Congress required only one source of constitutional authority to support the minimum coverage provision, and Roberts concluded that the provision was within the scope of the tax power.

Roberts explained that he was first deciding whether the minimum coverage provision was justified by the Commerce and Necessary and Proper Clauses because the provision "reads more naturally as a command to buy insurance than as a tax."⁴⁸ He reasoned that he could not resort to the "saving construction" entailed in viewing the provision as a tax until he concluded that no other clause supported the provision.⁴⁹

During the nineteenth century, Roberts's legal reasoning would have been persuasive. Back then, the canon of "constitutional avoidance" in statutory interpretation was narrow: a judge was justified in construing a statute so as to save it from constitutional invalidation only after concluding that the statute would indeed be unconstitutional if read free of any such substantive canon.⁵⁰ The problem for Roberts is that the modern avoidance canon is much broader than the classical canon he applied.⁵¹ The modern canon kicks in when a jurist has significant constitutional doubts about the constitutionality of a statutory provision. The judge is supposed to engage in the saving construction if such a construction is reasonably available without initially deciding the constitutionality of the first-best reading of the statute.⁵² "If there

is one doctrine more deeply rooted than any other in the process of constitutional adjudication,” the Court stated as recently as 1999, “it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.”⁵³

I cannot know why Roberts proceeded in this fashion. Perhaps he simply confused classical avoidance with modern avoidance. Perhaps he instead meant to reject modern avoidance. Perhaps he made a factual mistake when he wrote that “[t]he Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution.”⁵⁴ (The Government argued that the tax power provides an additional basis for upholding the minimum coverage provision, not an alternative basis.⁵⁵)

Whatever the explanation, Roberts’s legal reasoning on the avoidance question is unsatisfactory. If he was embracing the classical avoidance canon going forward—perhaps in light of criticism of the modern canon⁵⁶—then he owed the legal system an explanation to that effect in light of the rule-of-law values of guidance, predictability, reliance, and transparency. If he was instead embracing old avoidance for this case only, such a move seems difficult to square with the rule-of-law requirement that judges discipline themselves to the virtue of consistency.⁵⁷

One might defend Roberts as having used dicta to reduce uncertainty. The legal system now knows that he (and thus a majority of justices) accept a distinction between regulating and requiring commerce, and future Congresses can plan accordingly. But this defense is just an argument for abandoning the modern canon of constitutional avoidance in favor of the classical canon, which Roberts did not do. It is not a strong argument for applying the classical canon in this case only. As I discuss below, it is unlikely that Congress would have imposed additional purchase mandates even if the Court had upheld the minimum coverage provision under the

Commerce Clause. Accordingly, the legal system did not appear to require guidance concerning the validity of such mandates under the commerce power.

B. Interstate and Commerce, Necessary and Proper

Roberts not only decided constitutional questions that he did not need to decide. He also decided them wrongly. Under at least two decades of case law,⁵⁸ the Commerce Clause justifies the minimum coverage provision because it regulates economic conduct that substantially affects interstate commerce. Specifically, the provision regulates (through a financial incentive) how people pay for—or do not pay for—the health care that almost all of us inevitably consume and may not lawfully be denied, at a time we cannot predict, at a cost we may not be able to afford.⁵⁹ Americans who lack health insurance, as a general class, undeniably impact the costs borne by other participants in health care and insurance markets. In passing the ACA, Congress found that, in 2008 alone, the uninsured shifted \$43 billion in health care costs to health care providers, which “pass on the cost to private insurers, which pass on the cost to families.”⁶⁰ Cost shifting is an economic problem, and its aggregate effects on interstate commerce are substantial.

The minimum coverage provision also finds support in recent normative scholarship on constitutional federalism, which stresses that Congress may invoke the Commerce Clause if it reasonably believes it is ameliorating a significant problem of collective action that exists “among the several States.” This account offers a multi-generational synthesis and justification of post-New Deal and pre-*NFIB* case law.⁶¹ If Congress has no reasonable basis to believe that it is solving a significant collective action problem involving multiple states—whether races to the bottom or interstate spillovers—then Congress may not invoke its commerce power.⁶²

Roberts stressed that Congress may not use the Commerce Clause to force people into commerce.⁶³ Even assuming (notwithstanding the cost shifting noted above) that the uninsured

as a general class are presently inactive in commerce, a proper Commerce Clause inquiry does not ask whether Congress is mandating private action. Congress may mandate private action using its commerce power, just as it may otherwise regulate private action using its commerce power, to address a commercial problem of collective action facing the states—when the states are separately incompetent to solve the problem on their own because the scope of the problem disrespects state borders. The states are separately incompetent when they impose significant costs on one another without paying for them.

