Obamacare

Chief Justice Roberts's Political Dodge

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Chief Justice John Roberts surprised practically everyone by supplying the swing vote to uphold the constitutionality of the requirement in the Patient Protection and Affordable Care Act of 2010 (PPACA or Obamacare) that Americans buy health insurance.[1] The reasoning of his decision is equally surprising. He resorted to semantic gamesmanship and suspect logic to find the law constitutional. The artifice of his opinion confirms that he was driven by a desire to reach a result, however suspect the reasoning, that he thought would protect both the Supreme Court and himself from charges of political partisanship.

Roberts's decision is the latest in a series of rule-bending steps that have been taken to enact and then defend PPACA. The Democratic leadership in Congress entered into tawdry deals and employed procedural shortcuts to ram PPACA through in 2010. The president talked out of both sides of his mouth to push passage of the mandate and then to argue for it in the courts. The Supreme Court has bent the law and defied logic for its own political purposes. Congress, the president, the Court, and much of the punditocracy are complicit in stretching the boundaries of the political and legal systems to impose PPACA on America.

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1. PPACA is Pub. L. No. 111-148, as amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152. The Supreme Court reviewed the Constitutionality of the PPACA in *National Federation of Independent Business v. Sebelius*, 567 U.S. __, 132 S. Ct. 2566 (2012).

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Table Setting

PPACA requires most Americans to "ensure" that they have insurance coverage that meets federal standards. Failure to comply with this mandate triggers a "shared responsibility payment"—what the law calls a "penalty." In 2016, the penalty will be the greater of 2.5 percent of household income, or $2,085 for a family (but in no case more than the cost of the insurance they should have bought) (26 U.S.C. §5000A, added by PPACA §1501(b)).

Congress explicitly bottomed its enactment of the mandate on its authority under the Constitution to regulate interstate commerce. It invoked only this authority; it did not pretend to be acting under its constitutional power to impose taxes (PPACA §1501(a)). President Obama specifically assured Americans that the penalty was not a tax: requiring people to "take responsibility to get health insurance is absolutely not a tax increase. . . . Nobody considers that a tax increase," the president stated. "I absolutely reject [the] notion [that it is a tax increase]" (qtd. in Klingefeld 2009). It was well understood at the time that Congress would not have passed PPACA if the mandate were a tax—hence, the president's strong renunciation. Sanitized of any suggestion of a tax, the bill passed.

Obamacare bureaucratizes and politicizes the health care system. It gives the government broad authority to control the health insurance and health care delivery systems. It entails massive government spending, lighting the fuse on a fiscal time bomb. Broadly speaking, however, these elements do not make it unconstitutional, just unpopular. A majority of Americans opposed the law at the time of enactment, and despite its advocates' hope that it would become popular as people had a chance to read and understand it, most Americans' attitude has remained approximately the same ("Health Care Law" 2013). The 2010 congressional elections demonstrated public opposition to the new law, but critics did not have the votes in Congress to repeal it (and President Obama would have vetoed any repeal).

The mandate, however, raised constitutional questions. The Commerce Clause of the Constitution authorizes Congress to regulate interstate commerce (Art. I, sec. 8, cl. 3). However, the mandate, in requiring people to engage in commerce rather than merely regulating existing commerce, appeared to exceed that authority. PPACA's supporters defended it as a lynchpin of the law. A court judgment that it was unconstitutional would deal a political and psychological blow to the law and impede its implementation. Further, there was a possibility that if the mandate were found unconstitutional, the entire law would be invalidated. Opponents, therefore, challenged the mandate's constitutionality (as well as other provisions of PPACA) in the courts.

The administration defended the mandate as a permitted regulation of interstate commerce on the ground that even if individuals are not engaged in commerce at the moment, they would be when they sought health care. Over the past seventy-five years, after switching its jurisprudence in 1937 to uphold New Deal

legislation, the Supreme Court has broadly interpreted the scope of the Commerce Clause.[2] There is, however, a line the Court has not crossed: all the cases in which it upheld a provision under the Commerce Clause involved regulation of ongoing commerce; the Court had never found it constitutional for Congress to require an individual to engage in commerce.

