HEALTH REFORM AND THE SUPREME COURT: THE ACA SURVIVES THE BATTLE OF THE BROCCOLI AND FORTIFIES ITSELF AGAINST FUTURE FATAL ATTACK

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The single most important legal development in health law in 2012 was the Supreme Court's June 28 decision upholding the Patient Protection and Affordable Care Act ("ACA") against a surprisingly strong constitutional challenge.[1] The decision in *National Federation of Independent Business v. Sebelius* ("*NFIB*")[2] forever altered the scope of federal congressional power. Specifically, it diminished the authority of Congress under the Commerce and Spending Clauses and stretched its authority under the Taxing Clause.[3] The implications of the decision with respect to both health reform, and congressional power more generally, will only be known with the passage of time.[4] What the decision did

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[1] The overwhelming majority of constitutional and health law scholars dismissed as without merit the Commerce and Spending Clause challenges brought against the law based on almost a hundred years of precedent. *See Constitutionality of Health Care Law 'Unambiguous,' Say More than 100 Leading Scholars*, AM. CONST. SOC'Y (Jan. 18, 2011) [hereinafter *Constitutionality*], http://www.acslaw.org/acsblog/constitutionality-of-health-care-law-'unambiguous'-say-more-than-100-leading-scholars (listing the almost one-hundred-thirty legal scholars supporting the constitutionality of the Affordable Care Act). It was only when some lower court judges questioned its constitutionality that the Supreme Court granted certiorari to review and scheduled the case for three days of oral argument that the strength of the challenges became clear. Bill Mears, *Supreme Court Considers Whether to Let Parts of Health Care Law Stand*, CNN.COM, (Mar. 28, 2012), http://www.cnn.com/2012/03/28/politics/scotus-health-care/index.html.

[2] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) [hereinafter *NFIB*].

[3] *Id.* at 2608.

[4] Of course, some scholars are already speculating. *See, e.g.*, John D. Blum & Gayland O. Hethcoat II, *Medicaid Governance in the Wake of* National Federation of Independent Business v. Sebelius*: Finding Federalism's Middle Pathway, From Administrative Law to State Compacts*, 45 J. MARSHALL L. REV. 601, 603 (2012) (discussing the effects on states' government economies after the Supreme Court's decision); Pamela S. Karlan, *Democracy and Disdain*, 126 HARV. L. REV. 1, 41–55 (2012) (opining on the influence of political affiliations on the Justices on their decision making); Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83 (2012); Martha Minow, *Affordable Convergence:*

clarify, however, is that neither the media, nor constitutional scholars, are particularly apt at prognosticating decision making by the Roberts Court.[5] While prognosticators and scholars focused on the reach of the Commerce Clause in the build up to the case, the Spending and Taxing Powers carried the day.

The decision itself reflects a fascinating realignment of constitutional powers, Supreme Court Justices, and views on judicial deference. At least as important, the decision upholds the most significant social legislation passed by Congress in recent decades. For proponents of the health reform law, it is an unqualified victory. Nonetheless, the decision itself could be used to attack other critical pieces of social legislation.[6] And the decision may be nothing more than a temporary victory. The ACA is still vulnerable to political and constitutional attack.[7] Indeed, cases

"Reasonable Interpretation" and the Affordable Care Act, 126 HARV. L. REV. 117, 118–19 (2012) (hypothesizing the potential consequences of the decision on the scope of governmental powers); Randy Barnett, *We Lost on Health Care. But the Constitution Won.*, WASH. POST, July 1, 2012, at B1, *available at* http://www.washingtonpost.com/opinions/randy-barnett-we-lost-on-health-care-but-the-constitution-won/2012/06/29/gJQAzJuJCW_story_1.html (noting the Court's departure from traditional constitutional law interpretation in the decision); Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause after NFIB*, 101 GEO. L.J. (forthcoming 2013); Nicole Huberfield et al., *Plunging Into Endless Difficulties: Medicaid and Coercion in the Healthcare Cases*, 93 B.U. L. REV. (forthcoming Jan. 2013); Glenn H. Reynolds & Brannon P. Denning, National Federation of Independent Business v. Sebelius: *Five Takes* (SSRN, Working Paper No. 2133669) ("[T]he opinion handed the Administration a somewhat Pyrrhic victory while laying the foundation for robust judicially-enforced limits on congressional power."); Ilya Shapiro, *We Won Everything but the Case*, SCOTUSBLOG (June 29, 2012, 9:38 AM), http://www.scotusblog.com/2012/06/we-won-everything-but-the-case (discussing the "hollow[ness]" of the holding and Chief Justice Roberts's influence).

[5] For example, Harvard Law Professor (and former Solicitor General) Charles Fried said he would "eat a hat . . . made of kangaroo skin" if the Court struck down the mandate based on the Commerce Clause. Igor Volsky, *Reagan's Solicitor General Promises to "Eat a Hat Made of Kangaroo Skin" if Courts Repeal Health Law*, THINK PROGRESS (Apr. 15, 2012), http://thinkprogress.org/health/2010/04/15/171390/fried-unconstitutional/?mobile=nc ("The statute which I have in front of me, I bothered to read it, says that the health insurance industry is an $854 billion dollar industry. That sounds like commerce. The Supreme Court just five years ago with Justice Scalia in the majority said that it is all right under the Commerce Clause to make it illegal for . . . residents in California to grow pot for their own use, because that has affect on interstate commerce. Well, if that has affect on interstate commerce, what happens in an $854 billion national industry certainly does.").

[6] Sergio Eduardo Munoz, *Could Supreme Court Weaken Civil Rights Via Health-Law Decision on Medicaid?*, NEW AM. MEDIA (Mar. 28, 2012), http://newamericamedia.org/2012/03/could-supreme-court-weaken-civil-rights-via-health-law-decision-on-medicaid.php.