The language of separate state incompetence comes from the Constitutional Convention of 1787. The Convention instructed the midsummer Committee of Detail that Congress would be empowered to legislate in, among other things, “those Cases to which the States are separately incompetent.”⁶⁴ This language originated in Resolution VI of the Virginia Plan. The Committee of Detail changed the indefinite language of Resolution VI into an enumeration closely resembling Article I, Section 8 as adopted.⁶⁵

As Justice Ginsburg emphasized in one of the most important opinions of her career,⁶⁶ Congress reasonably concluded that the minimum coverage provision would ameliorate significant collective action problems involving multiple states. Such problems arise when a financially able individual declines to purchase health insurance. Such an individual can free ride on the benevolence of others in two ways. First, because of federal and state laws and the charitable practices of most hospitals in the United States, other institutions and individuals will pay a significant share of the cost of stabilizing medical care rather than let an uninsured person go untreated.⁶⁷ Second, even when the uninsured individual does not receive medical care for the time being, he benefits from the existence of the health care infrastructure and can rely on its availability in case of emergency. Indeed, insurers must account for such reliance in pricing

policies. A requirement to obtain health insurance coverage or pay for going without insurance is designed in part to overcome risk-taking in reliance on benevolence. This rationale does not apply to uninsured individuals who are able to pay the full cost of their health care, but a severe injury or illness can bankrupt even wealthy individuals who lack insurance.

Theoretical reasoning and empirical evidence suggest that this free rider problem is interstate in scope—that this collective action problem involving individuals causes a collective action problem for the states. For example, many insurance companies operate in multiple states, and many patients cross state lines to seek care at particular hospitals. The costs that insurers must bear in one state may affect their ability to operate in more marginal markets in other states. And millions of Americans have access to health care in states in which they do not reside.⁶⁸ Congress could reasonably conclude that no one state can regulate these phenomena without imposing significant costs on other states, and that effective coordination among multiple state regulators is unlikely.

Turning to the Necessary and Proper Clause, it gives Congress the power to pass laws that are necessary and proper to carrying into execution Congress's other enumerated powers. It was common ground in the ACA litigation that the Commerce Clause gives Congress the authority to prohibit insurance companies from denying coverage based on pre-existing conditions, canceling coverage absent fraud, charging higher premiums based on medical history, and imposing lifetime limits on benefits.⁶⁹ These ACA provisions solve collective action problems for the states by facilitating labor mobility, discouraging the flight of insurers from states that guarantee insurance access to states that do not, and disincentivizing states from free riding on the more generous health care systems of sister states.

Under established law, the minimum coverage provision is necessary and proper for carrying into execution these undeniably valid regulations of insurers. “[T]he relevant inquiry is simply ‘whether the means chosen are “reasonably adapted” to the attainment of a legitimate end under the commerce power.’”⁷⁰ Guaranteeing access to health insurance is a legitimate end, and the minimum coverage provision is reasonably adapted to the attainment of this end. Without the minimum coverage provision, there would be a perverse incentive for uninsured, financially secure individuals to buy insurance only when they require expensive care, thereby free riding on people who pay for insurance when they are healthy. This “adverse selection” problem would substantially undermine insurance markets.

Notwithstanding this straightforward application of pre-existing law, Roberts created new limits on the Commerce and Necessary and Proper Clauses. Regarding the commerce power, his opinion echoed Republican and Tea Party scare tactics about mandatory purchases of broccoli;⁷¹ about losing “the country the Framers of our Constitution envisioned;”⁷² about “fundamentally changing the relation between the citizen and the Federal Government;”⁷³ and about congressional use of the Commerce Clause as “a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transaction.”⁷⁴ Roberts thereby asserted that upholding the minimum coverage provision under the Commerce Clause would annihilate judicially enforceable limits on the commerce power.

Rhetoric aside, Roberts’s opinion voiced the strongest argument of opponents of the minimum coverage provision, which is the perceived need for a judicially enforceable limiting principle on the commerce power. A good response is that other judicially enforceable limits on the Commerce Clause would remain in place even if Roberts had rejected the novel distinction between regulating and requiring commerce. These limits are evident in the above discussions

of pre-*NFIB* doctrine and collective action federalism. They include the Court's distinction between regulating economic conduct and regulating non-economic conduct, and the functional distinction between problems that require collective action by states and problems that states can solve on their own.⁷⁵

These limits would not prohibit Congress from ever imposing a purchase mandate, nor is there any good reason that they should. But these limits would rule out some of the scarier hypotheticals crafted by opponents of the ACA, such as forced purchases of broccoli or gym memberships on the ground that healthier citizens impose fewer health care costs on others. The causal relationship between such purchases and good health is highly speculative and attenuated when the regulated individuals do not want to buy the good or service in question. That is not the case concerning the relationship between possession of health insurance and cost shifting in health care markets. Health insurance is how most of us routinely pay for health care.

Roberts also ignored the political safeguards of federalism, which often count in the Court's jurisprudence. Political constraints, not judicially enforceable limits, prevent Congress from raising the minimum wage to \$1,000 per hour. Political realism ensures that Congress will not prohibit people from purchasing unhealthy foods—or vegetables for that matter—even though the Court's Commerce Clause doctrine allows Congress to enact such fundamental changes in the relationship between the citizen and the federal government. Registering appropriate concerns about constitutional limits requires the human faculty of judgment—an ability to distinguish real threats to constitutional values from mere shadows.