The administration also argued, as a backup, that if the mandate is not authorized under the Commerce Clause, the penalty it imposes for failing to have the required insurance is nonetheless constitutional as an exercise of Congress's authority to levy taxes (Art. 1, Sec. 8, cl. 1). Even though the president had assured Americans that the mandate was "absolutely not" a tax, and Congress had asserted authority only as a regulation of commerce, the administration showed no embarrassment in arguing in court that the mandate actually is a tax.

Supreme Court Upholds the Mandate

On June 28, 2012, the Court issued its decision upholding, by a vote of five to four, the constitutionality of the mandate, but not on the ground on which the administration had mainly argued. Roberts wrote an opinion saying that the mandate is not authorized by the Commerce Clause (132 S. Ct. 2577 et seq.); the four other "conservative" justices wrote their own opinion to the same effect (at 2642 et seq.) but did not join his opinion.[3] Roberts wrote that the mandate "compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority" (at 2587, emphasis in original). It "would give Congress . . . license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal government" (at 2589). Thus noting the absence of any limiting principle if the Commerce Clause were interpreted to permit regulation of a nonactivity, Roberts pointed out that this would permit Congress to impose "a mandatory purchase to solve almost any problem" (at 2588)—for instance, by requiring the purchase of vegetables, including the iconic broccoli. The four "liberal" justices believed that the Commerce Clause permitted Congress to impose the mandate as a regulation of commerce and so dissented (at 2609 et. seq.).

2. The high water mark of this jurisprudence was set by *Wickard v. Filburn* (317 U.S. 111 (1942)), finding that the federal government had constitutional authority to penalize a farmer for growing wheat for his own use in excess of a quota set by the government.

3. Five Supreme Court justices, including Chief Justice Roberts, were appointed by Republican presidents and are commonly if grossly referred to as the "conservatives"; the four justices appointed by Democratic presidents correspondingly are collectively referred to as the "liberals."

Five members of the Court thus refused to expand the interpretation of the Commerce Clause to include regulation of inactivity. Their combined opinions did not roll back or restrict the current interpretation of what can be regulated by Congress under that authority.

Finding the mandate unconstitutional under the Commerce Clause, however, did not end Roberts's analysis. He turned to the administration's claim that the mandate payment is constitutional as a tax. He found—and the four "liberal" justices concurred—that it can be upheld on this ground. The four "conservative" justices dissented.

To take what Congress explicitly said was a penalty and find that it is a constitutionally permitted tax required logical twisting and semantic stretching, as described below under italicized headings that summarize the strands of Roberts's argument.

Roberts's Tortuous Reasoning

The mandate is not a tax under the Anti-Injunction Act (AIA).

Roberts first had to deal with the AIA (26 U.S.C. §7421). To protect the flow of government tax revenues, the AIA stipulates that a federal tax ordinarily can be challenged only after it is paid; the taxpayer has to seek a refund and go to court if the refund is denied. A challenge to the mandate would thus be premature if the AIA applied; the mandate penalties do not kick in until 2014.

Congress, Roberts recognized, acted under the Commerce Clause in imposing the mandate and penalty. Relying on the statutory text (at 2582), he acknowledged that Congress's intent was clear and that the law was a regulatory exercise with a penalty for noncompliance; he rejected the argument that it was a tax for purposes of determining whether the AIA applied. This rejection cleared the way for the Court to consider the mandate's constitutionality.

But the mandate is a tax for constitutional purposes.

Statutory language, Roberts observed, sometimes can have more than one possible meaning. Under the Court's long-standing jurisprudence, if there is a reasonable interpretation of a statute that would prevent it from being unconstitutional, the Court should adopt that interpretation. On that basis, Roberts found it sufficient that it was "fairly possible" that the mandate could be interpreted to be a tax and as such constitute a valid exercise of Congress's taxing authority, even if this was not "the most natural interpretation" (at 2593–94).

But the statutory language imposing the mandate and the penalty for noncompliance is not subject to multiple interpretations. The statute is clear: as Roberts recognized in determining that the AIA did not bar suit, Congress acted under the Commerce Clause and did not invoke its taxing authority. There is no ambiguity in this; there do not exist multiple interpretations from which the Court could draw one that supported constitutionality.