[7] *See, e.g.*, David B. Rivkin, Jr. & Lee A. Casey, *Rivkin and Casey: The Opening for a Fresh Obamacare Challenge*, WALL ST. J., Dec. 5, 2012, http://online.wsj.com/article/SB10001424127887324705104578151164101375482.html ("It is becoming increasingly clear, however, that the [C]ourt took a law that was flawed but potentially workable and transformed it into one that is almost certainly unworkable."); Greg

challenging the constitutional vitality of the ACA's requirement that insurance plans include contraceptive coverage appear to be headed for the Supreme Court.[8] But, unlike when the ACA was

Sargent, *Having Failed to Repeal Obamacare, Republicans Refuse to Implement It*, WASH. POST (Dec. 14, 2012), http://www.washingtonpost.com/blogs/plum-line/wp/2012/12/14/having-failed-to-repeal-obamacare-republicans-refuse-to-implement-it (discussing how Republicans are blocking attempts to implement the ACA at the state level, are refusing change, and are ultimately hoping to ensure its failure).

[8] Currently there are close to fifty lawsuits challenging the constitutionality of the contraceptives mandate in the Affordable Care Act. Tom Howell, Jr., *Contraception Mandate Hits Legal Hurdles; Conflicting Rulings Set Course for High Court*, WASH. TIMES, Jan. 18, 2013, at A1. Of the lawsuits where rulings have been obtained, nine have resulted in injunctive relief. *See generally* Korte v. U.S. Dep't of Health & Human Servs., No. 12-3841 (7th Cir. Dec. 28, 2012), http://c0391070.cdn2.cloudfiles.rackspacecloud.com/pdf/7th-circuit-order-granting-temporary-injunction-korte-v-sebelius-hhs-mandate.pdf (granting an injunction while plaintiffs appeal the lower court's ruling in Korte v. U.S. Dep't of Health & Human Servs., No. 3:12-CV-01072-MJR, 2012 WL 6553996 (S.D. Ill. Dec. 14, 2012)); O'Brien v. U.S. Dep't of Health & Human Servs., No. 12-3357 (8th Cir. Nov. 28, 2012), http://c0391070.cdn2.cloudfiles.rackspacecloud.com/pdf/8th-circuit-order-granting-temporary-injunction-in-obrien-v-hhs.pdf (granting an injunction while plaintiffs appeal the court's decision in O'Brien v. U.S. Dep't of Health & Human Servs., No. 4:12-CV-476 (CEJ), 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012)); Sharpe Holdings Inc. v. U.S. Dep't of Health & Human Servs., No. 2:12-CV-92-DDN (E.D. Mo. Dec. 31, 2012), http://www.becketfund.org/wp-content/uploads/2012/05/Sharpe-Holdings-TRO-Granted.pdf; Domino's Farms Corp. v. Sebelius, No. 12-15488 (E.D. Mich. Dec. 30, 2012), http://docs.justia.com/cases/federal/district-courts/michigan/miedce/2:2012cv15488/276166/17/0.pdf?ts=1356937882; Conestoga Wood Specialties Corp. v. Sebelius, No. 12-6744 (E.D. Penn. Dec. 28, 2012), http://www.scribd.com/doc/118373740/Conestoga-Wood-Spec-v-Sebelius; Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs., No. 12-3459-CV-S-RED (W.D. Mo. Dec. 20, 2012), http://c0391070.cdn2.cloudfiles.rackspacecloud.com/pdf/aclj-hhs-american-pulverizer-order-granting.pdf; Tyndale House Publishers, Inc. v. Sebelius, No. 12-1635(RBW), 2012 WL 5817323 (D.D.C. Nov. 16, 2012); Legatus v. Sebelius, No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012) (granting a preliminary injunction for one of the plaintiffs); Newland v. Sebelius, No. 1:12-CV-1123-JLK, 2012 WL 3069154 (D. Colo. July 27, 2012). In three other cases, requests for injunctions were denied. *See* Hobby Lobby Stores, Inc. v. Sebelius, No. 12A644, 2012 WL 6698888 (10th Cir. Dec. 26, 2012); Autocam Corp. v. Sebelius, http://www.becketfund.org/hhsinformationcentral/#DDC; Grote Indus. v. Sebelius, No. 4:12-CV-00134-SEB-DML, 2012 WL 6725905 (S.D. Ind. Dec. 27, 2012). Five other lawsuits were dismissed for lack of standing. *See* Zubik v. Sebelius, No. 2:12-CV-00676, 2012 WL 5932977 (W.D. Penn. Nov. 27, 2012); Catholic Diocese of Nashville v. Sebelius, No. 3-12-0934, 2012 WL 5879796 (M.D. Tenn. Nov. 21, 2012); Wheaton Coll. v. Sebelius, No. 12-1169 (ESH), 2012 WL 3637162 (D.D.C. Aug. 24, 2012); Belmont Abbey Coll. v. Sebelius, No. 11-1989 (JEB), 2012 WL 2914417 (D.D.C. July 18, 2012); Nebraska *ex rel.* Bruning v. U.S. Dept. of Health & Human Servs., No. 4:12CV3035, 2012 WL 2913402 (D. Neb. July 17, 2012). The plaintiffs in both *Belmont Abbey College* and *Wheaton College* appealed those rulings to no avail as the Court of Appeals for the District of Columbia Circuit found their cases unripe for review. *See* Wheaton Coll. v. Sebelius, Nos. 12-5273, 12-5291, 2012 WL 6652505 (D.C. Cir. Dec. 18, 2012). Beyond those fourteen decisions, many other lawsuits remain open, with more possible in the future. *See generally* Roman Catholic Archdiocese of N.Y. v. Sebelius, No. 12 Civ. 2542 (BMC), 2012 WL 6042864 (E.D.N.Y. Dec. 4, 2012); Colo. Christian Univ. v. Sebelius, No. 11-CV-03350-CMA-BNB (D. Colo. Aug. 31, 2012), http://docs.justia.com/cases/federal/district-courts/colorado/codce/1:2011cv03350/130236/59; *HHS Mandate Information Central*, BECKET FUND, http://www.becketfund.org/hhsinformationcentral/#DDC (last visited Jan. 8, 2013) (listing many of the cases still pending in the various federal district courts around the

first passed on by the Court, prognosticators and scholars will be able turn to *NFIB* to inform their predictions if and when the Supreme Court does agree to consider the next challenge to the law.