As for the Necessary and Proper Clause, Roberts seemed to concede that the minimum coverage provision was necessary (that is, convenient or useful) to effectuate the admittedly constitutional ACA provisions that require insurers to cover people with pre-existing conditions.

He nonetheless concluded that the provision was improper.⁷⁶ It was improper, as best I can discern, because it violated a new structural limit on federal power that disables Congress from compelling people to buy a product. He deemed such compulsion the exercise of a “great substantive and independent power” beyond those specifically enumerated, not an exercise of authority “derivative of, and in service to, a granted power.”⁷⁷

I do not understand why that is so. The minimum coverage provision is a means to the end of guaranteeing people access to health insurance without unraveling insurance markets. This rationale for the provision is narrower than the Commerce Clause theory because it requires a comprehensive regulatory scheme, and because many markets do not even arguably suffer from adverse selection problems. So the adverse selection rationale is another limiting principle that Roberts could have elected to embrace.

With respect to both the Commerce and Necessary and Proper Clauses, Roberts’s new constitutional prohibition on purchase mandates appears to lack a sound basis in constitutional text, history, structure, or precedent.⁷⁸ Nor does it seem grounded in a sensible functional understanding of the vertical division of powers in a federal system. If states may impose purchase mandates when commercial problems are intrastate in scope, why may not Congress impose them when such problems are interstate in scope? “The authority of the federal government over interstate commerce,” the Court instructed in the landmark case of *United States v. Darby*, “does not differ in extent or character from that retained by the states over intrastate commerce.”⁷⁹

C. Doctrinal Implications

Fortunately for the integrity of constitutional law, Roberts’s interpretation of the Commerce Clause (which the four dissenters share) seems unlikely to prove significant.

Congress never used the Commerce Clause to impose purchase mandates prior to the ACA—it actually imposed only a purchase incentive in the ACA—and it is unlikely to impose a purchase mandate in the future. Purchase mandates are politically unpopular, and Congress has a variety of other means to achieve its objectives. The parade of horrors invoked by opponents of the ACA—from forcing Americans to purchase broccoli to compelling them to buy American cars—seemed to have more to do with persuading the Court to invalidate the minimum coverage provision (and the entire ACA) than with future congressional legislation.

Roberts’s interpretation of the Necessary and Proper Clause may prove more consequential, partly because the four dissenters went even further in restricting the scope of this power. It is hard to know what will happen, however, because Roberts’s language is vague and difficult to apply. Going forward, how should Congress and the courts distinguish between a “great substantive and independent power” beyond those enumerated in the Constitution, and a power merely “derivative of, and in service to, a granted power”?⁸⁰

I suspect, although I cannot prove, that Roberts wrote this part of his opinion for this case only, not for the future. Having just denied Congress the power to impose purchase mandates under the Commerce Clause, he may have been determined not to allow such mandates under the Necessary and Proper Clause. Quoting selectively from *McCulloch v. Maryland*,⁸¹ while ignoring most of its language and structural logic, Roberts may have been insisting that Congress may not impose a purchase mandate under the Necessary and Proper Clause if Congress may not impose one under the Commerce Clause. Such a rationale risks denying the undeniable—that the Necessary and Proper Clause is an independent source of constitutional authority—but the damage may prove modest partly for this reason.

Moreover, following through on what Roberts wrote to justify his conclusion might have radical implications. If a requirement to buy a product is always a great substantive and independent power, then perhaps Congress has long used the Necessary and Proper Clause to exercise other great substantive and independent powers, from creating a national bank to deporting people. Federal power to charter corporations was so controversial at the time of the Founding that the Framers declined to vote on whether to grant Congress such authority.⁸² Moreover, deportation is not obviously derivative of the power to establish a uniform rule of naturalization.⁸³ Roberts likely did not contemplate that his analysis might call into question the constitutionality of a national bank or deportations by the federal government—or, for that matter, criminal laws whose violation can result in long prison terms or execution. Unlike the joint dissenters in *NFIB*, he had recently joined all of Justice Breyer’s broad interpretation of the Necessary and Proper Clause in *United States v. Comstock*.⁸⁴

My best guess is that the commerce and necessary and proper portions of Roberts’s opinion will come to be regarded as exercises in symbolic federalism. I read Roberts as prohibiting Congress from imposing purchase mandates, not as prohibiting Congress from ever regulating “inactivity” under the Commerce Clause or Necessary and Proper Clause. Federal power to quarantine or mandate vaccination might be critical in a public health emergency, such as a flu pandemic that disrespects state borders.