Roberts instead manufactured an ersatz ambiguity by recharacterizing what Congress had done. He found possibilities in the administration's argument: "[T]he

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. And if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress's constitutional power to tax" (at 2594). He set out to demonstrate that it is "fairly possible" that the mandate payment can be characterized as a tax.

The Court can characterize what Congress enacted.

Roberts said it is up to the Court to decide what Congress enacted. Congress's characterization of the payment as a penalty is not determinative (although he had found it was for AIA purposes) because Congress cannot determine on its own whether its action is constitutional (at 2594).

This reasoning is upside down and backward. True, Congress cannot make something constitutional merely by clever labeling. But it did not try to. Congress explicitly and at some length based its enactment of the mandate and penalty on the Commerce Clause. Five members of the Court reviewed the constitutional authority Congress chose and found it wanting. There was no camouflage labeling to get PPACA past constitutional review. Congress did not try to palm off something that was unconstitutional by giving it a label that would make it appear to be constitutional; it did not try to pass constitutional muster by calling a nontax a tax.

Roberts also said that the fact that Congress chose not to make the AIA applicable to PPACA "does not . . . control whether [the] exaction is within Congress's constitutional power to tax" (at 2594). That argument sets up a straw man.

Congress did not choose to make AIA inapplicable; it did not have to address the issue because it specifically said it was acting under the Commerce Clause. There is no doubt Congress could have imposed a tax and exempted it from the AIA. But it did not; because it had not enacted a tax, it had no need to. Whether Congress chose to make the AIA applicable, moreover, has no relevance to constitutionality. The issue is whether Congress exercised its taxing authority—not whether it could have. And even if it had chosen to impose a tax, constitutionality would not turn on whether it exempted the tax from the AIA.

Congress's clear intent and understanding of what it enacted, recognized by Roberts in the AIA context, does not change merely because the issue turns from applicability of the AIA to constitutionality. In each case, the question is what Congress in fact did and intended to do—impose a penalty or a tax. And it clearly did not intend to tax.[4]

The mandate "looks like a tax."

Having renounced any reliance on Congress's own understanding of what it had enacted, Roberts aggregated bits and pieces of what he said are the indicia

4. The dissent of the four "conservative" justices notes that Roberts's effort to define "tax" differently under the AIA and the Constitution "carries verbal wizardry too far, deep into the forbidden land of the sophists" (at 2656).

of taxation. He found enough of them to conclude that it is "fairly possible" that the mandate is a tax; after all, he stated, it "looks like a tax"(at 2594). His conclusion is based on stretched assumptions about the elements of taxation and the nature of the mandate payment.

The payment for failure to comply with the mandate is to be collected by the Internal Revenue Service (IRS).

Roberts observed that the payment is to be paid by taxpayers, is income related, and will be "collected solely" by the IRS (at 2596). But, of course, the administrative mechanism cannot characterize the nature of the imposition. In any event, enforcement of the mandate payment differs from the usual method of tax enforcement by the IRS.

Congress explicitly denied the IRS several enforcement tools that are typically available to collect taxes. PPACA rules out criminal penalties for failure to make the mandate payment. It also denies the IRS the authority to garnish wages or to put liens on or sell the property of a nonpayer (at 2580). The IRS has no tools to collect a payment except to offset any refund that would otherwise be owed the taxpayer. Thus, the usual attributes of tax enforcement are explicitly taken off the table.

Roberts noted the absence of these "punitive" enforcement mechanisms but took the gentler regime as evidence that the mandate payment is a tax and not a penalty (at 2596). He made the logically suspect argument that the absence of the usual tax collection measures is evidence that it *is* a tax.

At the same time, Roberts failed to note that the IRS plays a less important role with respect to collection of the mandate payment than it typically does for taxes. The Department of Health and Human Services (HHS) and the newly created insurance exchanges under its control are responsible mainly for the complex policy and administrative issues that underlie the mandate, such as defining what kind of coverage is required and who may be exempt from the mandate payment. The IRS is at the tail end of an administrative structure spearheaded by HHS, and its role is more ministerial than it is for most taxes.