This article will briefly describe the ACA, the constitutional challenges that brought it before the Supreme Court, and the intense scrutiny brought to bear on the Commerce Clause in the briefs, media reports, and oral arguments proffered in the lead up to the decision. It will then summarize the decision while focusing on the impact of the "broccoli horrible,"[9] and the question of severability. After paying brief tribute to the often overlooked opinion by the Justice Ruth Bader Ginsburg, the article will consider what role, if any, *NFIB* is likely to play in future constitutional challenges to the ACA. Specifically, the article will argue that *NFIB* is likely to play a small but critical role if and when the Supreme Court considers the constitutionality of the ACA's contraception mandate. Despite the expressed willingness of the four members of the Court to strike the entire statute down based on a single constitutional infirmity in *NFIB*, at least five Justices of the Court have made it vividly clear that even a successful challenge a single component of the Act—including the contraception mandate—will not bring down the ACA. After *NFIB*, the ACA will survive further assault in the courts.

I. THE ACA AND THE CONSTITUTIONAL CHALLENGES

The ACA is a massive federal act designed to expand access to health care coverage, control health care costs, and improve health care delivery systems.[10] The law has many moving pieces. It makes

country); *see also* Timothy Stoltzfus Jost, *Religious Freedom and Women's Health—The Litigation on Contraception*, 368 NEW ENG. J. MED. 4, 4–6 (2013), http://www.nejm.org/doi/pdf/10.1056/NEJMp1214605 (describing various court cases challenging the preventative services mandate of the Affordable Care Act); *Appeals Court Temporarily Blocks Contraception*, KHN (Nov. 30, 2012), http://www.kaiserhealthnews.org/daily-reports/2012/november/30/contraception-mandate-and-court-challenges.aspx; *Contraception and Insurance Coverage (Religious Exemption Debate)*, Times Topics, N.Y. TIMES (last updated May 21, 2012), http://topics.nytimes.com/top/news/health/diseasesconditionsandhealthtopics/health_insurance_and_managed_care/health_care_reform/contraception/index.html; Kathryn Smith, *Obamacare's Many Contraception Lawsuits*, POLITICO (Nov. 28, 2012, 4:39 AM), http://www.politico.com/news/stories/1112/84302.html.

[9] The "broccoli horrible" is the term coined by Justice Ginsburg to describe the slippery slope argument pressed by opponents of the ACA regarding the reach of Congress's powers under the Commerce Clause. *NFIB*, 132 S. Ct. 2566, 2624 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, dissenting in part).

[10] 42 U.S.C. § 18091(2)(c) (2010); Patient Protection and Affordable Care Act, Pub. L. No.

preventive care free,[11] makes insurance available to individuals and small businesses through health care exchanges,[12] and provides premium and cost sharing subsidies to make insurance affordable through the exchanges.[13] It also requires individuals to have coverage or pay a penalty.[14] It requires some employers—those that have fifty or more employees—to offer coverage.[15] It provides tax credits to small employers that choose to provide insurance.[16] The Act also expands Medicaid,[17] will create an essential health benefits package that must be provided by all health insurers,[18] requires coverage for adult children under the age of twenty-six,[19] and eliminates the preexisting condition exemptions[20] and lifetime caps on insurance.[21]

The text of the statute runs 906 pages.[22] The full implementation will require thousands more pages of regulation. Despite its size, or perhaps because of it, opponents have sought to prevent its implementation from the moment it became law. On the same day the President signed bill into law, the Attorney General from Florida and a dozen other states filed a lawsuit challenging its constitutionality.[23] The state of Virginia filed a separate action

111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

[11] 42 U.S.C. § 300gg-13 (2006 & Supp. IV 2010); *see also* Coverage of Preventive Services Under the ACA, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (to be codified at 29 C.F.R. pt. 54) ("[I]n directing non-grandfathered group health plans and health insurance issuers to cover preventive services and screenings for women, . . . Congress determined that both existing health coverage and existing preventative services recommendations often did not adequately serve the unique health needs of women.").

[12] 42 U.S.C. § 18031 (2010).

[13] *Id.*

[14] 26 U.S.C. § 5000A(a), (b)(1) (2010).

[15] *Id.*

[16] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1421, 124 Stat. 119, 120 (2010) (codified at I.R.C. § 45R(a) (2010)).

[17] 42 U.S.C. § 1396 (2006 & Supp. IV 2010).

[18] 42 U.S.C. § 18022 (2010).

[19] 42 U.S.C. § 300gg-14 (2010).

[20] 42 U.S.C. § 300gg-3 (2010).

[21] 42 U.S.C. § 300gg-11 (2006 & Supp. IV 2010).

[22] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified at I.R.C. § 45R(a) (2010)), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf.

[23] *NFIB*, 132 S. Ct. 2566, 2576 (2012) (listing the states); Tom Brown, *States Joined in Suit Against Healthcare Reform*, REUTERS (May 14, 2010), http://www.reuters.com/article/idUSTRE64D6CJ20100514; Michael Connor, *Florida Says Several States to File Healthcare Lawsuit*, REUTERS (Mar. 22, 2010), http://www.reuters.com/article/idUSN2215987420100322. The list of states which joined Florida's suit were: Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Louisiana, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Pennsylvania, South

specifically defending its statute against the Federal Health Reform Law.[24] Eventually, twenty-six states joined in the Florida suit and another lawsuit filed by the NFIB and two individual plaintiffs.[25] The Supreme Court eventually agreed to hear the NFIB and Florida cases.[26]

In total, the Supreme Court granted certiorari to address four issues across the cases.[27] The first was a threshold issue questioning whether the case was ripe for review given the Anti-Injunction Act.[28] The Anti-Injunction Act prohibits the court from reviewing challenges to taxing statutes before taxes have been levied.[29] The question raised by the lawsuits was whether the courts could hear the case challenging the imposition of an individual mandate before anyone had been subjected to a penalty for failure to comply with the mandate.[30]

The second issue presented by the various challengers was whether the federal government had the power to require individuals to purchase health insurance by imposing a penalty on those who failed to do so.[31] This issue was directed at the "shared responsibility clause" or the so-called mandate.[32] The shared responsibility clause requires individuals—except for those with

Carolina, South Dakota, Texas, Utah, and Washington. Connor, *supra*.