Of course, I cannot be certain that the Roberts opinion will be limited to purchase mandates. If I am wrong, then the consequences could be quite significant. For example, given the conceptual instability of the distinction between regulating “activity” and regulating “inactivity,” it is possible that a differently composed Court will use the Roberts opinion (and the joint dissent) to aggressively scale back the scope of federal power. But given how extreme it

would be to conclude, say, that a restaurant owner who refuses to serve African Americans is “inactive” in commerce for constitutional purposes, I doubt we will end up in such a place. Parties that practiced racial discrimination infamously made such claims in *Heart of Atlanta Motel, Inc. v. United States*⁸⁵ and *Katzenbach v. McClung*,⁸⁶ in which the Court held that the Commerce Clause justified provisions of the Civil Rights Act of 1964 that prohibited racial discrimination in hotels and restaurants. My sense of the Chief Justice, who presumably will be on the Court for decades, is that he has no desire to go there. He is too much of a believer in judicial deference to acts of Congress.

III. OUTSIDE LAW

I have so far occupied the perspective of the faithful legal practitioner, who has views about sound and unsound constitutional arguments. In this final Part, I will occupy the external perspective of the analyst of the constitutional system. I will ask what Chief Justice Roberts may have accomplished in responding to *NFIB* as he did. I will focus on the possible effects of his intervention, not on whether he intended those effects. As I noted at the outset, no one knows why he did what he did.

What may Roberts have accomplished by prohibiting Congress from using the Commerce and Necessary and Proper Clauses to require Americans to purchase products against their will? Any answer to this question is necessarily speculative at this point. The effects of a Supreme Court decision are a matter of empirical causation, which may be difficult to measure and may depend on whether one focuses on the short term or the long term.⁸⁷ There may also be a difference between the effects of judicial speech on elite opinion and the effects on public opinion, even if the latter is partially a function of the former. I cannot do more here than note these difficulties and proceed anyway.

In validating a legal position that was widely dismissed as near-frivolous just two years earlier,⁸⁸ Roberts expressed new popular and professional constitutional arguments. These arguments were developed by those who had mobilized against the predominant view among legal experts that the minimum coverage provision is constitutional. These experts including some of the most prominent legal conservatives in the nation, such as Charles Fried, Henry Monaghan, Richard Posner, Laurence Silberman, Jeffrey Sutton, and J. Harvie Wilkinson III.

Many millions of Americans balked at being forced by Congress to buy a product.⁸⁹ Perhaps they were misinformed about the rationales for the minimum coverage provision, given that the ACA provisions requiring insurers to cover individuals with pre-existing conditions remain very popular.⁹⁰ And perhaps much of the public was misinformed because so much more money was spent attacking the law than defending it.⁹¹ But it can be perilous to dismiss the opposition of a majority of Americans over a sustained period of time on grounds of public ignorance. Perhaps the Obama Administration would have defended the ACA more vigorously in the court of public opinion if doing so had entailed less political risk.⁹²

Republican and libertarian lawyers acted in harmony, and in concert, with the popular constitutional commitments of groups that had mobilized against the minimum coverage provision. These lawyers conceptualized Congress's enumerated powers in libertarian terms. The best instance may have been Randy Barnett's ingenious argument that the minimum coverage provision "commandeered the people," thereby turning citizens into "subjects."⁹³ From the standpoint of orthodox legal reasoning, it would have made more sense to present this liberty-based, freedom-from-contract objection to the minimum coverage provision as an economic substantive due process claim.⁹⁴ From the standpoint of conventional legal reasoning, it makes little sense from either a federalism or a liberty perspective to invalidate the minimum

coverage provision while conceding that a more centralizing and coercive single-payer system of Medicare for all is clearly constitutional.⁹⁵ But from the standpoint of emerging and contrarian constitutional arguments, such observations may be beside the point. In rejecting the Commerce and Necessary and Proper Clauses as justifications for the minimum coverage provision, Roberts's opinion was congruent with mobilization claims on the Republican right.

But Roberts's opinion also differed from these mobilization claims. By upholding the minimum coverage provision under the Taxing Clause, Roberts validated the commitments of the ACA's supporters, including the president and the political party that he leads. In addition, Roberts honored what Adrian Vermeule has identified as a fundamental post-New Deal constitutional convention: "the Court should not invalidate major social welfare statutes enacted by the federal government."⁹⁶ The ACA is deadly serious business. Almost all Americans will be personally affected by the legislation, just as they would have been personally affected by the Court's invalidation of it. The ACA is much closer to Social Security, Medicare, and Medicaid than it is to any federal law invalidated by the Rehnquist Court on federalism grounds. A principal effect of Roberts's intervention was that the Court avoided striking down—by a vote of five Republicans to four Democrats—much or all of the most important piece of domestic legislation in nearly half a century.