The mandate payment raises revenue.

Roberts recognized that the purpose of the mandate payment is to affect conduct by incentivizing people to purchase insurance, but he argued that this purpose does not preclude it from being a tax. After all, he said, there is nothing new about taxes that seek to affect behavior—pointing to tariffs and taxes on marijuana, cigarettes, and sawed-off shotguns (at 2596). Although the mandate payment was designed to affect behavior, the fact that it "will raise considerable revenue"—about $4 billion per year by 2017—is sufficient to make it a tax (at 2594, 2596).

His syllogism is: the mandate payment affects behavior and raises money for the government; taxes affect behavior and raise revenue; therefore, the mandate payment can be seen as a tax. But this logic overlooks the fact that not everything that affects behavior and raises revenue is a tax. Every regulatory requirement enforced with a fine will raise revenue, and every tax is to some extent regulatory.

Roberts did not explain his conclusion that the PPACA payment is a tax in light of the fact, as he conceded, that the mandate "is plainly designed to expand health insurance coverage" (at 2596).

Individuals can choose whether to pay.

Roberts also found an indicium of tax in individuals' ability to decide whether to make the mandate payment; as he sees it, the issue is simply a matter of their balancing the cost and benefit of buying coverage against the amount due the government for failure to have coverage. Because the payment will be less than the cost of insurance, people may make a "reasonable financial decision" not to buy but to make the required payment instead. And because the amount they have to pay is not a "prohibitory financial punishment"—and indeed because IRS is limited in its ability to collect the payment—it is a tax (at 2595–96).

It is not clear why this "choice" makes the payment a tax. Does the possibility that the costs of complying with a regulatory requirement are greater than the penalty for noncompliance turn it into a tax? It is strange that a choice of whether to buy insurance or to make a payment for not doing so is considered to be characteristic of a tax. Most people would consider an imposition in such an accommodative environment to be the antithesis of a tax.

It is a tax because scienter is not required.

Roberts also asserted that the mandate payment is a tax because there is no requirement that people knowingly engage in the prohibited (taxed) behavior for it to be assessed. He argued that "scienter" is a hallmark of a penalty and that the absence here of a requirement for wrongful intent suggests the mandate is a tax (at 2596). This argument is inconsistent with his theory that the payment is a tax because people can choose whether to pay it or not. The choice posited by Roberts as an indicium of tax means that people who pay the tax will intentionally have chosen not to buy the insurance—establishing scienter. If that choice does not focus their attention, people will also be reminded that they do not have the required insurance when they confront the IRS forms assessing the "tax." Those who do not purchase insurance will have the guilty knowledge Roberts assumed is missing.

Congress's lack of concern shows that the mandate is a tax and not a penalty.

Roberts asserted that Congress was not greatly concerned about the uninsured and used his assumption as evidence that the mandate payment is a tax.

Roberts defined a penalty as a punishment for an unlawful act. Failure to get insurance, as required by PPACA, is not unlawful because it engenders no negative legal consequences (other than having to pay IRS). In fact, he said, Congress would be "troubled" if the failure to get insurance were unlawful. Congress recognized that 4 million people would fail to buy insurance but regarded this "extensive failure" as "tolerable." It did not think it was creating 4 million "outlaws." Therefore, the payment is a tax and not a penalty (at 2597).

Thus, the logic is: Congress did not want to create 4 million outlaws; by definition, therefore, people who fail to have insurance are not outlaws; if they are

not outlaws, the failure to purchase is not unlawful; and because this failure is not unlawful, the sanction cannot be a penalty and must be a tax. QED.

It is not clear how the level of Congress's concern can determine whether an action is a tax or a penalty. Roberts appeared to assume that if Congress is only a bit concerned—as reflected by the fact that it did not make the conduct criminal or otherwise unlawful—this is evidence that the mandate is a tax. Thus, if legislation imposes criminal sanctions or otherwise brands violators as "outlaws," this would be evidence that Congress is more concerned in the matter and that a payment would be a penalty.