[24] Warren Richey, *Supreme Court Says No to Expedited Hearing on Health-Care Reform Law*, CHRISTIAN SCI. MONITOR, Apr. 25, 2011, http://www.csmonitor.com/USA/Justice/2011/0425/Supreme-Court-says-no-to-expedited-hearing-on-health-care-reform-law (noting that twenty-six states are in the Florida case, and Virginia has its own case).

[25] *NFIB Joins National Lawsuit Challenging Healthcare Law*, NFIB (May 14, 2010), http://www.nfib.com/press-media/press-media-item?cmsid=51584 (representing small companies, NFIB—a trade group—is concerned about the cost of compliance with the new law).

[26] *Certiorari—Summary Dispositions* 2–3 (Nov. 14, 2011), http://www.supremecourt.gov/orders/courtorders/111411zor.pdf.

[27] *NFIB*, 132 S. Ct. at 2580–83.

[28] In *Department of Health and Human Services v. Florida*, the Supreme Court directed the parties to brief and argue "[w]hether the suit brought by respondents to challenge the minimum coverage provision of the Patient Protection and Affordable Care Act is barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a)." *Certiorari—Summary Dispositions*, *supra* note 26, at 3.

[29] The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a) (2006 & Supp. IV 2010).

[30] *NFIB*, 132 S. Ct. at 2582–85.

[31] *Id.* at 2577 ("[W]hether Congress has the power under the Constitution [i.e., the Commerce and Taxing and Spending Clauses] to enact the challenged [minimum coverage] provision[] [i.e., the individual mandate]."); *see* Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1268 (11th Cir. 2011).

[32] 26 U.S.C. § 5000A(b)(1) (2010).

very low incomes—to obtain health insurance or pay a penalty.[33] When the mandate goes into effect in 2014, the penalty will be $95 per adult and $47.50 per child, up to $285 for a family.[34] The $95 penalty will increase to $325 for 2015, and $695 for 2016 and beyond.[35] The issue of federal constitutional authority to impose a mandate raised questions under the Commerce, the Necessary and Proper, and Taxing Clauses.[36]

The third issue raised by the lawsuits involved the Medicaid expansion.[37] Specifically, the question was whether the Medicaid expansion exceeded Congress's power under the Spending Clause.[38] The Medicaid expansion was a key component of the ACA's effort to ensure universal health care coverage. It was designed to ensure coverage for millions of low-income individuals, many of whom currently make too much money to qualify for Medicaid but are too poor to purchase insurance, even under the newly formed health care exchanges.[39] To understand the challenge to the Medicaid expansion, one must understand the basics of how the Medicaid program works. Medicaid is a joint state and federal program.[40] It is voluntary for states.[41] If a state chooses to participate in the program, it must follow federal rules.[42] The ACA would have changed the federal rules applicable to the states that participate in Medicaid effective in 2014.[43] Specifically, as drafted, the ACA would require states to expand the pool of Medicaid eligibility or lose existing funds so that everyone with incomes at or below 133% of the federal poverty line would be Medicaid eligible.[44] One-

[33] *Id.*

[34] *Id.* § 5000A(c)(3).

[35] *Id.* § 5000A(c)(2)(B).

[36] *NFIB*, 132 S. Ct. 2566, 2578–79 (2012).

[37] *Id.* at 2576.

[38] The specific issue on which the court granted certiorari was:

> [d]oes Congress exceed its enumerated powers and violate basic principles of federalism when it coerces States into accepting onerous conditions that it could not impose directly by threatening to withhold all federal funding under the single largest-grant-in-aid program, or does the limitation on Congress' spending power that this Court recognized in South Dakota v. Dole, 483 U.S. 203 (1987), no longer apply?

Petition for Writ of Certiorari, Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011) (No. 11-400), 2011 WL 4500702 at *i.

[39] 42 U.S.C. § 1396a(a)(10)(A)(i)(VII) (2006 & Supp. IV 2010).

[40] *Id.* § 1396a.

[41] Florida *ex rel.* Bondi v. U.S. Dep't Health & Human Servs., 780 F. Supp. 2d 1256, 1267 (N.D. Fla. 2011) ("I noted that state participation in the Medicaid program under the Act—as it always has been—voluntary.").

[42] *NFIB*, 132 S. Ct. 2566, 2601–02 (2012).

[43] *See* 42 U.S.C § 1396a(a)(10)(A)(i)(VIII) (2006 & Supp. IV 2010).

[44] *Id.*

hundred thirty-three percent of the federal poverty line equals $14,856 of income per year for an individual, or $30,657 per year for a family of four—in 2012.[45] Currently, some states do not cover adults without dependent children at all in their Medicaid programs.[46] Other states cover parents only at much lower rates than they cover children.[47] As enacted, the ACA's Medicaid expansion had both carrot and stick components. As a carrot, the federal government would pay 100% of the cost of the expansion in 2014, and would continue to pay the bulk of the costs indefinitely—the federal share would gradually decrease to 90% in 2020 and thereafter.[48] The stick was a penalty for states that did not agree to the expansion.[49] Under the ACA, states that refused to expand the program to include individuals with incomes at or below 133% poverty line would lose all of their Medicaid funds, not just those that came with the expansion.[50] The question for the Court was whether the ACA's expansion of the Medicaid program was an abuse of Congress's spending power.[51]

Finally, the Supreme Court agreed to decide the question of severability. That is, it agreed to decide whether the entire Act must be stricken if one part of the statute was found to be unconstitutional.[52]

II. THE BATTLE OF BROCCOLI: THE LEAD UP TO THE DECISION

When the lawsuits against the ACA were first filed, the overwhelming consensus among constitutional scholars was that the claim that Congress lacked the authority to pass the ACA was

[45] *2012 Federal Poverty Level*, COVERAGEFORALL.ORG (Jan. 26, 2012), http://coverageforall.org/pdf/FHCE_FedPovertyLevel.pdf.