Roberts did not give the ACA's opponents and proponents half a loaf: opponents lost this part of the case and won a limit on federal commerce power that seems unlikely to come into play much in the future. But Roberts did accept their key constitutional, moral, and symbolic claim: Congress may not coerce people into commerce the better to regulate them. Whether intentionally or unwittingly, Roberts partially validated the sincerely held moral beliefs of both sides. This is precisely what Professor Paul Mishkin understood Justice Powell to have

accomplished when the Court initially established constitutional standards for affirmative action in higher education.⁹⁷ Like Powell in the *Bakke* case,⁹⁸ Roberts thereby may have helped to sustain some measure of social solidarity amidst intense disagreement over the meaning of the Constitution—and of the nation’s commitments to the general welfare and individual liberty.

Justices sometimes respond to momentous cases by practicing judicial statesmanship. They “seek not only the ‘right answer’ to legal questions as a matter of professional reason but also an answer that sustains the social legitimacy of law.”⁹⁹ Such judges take some account of the conditions of the public legitimacy of the constitutional law that they craft. They may succeed in sustaining the public legitimacy of constitutional law by fashioning judicial opinions that express social values as social circumstances change, and by sustaining social solidarity amidst reasonable, irreconcilable disagreement. Statesmanship is political in the sense of attempting to secure the political foundations of the rule of law,¹⁰⁰ which requires attention to the subtle relationships of “trust” that make the rule of law possible.¹⁰¹ Statesmanship is not political in the “low politics” sense of seeking partisan advantage.¹⁰²

To be clear, I have underscored some possible consequences of Roberts’s conduct from the external perspective, and I have noted its similarity to the practice of judicial statesmanship. I have not approved his commerce and necessary-and-proper analyses from the internal perspective. I am loath to endorse these parts of Roberts’s opinion on grounds of statesmanship because I believe that they contradict sound legal reasoning. If one were going to defend these portions of his opinion, however, statesmanship likely would provide the most persuasive means of doing so. But such a defense would entail the application of criteria that sound in social solidarity and judicial legitimacy, which are difficult to justify as legal from the internal point of view.¹⁰³

As I observed at the beginning of this chapter, liberal supporters of the ACA praised Roberts's judicial statesmanship in upholding the minimum coverage provision under the Taxing Clause. If the foregoing account of Roberts's conduct is persuasive, then these commentators were right to stress his statesmanship, but wrong to locate it exclusively in his reliance on the tax power. Such statesmanship also lay in his conclusions that the minimum coverage provision was beyond the scope of the Commerce and Necessary and Proper Clauses.

A focus on judicial statesmanship does not suggest that Roberts disbelieved his own interpretations of these two clauses. To reiterate, I am examining the potential effects of his intervention, not whether he intended those effects. Moreover, Roberts easily could have believed his interpretations of these clauses even if he intended to practice statesmanship. Statesmanship might then explain why he needlessly decided these questions, not whether he believed in the soundness of the resolutions that he reached.

This account of Roberts's statesmanship in *NFIB* may seem most persuasive to those who agree with me on the merits—that is, those who think the tax part of his opinion is right and the commerce and necessary-and-proper parts are wrong. I am not so sure. Although views about judicial statesmanship are not entirely independent of views about the merits,¹⁰⁴ nor are the two co-extensive. For example, one might agree with certain liberal defenders of the ACA's constitutionality that Roberts's opinion is statesman like for the reasons I have offered while still concluding that all three parts of his opinion on the minimum coverage provision are wrong. One could also appreciate the potentially positive systemic effects of his intervention even after concluding that legality required him to invalidate the minimum coverage provision.

IV. CONCLUSION

There is adequate legal justification for Chief Justice Roberts’s conclusion that the minimum coverage provision was within the scope of Congress’s tax power. There is inadequate legal justification for why and how Roberts concluded that the minimum coverage provision was beyond the scope of the Commerce and Necessary and Proper Clauses. But in partially responding to conservative mobilization against the ACA, Roberts may have practiced judicial statesmanship—not just by upholding the minimum coverage provision under the Taxing Clause, but also by rejecting it under the Commerce and Necessary and Proper Clauses. The ACA’s opponents thereby won something, even if mostly symbolic, in their quest to defeat health care reform.

It is difficult to approve this facet of Roberts’s opinion if one believes, as I do, that the minimum coverage provision is a valid regulation of interstate commerce, as well as a constitutionally appropriate means of effectuating other valid regulations of interstate commerce. But to the extent that Roberts succeeded in enhancing the social legitimacy of constitutional law, this consequence of his opinion should, perhaps, give some pause to those inclined to judge him in exclusively legal terms—and to judge him harshly. American constitutional discourse requires resources to distinguish the different senses in which judges may act “politically.” Statesmanship and partisanship are not the same.

* Professor of Law and Political Science, Co-Director, Program in Public Law, Duke Law School. For illuminating discussions, I thank Jack Balkin, Randy Barnett, Katharine Bartlett, Joseph Blocher, Robert Cooter, R. Craig Green, Linda Greenhouse, Andy Koppelman, Gillian Metzger, Trevor Morrison, Nathaniel Persily, Robert Post, Theodore Ruger, Reva Siegel, Lawrence Solum, Robert Weiner, participants in Columbia Law School’s conference on *NFIB*, and workshop participants at the University of Miami Law School.