This standard is meaningless. How can a court measure Congress's relative concern (although Roberts apparently thought he could)? Congress, for example, made it illegal to import plants and animals in violation of a foreign country's law, and it imposed penalties, fines, and imprisonment for violations.[5] Does that mean Congress is more concerned about importation of feathers and woods in violation of foreign law than it is about reforming the health care system and reducing the number of uninsured in the United States? What laws should be balanced against each other to determine Congress's relative concern? What is the equilibrium point against which relative concern is measured? And even if it were possible for courts to titrate congressional concern, on what basis can it be said that conduct about which Congress is less concerned gives rise to a tax?

Taxation of inactivity is less onerous than regulation of inactivity.

Roberts was aware that it might appear incongruous to find that Congress can tax nonactivity while rejecting Congress's authority to regulate that nonactivity under the Commerce Clause. But he assured us that we need not be disturbed by this incongruity:

1. The "Constitution does not guarantee that individuals can avoid taxation by inactivity," he said, pointing to the authorization in the Constitution for capitation (head) taxes (at 2599). Roberts recognized that the tax at issue is not a capitation tax (and would be constitutionally invalid if it were because capitation taxes must be apportioned among the states by population). But authorization to impose a head tax does not mean that the Constitution generally allows taxes on inactivity. If anything, explicitly authorizing head taxes implies that the taxing power does not otherwise authorize taxing inactivity. Roberts contrasted the Commerce Clause, implying that there is a prohibition against regulating inactivity in that clause that is not present in the taxing clause (at 2599). There is no such explicit prohibition in the Commerce Clause; Roberts's opinion found that the clause does not include authority for regulation of a nonactivity. He could similarly have found that the taxing authority does not extend to inactivity.

5. Lacey Act, 16 U.S.C. § 3371. See U.S. Department of Justice 2012.

Roberts argued that there is nothing new about using the taxing clause to encourage purchases, pointing to tax breaks for home purchases and professional education (at 2599). But those breaks are not taxes on inactivity; they are tax relief provided for favored transactions that the individual voluntarily undertakes.

2. Roberts recognized that the power to tax can turn into a penalty, but, quoting shibboleths from previous cases, he reassured that so long as the Court sits, the power to tax will not become the power to destroy (at 2599–600). Thus his argument is that a tax on inactivity is permitted because the Court will make sure it is a tax, on the basis of a nonexistent standard. But that argument does not answer the question whether the taxing clause permits a tax on inactivity in the first instance, no matter how mild the tax might be. One might as well say that it would be permissible to regulate nonactivity under the Commerce Clause because the Court would be vigilant to ensure that the nonactivity affected interstate commerce.

Roberts recalled Benjamin Franklin's remark that the only things in life that are certain are death and taxes as support for the view that the Constitution contains no prohibition against taxation of inactivity (at 2599). He seized Franklin's wise observation about the realities of life to support an expansive reading of how intrusively the people agreed, through the Constitution, to be taxed. One can only hope that Roberts was simply offering a whimsical note here.

3. Finally, Roberts stated, a tax does not give Congress the same degree of control over individual behavior as regulation does. Under a regulatory scheme, Congress can "simply command individuals to do as it directs," with civil and criminal sanctions and public shaming for failure to comply. A tax, in contrast, is "limited to requiring an individual to pay money into the Federal Treasury, no more" (at 2600). If paid, there is no power to impose criminal sanctions or brand a violator as a criminal. Some people might disagree with the benign assumption that taxation does not control behavior (as Roberts elsewhere recognized in his opinion). And, of course, what Roberts sees as only limited control of individuals' activity through taxation may be a function of the fact that Americans to date have not been required to engage in a commercial activity at the risk of paying a tax if they do not. Roberts defended his grant of extensive authority through the taxing authority on the basis of the very status quo that his opinion undermines.

Roberts's comparison between taxation and regulation is confused in several more respects. It is, in the first place, asymmetrical. Roberts contrasted the actions that the government can take against a person who fails to meet a regulatory requirement with the fact that it has no further power over a taxpayer who complies. These are apples and oranges, comparing a compliant taxpayer with a person who fails to comply with a regulatory requirement. A more symmetrical comparison would consider the sanctions imposed for failure to pay a tax—and they can be (generally, if not for the tax imposed by PPACA) at least as onerous as those imposed for violations of a regulatory requirement.