[46] *NFIB*, 132 S. Ct. at 2601; *see also* GM Kenney et al., *Opting in to the Medicaid Expansion under the ACA: Who Are the Uninsured Adults Who Could Gain Health Insurance Coverage?*, ROBERT WOOD JOHNSON FOUND. (Aug. 1, 2012), http://www.rwjf.org/content/rwjf/en/research-publications/find-rwjf-research/2012/08/opting-in-to-the-medicaid-expansion-under-the-aca.html ("With the implementation of the coverage provisions of the Affordable Care Act . . . Medicaid eligibility could increase dramatically for [non-disabled, non-pregnant parents with incomes up to [133] percent of the federal poverty level].").

[47] *NFIB*, 132 S. Ct. at 2601.

[48] 42 U.S.C. §1396d(y)(1) (2006 & Supp IV 2010).

[49] *Id.* § 1396c.

[50] *Id.*

[51] *NFIB*, 132 S. Ct. at 2601.

[52] *NFIB* was granted certiorari on a limited basis to consider: "whether the ACA must be invalidated in its entirety because it is non-severable from the individual mandate that exceeds Congress' limited and enumerated powers under the Constitution." Petition for Writ of Certiorari, *NFIB*, 132 S. Ct. 2566 (No. 11-393), 2011 WL 4479107 at *i.

specious.[53] After all, Congress had long engaged legislation in the health care space. Moreover its powers to regulate anything that affected interstate commerce were vast. The settled rule was that Congress could regulate virtually anything that affected interstate commerce, including activities that seemed local, such as the

[53] *See The Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (testimony of Charles Fried, Professor, Harvard Law School), *available at* http://www.judiciary.senate.gov/pdf/11-02-02%20Fried%20Testimony.pdf (finding health care reform constitutional under the Commerce Clause); Brief of Constitutional Law Scholars as Amici Curiae Support of Petitioners, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 135050, at *1–2 (arguing that the Patient Protection and Affordable Care Act encompasses complex economic questions beyond the purview of the judicial branch; declaring that the minimum coverage provision of the Affordable Care Act is within Congress's taxing power); Erwin Chemerinsky, *A Defense of the Constitutionality of the Individual Mandate*, 62 MERCER L. REV. 618, 618–19 (2011) (affirming Congress's authority to mandate health care reform as clearly constitutional); Wilson Huhn, *Constitutionality of the Patient Protection and Affordable Care Act Under the Commerce Clause and the Necessary and Proper Clause*, 32 J. LEGAL MED. 139, 164–65 (2011) (contending that Congress's authority to enact the Affordable Care Act is only questionable under pre-1937 constitutional interpretation); Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 3 (2011) (finding that the "individual mandate" is clearly constitutional under Congress's power to regulate commerce); Gillian Metzger, *Defense of the Constitutionality of Health Care Reform*, 62 MERCER L. REV. 633, 633–35 (2011) (advocating the constitutionality of the Affordable Care Act under Congress's taxing, spending, and commerce powers); Stephen B. Presser, *Will the Supreme Court be Faithful to its Oath to Uphold the Constitution in the Obamacare Case?*, 19 GEO. MASON L. REV. 959, 959 (2012) (discussing that scholars from both the left and right view the Affordable Care Act as constitutional); Laurence H. Tribe et al., *Is the Patient Protection and Affordable Care Act Constitutional?*, 4 CAL. J. POL. & POL'Y 1 (2011) (comments of Professor Laurence H. Tribe) (contending that the "individual mandate" is constitutional with Congress's authority under both the Commerce Clause and Necessary and Proper Clause); Ezra Klein, *Unpopular Mandate: Why do Politicians Reverse Their Positions?*, NEW YORKER, June 25, 2012, http://www.newyorker.com/reporting/2012/06/25/120625fa_fact_klein (noting Professor Sanford Levinson's stance that the lawsuits challenging the constitutionality of the Affordable Care Act are close to "frivolous"); Nick Perry, *UW Panelists Say Lawsuits Challenging Health Bill Lack Merit*, SEATTLE TIMES, Mar. 31, 2010, *available at* http://www.seattletimes.nwsource.com/html/localnews/2011483297_healthdebate31m.html (noting that there are very few constitutional law scholars who believe the Affordable Care Act is unconstitutional); *Constitutionality*, *supra* note 1 (listing the almost one-hundred-thirty legal scholars supporting the constitutionality of the Affordable Care Act); Henry Paul Monaghan, *A Conservative Law Professor on the Obvious Constitutionality of Obamacare*, NEW REPUBLIC (Apr. 16, 2012), http://www.tnr.com/article/politics/102685/conservative-defense-obamacare-affordable-care-health (commenting that the unique problems associated with health care provide more than enough impetus for congressional authority to regulate it under the commerce clause power). *But see* Brief of the Washington Legal Foundation and Constitutional Law Scholars as Amici Curiae in Support of Respondents, *NFIB*, 132 S. Ct. at 2566 (No. 11-398), 2012 WL 1680857, at *1 (arguing that the "individual mandate" of the Patient Protection and Affordable Care Act exceeds congressional authority); Randy E. Barnett, *Turning Citizens into Subjects: Why the Health Insurance Mandate is Unconstitutional*, 62 MERCER L. REV. 608, 612 (2011) (finding health care reform as an unconstitutional infringement upon state sovereignty); Ilya Shapiro, *A Long Strange Trip: My First Year Challenging the Constitutionality of Obamacare*, 6 FIU L. REV. 29, 57–58 (2010) (debating the federal government's ability to compel citizens to purchase health care).