¹ 132 S. Ct. 2566 (2012).

² *Id.* at 2584-93 (Roberts, C.J.).

³ *Id.* at 2593-2600. Justices Ginsburg, Breyer, Sotomayor, and Kagan joined this part of Roberts’s opinion for the Court.

⁴ See THE STAFF OF THE WASH. POST, LANDMARK: THE INSIDE STORY OF AMERICA'S NEW HEALTH-CARE LAW AND WHAT IT MEANS FOR US ALL 66-68 (2010).

⁵ Jeffrey Rosen, *Big Chief: How to Understand John Roberts*, THE NEW REPUBLIC, July 13, 2012, available at <http://www.tnr.com/article/politics/magazine/104898/john-roberts-supreme-court-aca>.

⁶ Jeffrey Toobin, *To Your Health*, THE NEW YORKER, July 9, 2012, available at http://www.newyorker.com/talk/comment/2012/07/09/120709taco_talk_toobin.

⁷ David Von Drehle, *Roberts Rules: What the Health Care Decision Means for the Country*, TIME, June 29, 2012, available at <http://swampland.time.com/2012/06/29/roberts-rules-what-the-health-care-decision-means-for-the-country/>.

⁸ James Taranto, *We Blame George W. Bush*, WALL ST. J., June 28, 2012, available at <http://online.wsj.com/article/SB10001424052702304058404577494622616505142.html>.

⁹ *Id.*

¹⁰ Mark A Thiessen, *Why are Republicans So Awful at Picking Supreme Court Justices?*, WASH. POST, July 2, 2012, available at http://www.washingtonpost.com/opinions/marc-a-thiessen-why-are-republicans-so-awful-at-picking-supreme-court-justices/2012/07/02/gJQAHFJAIW_story.html.

¹¹ *Id.*

¹² Toobin, *supra* note 6, at 30.

¹³ Jeffrey Rosen, *Welcome to the Roberts Court: How the Chief Justice Used Obamacare to Reveal His True Identity*, THE NEW REPUBLIC, June 29, 2012, available at <http://www.tnr.com/blog/plank/104493/welcome-the-roberts-court-who-the-chief-justice-was-all-along>.

¹⁴ U.S. CONST. art. I, § 8, cl. 1. For a theory of the tax power that Roberts's opinion tracks closely, see generally Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195 (2012).

¹⁵ For an analysis of judicial statesmanship, see generally Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008).

¹⁶ 26 U.S.C. § 5000A(b)(1).

¹⁷ 26 U.S.C. § 5000A(b), (c).

¹⁸ For documentation of these facts, see Cooter & Siegel, *supra* note 14, at 1241.

¹⁹ See, e.g., *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 424 (4th Cir. 2011) (Davis, J., dissenting) (“Congress deliberately deleted [previous] references to a ‘tax’ in the final version of the Act and instead designated the exaction a ‘penalty.’” (citations omitted)).

²⁰ See generally Cooter & Siegel, *supra* note 14.

²¹ See *id.* at 1226–28.

²² 26 U.S.C. § 5000A(c).

²³ See Cooter & Siegel, *supra* note 14, at 1222–24.

²⁴ *NFIB v. Sebelius*, 132 S. Ct. 2566, 2595, 2600 (2012).

²⁵ CONGRESSIONAL BUDGET OFFICE, PAYMENTS OF PENALTIES FOR BEING UNINSURED UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (April 2010), at 1, <http://www.cbo.gov/publication/21351>.

²⁶ CONGRESSIONAL BUDGET OFFICE, UPDATED ESTIMATES FOR THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT (March 2012), at 11, <http://www.cbo.gov/sites/default/files/cbofiles/attachments/03-13-Coverage%20Estimates.pdf>.

²⁷ *Cf.* *United States v. Lopez*, 514 U.S. 549 (1995) (holding a ban on firearm possession in school zones beyond the scope of the commerce power).

²⁸ For a distinction between pure taxes and tax equivalents, see generally Cooter & Siegel, *supra* note 14.

²⁹ These claims are defended in Cooter & Siegel, *supra* note 14, at 1200–22.

³⁰ U.S. CONST. art. I, § 8, cl. 1.

³¹ See Cooter & Siegel, *supra* note 14, at 1205–06 (discussing Alexander Hamilton's program for industrialization and quoting Joseph Story's *Commentaries*).

³² *Dep't of Revenue of MT v. Kurth Ranch*, 511 U.S. 767, 782 (1994).

³³ I do not address here the applicability of the federal tax Anti-Injunction Act. For my views, see generally Michael C. Dorf & Neil S. Siegel, “*Early-Bird Special*” *Indeed!: Why the Tax Anti-Injunction Act Permits the Present Challenges to the Minimum Coverage Provision*, 121 YALE L.J. ONLINE 389 (2012), <http://yalelawjournal.org/2012/01/19/dorf&siegel.html>.