Nor is it evident how the attempted comparison of the amount of control is relevant to the question of whether the mandate is constitutional as a tax. There is a broad range of regulatory requirements; there is a broad range of taxes. Efforts taken to legally avoid or reduce a tax burden may be no less intrusive than a regulatory requirement. It is meaningless to say that taxes are less intrusive than regulations—it depends on the specifics in each case.

But even if taxes were as a general matter less intrusive than regulatory control, it is not apparent why that would establish that the mandate payment is a tax. Under PPACA, the sanction for not buying the required insurance is the same whether it is called a tax or a penalty. The effect on individual behavior is the same. And even if the mandate as a tax were somehow considered less intrusive than regulation of the nonactivity, why does that make it a tax? Merely on the basis of Roberts's assumption that taxes are less controlling?

What Has the Court Wrought?

Roberts's opinion gives Congress a powerful new tool for using taxes as an instrument of social regulation. Congress merely has to impose a "tax" on the failure to take an action. There is no principle limiting what conduct Congress might expect to achieve by imposing a "tax" on inaction—except that the "tax" fit within the Court's nonexistent standard of what constitutes a tax. Congress might tax Americans who do not buy cars favored by the government in order to support the car industry and increase employment of auto workers. Or it might tax Americans who fail to purchase health-promoting products, including the broccoli that crystallized the discussion of the Commerce Clause's reach.

In fact, Roberts found it self-evident that nonactivity might be taxed. He posited that Congress might require every homeowner who does not have energy-efficient windows to pay the IRS $50 (with adjustments depending on family income) and blithely chirped that "no one would doubt that this . . . was within Congress's power to tax" (at 2597–98). No? One can only marvel at the insouciance of this circular—and disturbing—reasoning. He used his self-referential assumption as evidence that the mandate is a tax rather than a caution against it.

The electorate may be less willing to enact a tax than to impose a regulation (as was apparent in the run-up to passage of the PPACA). Roberts's decision neutralizes this political consideration. It allows Congress to enact a tax surreptitiously or even, as here, unknowingly after renouncing the notion that it was imposing a tax. Although Roberts reminded us that the ultimate arbiter of the wisdom of legislation is the people, not the Court, his opinion undercuts the people's ability to assert their will. If Congress enacts legislation that does not have a constitutional basis as a regulation, Roberts's opinion would enable the Court to recast the legislation so as to find some "fairly possible" ground to uphold it—even though the people through their representatives did not choose that approach

and had rejected it. The difference may only be a difference of language—but a difference that can determine what legislation is enacted. The Court transformed what Congress actually did into something that was not and could not have been enacted.

Because the penalty payment has now been revealed to be a tax, any effort by Congress to require a larger payment would be branded a tax increase. Ironically, however, the more stringent Congress makes the penalty, the less it is, under Roberts's reasoning, a tax, and the more it would resemble a regulatory penalty. Roberts's contortions can only result in more of the same whenever the mandate payment is addressed.

Roberts's decision spared the administration significant political embarrassment. But the administration did not have the grace or the fortitude to accept the gift crafted with such effort. Even while welcoming the result and breathing an audible sigh of relief, it refused to play along with the Court. It instead added to the pervasive jabberwocky. The White House continued to insist that the payment was not a tax, although the Court had just determined that it was. According to the White House spokesman, "It's a penalty because you have a choice. You don't have a choice to pay your taxes" (White House 2012; qtd. in Condon 2012). Ironically and significantly, of course, Roberts relied on people's ability to choose whether to buy insurance or pay the IRS as one of the elements that made the mandate a tax. The administration cynically pocketed the Court's decision while denying its rationale.

Roberts's Scruples: An Opening for Political Pressure

Why did Roberts strain so mightily to find the mandate constitutional as a tax? We don't know with any certainty and can't know—unless Roberts himself tells us more, which is unlikely. But his understanding of the role of the chief justice and of the political environment in which the Court acted provide strong clues.