growing of wheat or marijuana for personal consumption, where the aggregate of local activities have a substantial impact on interstate commerce.[54] The health care system is undeniably part of interstate commerce. The market for health care is, and was, enormous; Americans spent $2.5 trillion—17.6% of the U.S. economy—on health care in 2009.[55] Also in 2009, almost fifty million people lacked health insurance; these uninsured individuals consumed more than a billion dollars in health care costs, costs that heavily burden the national health care market.[56] The costs are attributable in part to the unique nature of our health care system; unlike in any other market, the inability to pay for health care at the point of purchase does not keep individuals from consuming the product (health care). Eventually everybody gets sick. Our laws,[57] together with societal and professional ethics, require hospitals and physicians to provide care to the uninsured, even when they will receive no payment for the delivery of services. As a result, health care providers pass on the costs of uncompensated care to payers. In turn, private insurers pass those costs on to paying customers, who effectively subsidize the cost of medical care to those who cannot afford it. Given the size of the market, and the unique cost shifting that occurs when people without insurance obtain medical care, the answer to the Commerce Clause question put before the Court seemed obvious: health care is a part of interstate commerce; the provision of care to the uninsured has a substantial effect on that market; and therefore, the regulation of health care—including the regulation of those people without health insurance—fell

[54] *See* United States v. Darby, 312 U.S. 100, 118–19 (1941) (holding that the power of Congress over interstate commerce is not confined to the regulation of commerce among the states, but extends to activities having a "substantial effect on interstate commerce"); Wickard v. Filburn, 317 U.S. 111, 125 (1942) ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."); Gonzales v. Raich, 545 U.S. 1, 17 (2005) (holding that commerce power extends to regulation of marijuana grown for personal consumption because the local activity of growing marijuana, when viewed in the aggregate, has a substantial impact on interstate commerce).

[55] *NFIB*, 132 S. Ct. at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, dissenting in part).

[56] *See* 42 U.S.C. § 18091(2) (2010); *see also* Carmen DeNavas Walt et al., *Income, Poverty, and Health Insurance Coverage in the United States: 2009*, U.S. CENSUS BUREAU 1, 23 tbl.8 (2010), http://www.census.gov/prod/2010pubs/p60-238.pdf (noting that in 2008 and 2009, the number (in thousands) of uninsured individuals were approximately 301,000 and 304,000, respectively); *Hidden Health Tax: Americans Pay a Premium*, FAMILIES USA 1, 2 (2009), http://familiesusa2.org/assets/pdfs/hidden-health-tax.pdf (discussing the economic and health-related dangers of having uninsureds).

[57] *E.g.*, Examination and Treatment for Emergency Medical Conditions and Women in Labor, 42 U.S.C. § 1395dd (2006 & Supp. IV 2010).

squarely within Congress's Commerce Clause power.[58]

But something happened on the way to the Supreme Court.[59] Opponents of the law pushed a libertarian-based argument promoted largely by Georgetown Law Professor Randy Barnett and a handful of others.[60] The argument focused on the shared responsibility clause,[61] or the mandate. Barnett and others claimed that the mandate to buy health insurance was not a permissible assertion of Congress's power to regulate commerce because a decision to forgo health insurance was a form of inaction, not action.[62] That is, the ACA attempted to regulate a decision by an individual to not enter a market, rather than a decision to enter a market. Such an assertion of power, argued Barnett and colleagues, was unprecedented and dangerous.[63]

Barnett and colleagues buttressed their claim with a classic slippery slope argument. The claim was that if Congress could regulate the decision against entering a market for health care, congressional power would be unlimited. It could similarly be used

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[58] Mark Hall's law review article depicts a more thorough exploration of the history, application, and analysis of the Commerce Clause in the context of the health reform debate. *See* Mark A. Hall, *Commerce Clause Challenges to Health Reform*, 159 U. PA. L. REV. 1825, 1825–72 (2011).

[59] *See* Josh Gerstein, *How the Legal Assault on Obama's Health Law Went Mainstream*, POLITICO (Mar. 25, 2012, 7:01 AM), http://www.politico.com/news/stories/0312/74429_Page2.html (depicting one account of what happened on the way to the Supreme Court); *see also* James B. Stewart, *How Broccoli Landed on Supreme Court Menu*, N.Y. TIMES, June 13, 2012, at A1, *available at* http://www.nytimes.com/2012/06/14/business/how-broccoli-became-a-symbol-in-the-health-care-debate.html?pagewanted=all&_r=0 (describing another account of what happened on the way to the Supreme Court; attributing the argument to libertarian lawyer David B. Rivkin Jr.).

[60] Barnett and colleagues first pressed the argument in a memorandum published by the conservative Heritage Foundation. *See* Randy Barnett, Nathaniel Stewart & Todd Gaziano, *Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional*, HERITAGE FOUND. (Dec. 9, 2009), http://www.heritage.org/research/reports/2009/12/why-the-personal-mandate-to-buy-health-insurance-is-unprecedented-and-unconstitutional; *see also* Barnett, *supra* note 53, at 608 (finding health care reform as an unconstitutional infringement upon state sovereignty).

[61] 26 U.S.C. § 5000A(b)(1) (2010).

[62] *See* Barnett, Stewart, & Gaziano, *supra* note 60. Prior to the health care reform case,

> [t]he Supreme Court ha[d] never expressly validated or prohibited Commerce Clause regulation of pure inactivity. The constitutional text could be read either way, but following the modern development of the federal commerce power, allowing this form of regulation is more principled than forbidding it. Some limit on the commerce power is necessary, and more limits might be desirable, but that does not mean that limits should be set willy-nilly. The opportunity to set this particular limit exists mainly because it has not previously been addressed. That is more an accident of history than a creature of logic.