³⁴ See, e.g., *New York v. United States*, 505 U.S. 144, 169-74 (1992); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 35 (1922); *License Tax Cases*, 72 U.S. (5 Wall.) 462 (1866).

³⁵ See Cooter & Siegel, *supra* note 14, at 1226–27.

³⁶ Transcript of Oral Argument at 52–53, *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

³⁷ U.S. CONST. art. I, § 8, cl. 3.

³⁸ U.S. CONST. art. I, § 8, cl. 18.

³⁹ See, e.g., Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 632 (2010).

⁴⁰ See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

⁴¹ For discussions, see Cooter & Siegel, *supra* note 14, at 1244–45.

⁴² See *NFIB*, 132 S. Ct. at 2579 (“Our permissive reading of [Congress’s enumerated] powers is explained in part by a general reticence to invalidate the acts of the Nation’s elected leaders.”); *id.* at 2594 (stressing “the full measure of deference owed to federal statutes”).

⁴³ See, e.g., *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009). For use of the presumption of constitutionality to privilege constitutional avoidance over clear statement rules in tax power cases, see generally Gillian E. Metzger & Trevor W. Morrison, *The Presumption of Constitutionality and the Individual Mandate*, in this volume.

⁴⁴ *NFIB*, 132 S. Ct. at 2593.

⁴⁵ *Id.* at 2600.

⁴⁶ *Id.*

⁴⁷ *Id.* at 2579.

⁴⁸ *Id.* at 2600.

⁴⁹ *Id.* at 2601 (“Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction.”).

⁵⁰ For a discussion of the change from an “unconstitutionality” understanding of the avoidance canon to a “doubts” understanding, see RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 78–80 (6th ed. 2009); see *id.* at 78–79 (“Under the unconstitutionality approach, which was commonly practiced during the nineteenth century, the courts adopted an alternative interpretation only after first deciding that the preferred interpretation would render the statute unconstitutional.”).

⁵¹ On the distinction between “classical avoidance” and “modern avoidance,” see generally Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997).

⁵² See FALLON ET AL., *supra* note 50, at 79 (“Modern avoidance . . . rejects the unconstitutionality approach on the ground that the former practice still requires an unnecessary constitutional ruling.”). The canonical citation is *Ashwander v. TN Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

⁵³ *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 343 (1999) (quoting *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944)).

⁵⁴ *NFIB*, 132 S. Ct. at 2594.

⁵⁵ See Brief for Petitioners at 52, *NFIB*, 132 S. Ct. 2566 (No. 11–398) (Minimum Coverage Provision) (“The minimum coverage provision is independently authorized by Congress’s tax power.”).

⁵⁶ For a cogent discussion and citations to the literature, see FALLON ET AL., *supra* note 50, at 79–80.

⁵⁷ For a discussion of rule-of-law values, see Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1474–77 (2007).

⁵⁸ See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

⁵⁹ See generally Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 L. & CONTEMP. PROBS., no. 3, at 29 (2012).

⁶⁰ 42 U.S.C. § 18091(a)(2)(F) (2010).

⁶¹ See generally Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010). For related accounts, see generally Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554 (1995); Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335 (1934).

⁶² Reasonableness is the appropriate test. See, e.g., *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 564 (6th Cir. 2011) (Sutton, J., concurring in part and delivering the opinion of the court in part) (“The courts do not apply strict scrutiny to commerce clause legislation and require only an ‘appropriate’ or ‘reasonable’ ‘fit’ between

means and ends.”) (quoting *United States v. Comstock*, 130 S. Ct. 1949, 1956–57 (2010)).

⁶³ *NFIB v. Sebelius*, 132 S. Ct. 2566, 2585-91 (2012) (Roberts, C.J.).

⁶⁴ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 131-32 (Max Farrand ed., rev. ed. 1966).

⁶⁵ See Stern, *supra* note 61, at 1340.

⁶⁶ See, e.g., *NFIB*, 132 S. Ct. at 2612 (Ginsburg, J., concurring in part, concurring in judgment in part, and dissenting in part) (“States cannot resolve the problem of the uninsured on their own.”); *id.* (“Congress’ intervention was needed to overcome this collective-action impasse.”).

⁶⁷ For documentation of these laws and charitable hospital practices, see Siegel, *supra* note 59, at 57.

⁶⁸ For a discussion, see *id.* at 56-61.

⁶⁹ 42 U.S.C. § 300gg, 1(a), 3(a), 11, 12 (2010).

⁷⁰ *Comstock*, 130 S. Ct. at 1957 (quoting *Raich*, 545 U.S. at 37 (Scalia, J., concurring in judgment) (quoting *United States v. Darby*, 312 U.S. 100, 121 (1941))).

⁷¹ See *NFIB*, 132 S. Ct. at 2588 (“Under the Government’s theory, Congress could address the [unhealthy] diet problem by ordering everyone to buy vegetables.”).

⁷² *Id.* at 2589.