Roberts has publicly emphasized the need to place bipartisan legitimacy above ideology. He has been concerned about five-to-four votes that appear to be divided along partisan lines (based, presumably, on the party of the president who nominated each of the justices); these votes, he said, undermine the faith of the public that the Court as an institution transcends politics. He has also said that chief justices are more likely than associate justices to subordinate their personal views for the good of the Court (Rosen 2007, 2012).

Supporters of the PPACA homed in on the opening that Roberts's scruples offered. After the case had been heard by the Supreme Court, and pending its decision, there was a broad, if not coordinated, effort to influence the Court's decision by delegitimizing in advance any decision that knocked out the mandate. This effort played directly on Roberts's concerns.

A week after the Court heard arguments, President Obama disputed the Court's authority to overrule statutes enacted by Congress: "Ultimately I am confident that the Supreme Court will not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress" (qtd. in Mason 2012). This statement was erroneous as a matter of both law and history. As a barely veiled threat that Obama would wage a political campaign against the Court if it did not uphold the constitutionality of PPACA, it was also inappropriate. It was an obvious effort to influence the Court. For what other purpose would the statement be made? The President's reference to a "strong majority" in Congress, moreover, was disingenuous. Final passage of the bill was achieved by a vote of 219-212 in the House.

Senator Pat Leahy, chairman of the Senate Judiciary Committee, similarly warned the chief justice: "I trust that he will be a Chief Justice for all of us and that he has a strong institutional sense of the proper role of the judicial branch." He opined that "[t]he conservative activism of recent years has not been good for the Court" and added that, "[g]iven the ideological challenge to [PPACA] and the extensive, supportive precedent, it would be extraordinary for the Supreme Court not to defer to Congress in this matter that so clearly affects interstate commerce" (qtd. in Mears 2012).

Numerous commentators also took up the cause, pontificating that if the chief justice voted to strike down the law, he would be acting politically and undermine the Court's credibility. He was urged to put aside partisanship and vote to support the law. Although at least half the country was opposed to the law, there was a one-sided campaign to entrench the notion that upholding the statute would be an act of statesmanship, whereas finding it unconstitutional would be political, partisan, and divisive. Because Roberts had been appointed by a Republican president, he could show a lack of partisanship only if he voted to uphold the law, which the Republicans in Congress had opposed. Yet the expected votes by the four "liberal" justices to uphold the law were ironically not considered to be political or partisan.

After the decision was announced, liberal commentators gave the chief justice the obligatory pat on the head. He was praised for his "political genius," "exquisite delicacy," and even "statesmanship" (Klein 2012; Liptak 2012). Jeffrey Rosen, with whom Roberts had previously shared his concerns about maintaining the Court's legitimacy, described Roberts's opinion as a "twistification of which [Chief Justice John] Marshall would have been proud." (Thomas Jefferson used the word *twistification* to describe an opinion by Marshall.) Rosen continued: "For bringing the Court back from the partisan abyss, Roberts deserves praise not only from liberals but from all Americans who believe that it's important for the Court to stand for something larger than politics." The coherence of the legal arguments is irrelevant; "Roberts's decision was above all an act of judicial statesmanship." It was a "canny performance" and a work of "political genius" (2012).

Although numerous conservative commentators wrote that the decision was a political cave-in,[6] two of the most respected ones congratulated Roberts on his political sagacity.

Charles Krauthammer posited that the chief justice was responding to political considerations. No doubt with Roberts's concept of the role of a chief justice in mind, Krauthammer assumed that if Roberts were not chief justice, he would have decided the case differently, but the commentator praised Roberts for "pulling off one of the great constitutional finesses of all time. He managed to uphold the central conservative argument against Obamacare [by rejecting the extension of the Commerce Clause to cover regulation of nonactivity], while at the same time finding a narrow definitional dodge to uphold the law—and thus prevented the court from being seen as having overturned, presumably on political grounds, the signature legislation of this administration." Concerned about being seen as political, Roberts was, Krauthammer stated, able to obviate "any charge that a partisan court overturned duly passed legislation. And yet at the same time the commerce clause is reined in." To do all this, Krauthammer recognized, Roberts had to engage in "a dodge, and a flimsy one at that" (2012).