Hall, *supra* note 58, at 1839 (footnote omitted).

[63] *See* Barnett, Stewart, & Gaziano, *supra* note 60.

to regulate individual decisions against entering the market for other goods and services, such as food or automobiles.[64] For example, at a debate hosted by Harvard Law School,[65] Barnett claimed that if Congress can mandate the acquisition of health insurance, Congress could use the same power to impose a broccoli mandate. That is, if Congress has the authority to force individuals into a market in which it has a national interest (public health, the public fisc, etc.), all it would take for Congress to force people to eat broccoli would be a finding that consuming broccoli was good for public health. Such an imposition into the personal lives of citizens, argued Barnett, was surely beyond what the framers envisioned when they gave the federal government limited power to regulate interstate commerce.[66]

The argument had teeth.[67] Despite strong rebuttals from most health law and constitutional experts, the argument persuaded a handful of district and circuit court judges,[68] and it caught on with the media.[69] By the time the case went to the Supreme Court, the

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[64] *See* Stewart, *supra* note 59, at A1.

[65] Barnett argued against Professors Lawrence Tribe and Charles Fried. *See* Video: *Is the Obama Health Care Reform Constitutional? Fried, Tribe, and Barnett Debate the Affordable Care Act*, HARV. L. SCH. (HLS Debate Mar. 24, 2011), http://www.law.harvard.edu/news/spotlight/constitutional-law/is-obama-health-care-reform-constitutional.html.

[66] Barnett, *supra* note 53, at 608.

[67] *See* Florida *ex rel.* Bondi v. U.S. Dep't Health & Human Servs., 780 F. Supp. 2d 1256, 1293 (N.D. Fla. 2011) ("There is quite literally *no* decision that, in the natural course of events, does not have an economic impact of some sort. The decisions of whether and when (or not) to buy a house, a car, a television, a dinner, or even a morning cup of coffee also have a financial impact that—when aggregated with similar economic decisions—affect the price of that particular product or service and have a substantial effect on interstate commerce."); *see also* Wendy K. Mariner et al., *Can Congress Make You Buy Broccoli? And Why That's a Hard Question*, 364 NEW ENG. J. MED. 201, 202–03 (2011) ("Does the Commerce Clause authorize Congress to require individuals to buy products the Congress thinks they should buy to further the general welfare? That question is at the core of our constitutional democracy. The federal government has never exercised its authority in this manner before—and that's what makes answering the constitutional question so hard.").

[68] For example, one court wrote,

> [A]s was discussed during oral argument, Congress could require that people buy and consume broccoli at regular intervals, not only because the required purchases will positively impact interstate commerce, but also because people who eat healthier tend to be healthier, and are thus more productive and put less of a strain on the health care system. Similarly, because virtually no one can be divorced from the transportation market, Congress could require that everyone above a certain income threshold buy a General Motors automobile—now partially government-owned—because those who do not buy GM cars (or those who buy foreign cars) are adversely impacting commerce and a taxpayer-subsidized business.

Florida, 780 F. Supp. 2d at 1289.

[69] *See* Stewart, *supra* note 59, at A1 (attributing the argument to libertarian lawyer David B. Rivkin Jr.); *see also* Terence P. Jeffrey, *Can Obama and Congress Order You to Buy*

broccoli battle was in full force. The argument appeared in briefs.[70] And during oral arguments, Justice Scalia quipped, "everybody has to buy food sooner or later, so you define the market as food; therefore, everybody is in the market; therefore, you can make people buy broccoli."[71] Pundits began to predict that the Court would strike down the mandate.[72] Discussions turned to whether the Court would strike down the entire statute, or if the Court would just declare the mandate unconstitutional and allow the rest of the statute to survive.[73]

III. THE DECISION ITSELF: *NATIONAL FEDERATION OF INDEPENDENT BUSINESSES V. SEBELIUS*

So intense was the focus on the Commerce Clause challenge to the mandate, that on the day the Court handed down its decision, two major outlets—CNN and Fox News—misreported the result.[74] When Justice Roberts announced from the bench that five members of the Court agreed that the Commerce Clause was not robust

Broccoli?, CNSNEWS (Oct. 21, 2009), http://cnsnews.com/blog/terence-p-jeffrey/can-obama-and-congress-order-you-buy-broccoli ("Can President Obama and Congress enact legislation that orders Americans to buy health insurance? They might as well order Americans to buy broccoli.").

[70] *See, e.g.*, Brief for State Respondents at 25–33, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 392550 (arguing against an automobile mandate).

[71] Transcript of Oral Argument at 13, *NFIB*, 132 S. Ct. at 2566 (No. 11-398), 2012 WL 1017220, *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf.

[72] *See* Noah Feldman, *Broccoli-Bungling Defense Hurts Healthcare*, BLOOMBERG (Mar. 27, 2012, 6:28 PM), http://www.bloomberg.com/news/2012-03-27/broccoli-bungling-defense-puts-health-care-at-risk-noah-feldman.html ("Broccoli, by contrast, presents no problems of adverse selection. Scalia's intuition is that the federal government may not go around ordering people to buy things that they do not wish to buy. That intuition is plausible.").

[73] *See* Bob Drummond, *Obama Health Law Seen as Valid; Scholars Expect Rejection*, BLOOMBERG (June 22, 2012, 12:15 PM), http://www.bloomberg.com/news/2012-06-22/law-experts-say-health-measure-legal-as-some-doubt-court-agrees.html (finding that while nineteen constitutional law professors nationwide believe that the health care law should be upheld based on legal precedent, only eight professors predicted the Court would actually do so); Steven Rosenfeld, *The Supreme Court on Health Reform, The Odds Are Bad for a Good Result*, ALTERNET (June 26, 2012), http://www.alternet.org/story/156045/the_supreme_court_scenarios_on_health_care%3B_the_odds_are_bad_for_a_good_result (discussing the several routes that the Court could take with its decision).