⁷³ *Id.*

⁷⁴ *Id.* at 2591.

⁷⁵ For a discussion of these limits, see generally Neil S. Siegel, *Four Constitutional Limits that the Minimum Coverage Provision Respects*, 27 CONST. COMMENT. 591 (2011).

⁷⁶ *NFIB*, 132 S.Ct. at 2592 (“Even if the individual mandate is ‘necessary’ to the Act’s insurance reforms, such an expansion of federal power is not a ‘proper’ means for making those reforms effective.”).

⁷⁷ *Id.* at 2591-93 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819)).

⁷⁸ For substantiation of these claims, see generally Siegel, *Free Riding on Benevolence*, *supra* note 59.

⁷⁹ 312 U.S. 100 (1941).

⁸⁰ 132 S. Ct. at 2591-93 (quoting *McCulloch*, 17 U.S. at 411).

⁸¹ *McCulloch*, 17 U.S. at 316.

⁸² See, e.g., PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR, & REVA B. SIEGEL, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 27-28 (5th ed. 2006).

⁸³ U.S. CONST. art. I, § 8, cl. 4.

⁸⁴ 130 S. Ct. 1949 (2010).

⁸⁵ 379 U.S. 241 (1964).

⁸⁶ 379 U.S. 294 (1964).

⁸⁷ For an empirical examination of certain short-term effects of *NFIB*, see generally Andrea Campbell & Nathaniel Persily, *The Health Care Case in the Public Mind: How the Supreme Court Shapes Opinion About Itself and the Laws It Considers*, in this volume.

⁸⁸ See, e.g., Kevin Sack, *Judge Voids Key Element of Obama Health Care Law*, N.Y. TIMES, Dec. 13, 2010, available at http://www.nytimes.com/2010/12/14/health/policy/14health.html?pagewanted=1&%2359;affordable%20care%20act&%2334&_r=1&sq&st=nyt&scp=30&%2359;%20and%20challenges%20frivolous (observing that a district court’s invalidation of the minimum coverage provision was “striking given that only nine months ago, prominent law professors were dismissing the constitutional claims as just north of frivolous”).

⁸⁹ A variety of illuminating polls are available at PollingReport.com, <http://pollingreport.com/health.htm>.

⁹⁰ See Peter Baker, *For Obama, A Signature Issue That the Public Never Embraced Looms Large*, N.Y. TIMES, June 29, 2012, available at http://www.nytimes.com/2012/06/30/us/politics/health-care-overhaul-is-still-no-hit-with-public.html?_r=2&pagewanted=all (referencing “polls showing that elements of the law, like protections for those with pre-existing conditions, rate high with the public”).

⁹¹ See Abby Goodnough, *Distaste for Health Care Law Reflects Spending on Ads*, N.Y. TIMES, June 20, 2012, available at <http://www.nytimes.com/2012/06/21/health/policy/health-care-law-loses-ad-war.html?hp&pagewanted=all> (“In all, about \$235 million has been spent on ads attacking the law since its passage in March 2010 . . . Only \$69 million has been spent on advertising supporting it.”).

⁹² See, e.g., Baker, *supra* note 90.

⁹³ See generally Barnett, *supra* note 39.

⁹⁴ For analysis of the liberty claim, see generally Jedediah Purdy & Neil S. Siegel, *The Liberty of Free Riders: The Minimum Coverage Provision, Mill’s “Harm Principle,” and American Social Morality*, 38 AM. J.L. & MED. 374 (2012).

⁹⁵ For explication of these points, see Siegel, *Free Riding on Benevolence*, *supra* note 59, at 73-74.

⁹⁶ Adrian Vermuele, *Constitutional Conventions*, NEW REPUBLIC, Aug. 2, 2012 (reviewing MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* (2012)), available at http://www.tnr.com/book/review/power-precedent-michael-gerhardt?utm_source=The+New+Republic&utm_campaign=ce2825869c-TNR_B%26A_080212&utm_medium=email#.

⁹⁷ Mishkin wrote and taught about judicial opinions that “both symbolically and actually recognize[] the legitimacy of deeply held moral claims on both sides.” Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 922 (1983).

⁹⁸ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

⁹⁹ Siegel, *supra* note 15, at 979.

¹⁰⁰ *See id.* at 965-69.

¹⁰¹ *See* Carla A. Hesse & Robert Post, *Introduction*, in *HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA* 13, 20 (Carla A. Hesse & Robert Post eds., 1999) (“[T]he relationship between the governed and the governors necessary to sustain the rule of law . . . consists of specific practices that reflect trust and tacit social understandings.”).

¹⁰² For a distinction between “high politics,” in which judges pursue a political vision, and “low politics,” in which judges seek partisan advantage, see generally Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001).

¹⁰³ *See generally* Robert C. Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319 (2010).

¹⁰⁴ *See* Siegel, *supra* note 15, at 999–1000 (discussing the relationship between views about statesmanship and views about the values that courts enforce).