George Will similarly nodded his approval. He congratulated the Court, saying that conservatives "won a substantial victory." Because the Court did not uphold the mandate as an exercise of the Commerce Clause, it was a "huge victory for the long haul." After all, he stated, the Court upheld the mandate "only because Congress could have identified its enforcement penalty as a tax" (2012). (Actually, Roberts said that the issue was what Congress did, not what it could do [at 2599].) Will pooh-poohed the implications of the Court's turning the penalty into a tax and broadly interpreting what can be done under the taxing authority.

Both Will and Krauthammer found in Roberts's rejection of the effort to defend the mandate under the Commerce Clause a victory for the principle of constitutional restraint. But the victory may not last long. The conclusion (via the overlapping opinions of Roberts and the four "conservative" justices) that the Commerce Clause does not permit regulation of inactivity was not necessary for the Court's decision; once the Court had determined that the mandate could be upheld as constitutional under the taxing clause, it did not have to reach the Commerce Clause issue. The rejection of the mandate under the Commerce Clause, therefore, may be considered dictum, with the possibility that it will not have great precedential value in future cases in which Congress attempts to regulate nonactivity. And even if it is accepted that the Court bounded the Commerce Clause, this may be of little significance because the decision gives Congress broader power for social regulation through the taxing authority. Will and Krauthammer

6. McGurn 2012 (if Roberts acted to earn political capital, questions are raised about the Court's integrity); Thompson 2012 (inappropriate if Roberts acted to protect the Court as an institution rather than deciding on the law); "A Vast New Taxing Power" 2012 (Roberts failed in the "most basic responsibility" to protect liberty).

uncharacteristically failed to recognize that the victory is a pyrrhic one. The bottom line is that the Court expanded the taxing authority available to Congress and at the same time may not have protected against extension of the Commerce Clause.

Roberts's Misguided Effort at Political Inoculation

Roberts's opinion is described as the statesmanlike work of political genius, a canny performance, achieved through a "flimsy dodge," a "twistification," and a "finesse". These words of intended praise reflect how transparently contrived the opinion is. Roberts decided the case on political grounds in order to avoid political attack. One is reminded of the iconic explanation from the Vietnam War: U.S. soldiers had to burn a village in order to save it.

In his confirmation hearings, Roberts said he viewed his role as a judge to be like an umpire's—he would not make the rules but promised simply to call the balls and strikes as he saw them. Here, however, he violated his own stricture. To carry his analogy forward, by his vote the Court determined that Congress struck out when it issued the mandate under the Commerce Clause, but Roberts nonetheless believed that he and the Court had an obligation to help Congress win if "fairly possible," and he in effect awarded it a bases-loaded walk on the ground that it really had not meant to swing. Once an umpire lets extraneous factors influence his call, he loses respect and is on the slippery slope of trimming and countertrimming.

Americans will always look askance at both the product and the process of the Court's decision, just as a majority of them judge Congress's passage of PPACA in the first place. One poll showed that 65 percent of respondents were disappointed by the decision. Another poll found that 64 percent (including 47 percent of Democrats) thought politics played too great a role in the decision (Rugg 2012). Another survey, also taken right after the decision, found that the Supreme Court's "poor" rating increased by eleven points (to 28 percent) in one week ("Approval Ratings" 2012).

A decision made for the political benefit of the chief justice and the Court by side-stepping the law, perverting logic, and engaging in word games is not a solid basis for respecting the Court as an institution. Roberts's effort may result in the very damage to the Court's reputation and standing that he sought to avoid.

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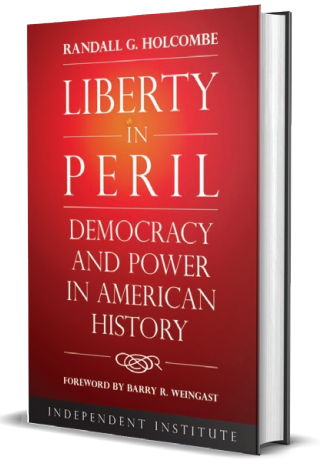

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