[74] Dan Freedman & Elizabeth Traynor, *Anatomy of a Media 'Oops' Moment: How CNN and Fox Got Obamacare Ruling Wrong*, S.F. CHRON. (June 28, 2012, 3:57 PM), http://blog.sfgate.com/nov05election/2012/06/28/anatomy-of-a-media-oops-moment-how-cnn-and-fox-got-obamacare-ruling-wrong (displaying a screenshot of the CNN homepage with the incorrect headline and describing how Fox News reacted to its incorrect reporting of the outcome).

enough to support the congressional enactment, the CNN headline read "Mandate Struck Down."[75] Of course, the headline was wrong.

In a complex decision that mentions broccoli twelve times,[76] five Justices of the Supreme Court upheld the mandate *and* five others voted that the mandate was unconstitutional under the Commerce Clause. The key, of course, was the opinion of Chief Justice Roberts. Roberts reached a supreme compromise to save most of, but not all of the statute. In a decision he read from the bench, Roberts concluded: "The Federal Government does not have the power to order people to buy health insurance. [The 'shared responsibility' provision or mandate] would therefore be unconstitutional if read as a command. The Federal Government does have the power to impose a tax on those without health insurance."[77] Roberts was the only Justice taking that position.[78] Four conservative Justices (Scalia, Thomas, Kennedy, and Alito) would have stricken the statute in its entirety on every ground proffered.[79] Two liberal Justices (Ginsburg and Sotomayor) would have upheld the statute in its entirety.[80] Five Justices (Roberts, Kagan, Ginsburg, Sotomayor, and Breyer) voted to uphold the mandate, but found the Medicaid expansion to be an unconstitutional exercise of congressional spending power.[81] The following chart shows the vote breakdown:

[75] *Id.*

[76] *See* Joe Palazzolo, *Is Broccoli Overexposed?*, WALL ST. J. (June 28, 2012, 3:43 PM), http://blogs.wsj.com/law/2012/06/28/is-broccoli-overexposed (listing the twelve instances that "broccoli" was mentioned in the opinion).

[77] *NFIB*, 132 S. Ct. 2566, 2601 (2012).

[78] *Id.* at 2575 (noting that only Roberts joined in Part III-D, where the quote appeared).

[79] *Id.* at 2644–50 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (individual mandate Commerce Clause analysis); 2650–55 (individual mandate Taxing and Spending Clause analysis); *id.* at 2655–56 (Anti-Injunction Act analysis); *id.* at 2656–68 (Medicaid expansion analysis); *id.* at 2668–77 (severability).

[80] *NFIB*, 132 S. Ct. at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, dissenting in part).

[81] *Id.* at 2608 (majority opinion).

Holding	For	Against
Anti-Injunction Act does not prevent Court from deciding case now; mandate does not expressly impose a tax.	9	0
Mandate exceeds Congress's power under the Commerce and Necessary and Proper Clauses.	5	4
Mandate is a constitutional exercise of Congress's power to levy taxes.	5	4
Medicaid expansion exceeds Congress's power under the Spending Clause because it is unconstitutionally coercive.	7	2
Remedy to problem with Medicaid expansion is to limit HHS's power to withhold funds, but allow incentives for those states that participate that participate voluntarily.	5	4

A. On the Power to Regulate Interstate Commerce: The Battle of Broccoli

The decision itself contains sixty-four pages on the power to regulate interstate commerce. Arguably, those sixty-four pages are dicta, because—as Justice Ginsburg pointed out—they are unnecessary to the Court's holding.[82] Nonetheless, with the focus in briefs and arguments on the power to regulate interstate commerce, and perhaps with an eye toward future cases, both Chief Justice Roberts, and the conservative dissenters wrote extensively on a new constitutional doctrine, which hems in Congress's power to regulate

[82] Justice Ginsburg chastises the Chief Judge for undertaking "a Commerce Clause analysis that is not outcome determinative." *Id.* at 2629 n.12 (Ginsburg, J., concurring in part, concurring in the judgment in part, dissenting in part). But, Justice Roberts states, "[i]t is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question." *Id.* at 2600 (majority opinion). Arguably, this statement makes the Court's writing on the Commerce Clause binding in future cases.

interstate commerce. Specifically, Justice Roberts concluded that the commerce power does not permit "Congress . . . to compel individuals not engaged in commerce to purchase an unwanted product."[83] On this point, he agreed with dissenters Scalia, Kennedy, Alito, and Thomas: forcing people to buy health insurance is the same as forcing people to buy broccoli or cars—something so clearly intrusive in the lives of citizens that it is beyond the permissible reach of Congress's Commerce Clause power.[84]

Specifically, Roberts reasoned that the decision to forgo health insurance was not an "activity" subject to direct congressional regulation regardless of the economic impact of the decision.[85] "The Constitution grants Congress the power to '*regulate* Commerce.' The power to *regulate* commerce presupposes the existence of commercial activity to be regulated."[86] He claimed that precedent supported the activity/inactivity distinction: "As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching 'activity.'"[87] In Roberts's view, the mandate to purchase health insurance

> does not regulate existing commercial activity. It instead 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.[88]

Thus, Roberts wrote, allowing Congress to regulate inactivity would take the country down a dangerous slippery slope.

> Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and—under the Government's theory—empower Congress to

[83] *Id.* at 2586.
[84] *Id.* at 2593.
[85] *See id.* at 2586.
[86] *Id.* (quoting U.S. CONST. art I, § 8, cl. 3).
[87] *NFIB*, 132 S. Ct. at 2587.
[88] *Id.*

make those decisions for him.[89]

That the failure to purchase health insurance has a cascading economic effect in the market for health insurance was unpersuasive to Roberts. "To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers, who were 'practical statesmen,' not metaphysical philosophers."[90] What matters is the potential abuse of a commerce power broad enough to allow Congress to require that individuals purchase health insurance:

> Everyone will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize Congress to direct them to purchase particular products in those or other markets today. The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.[91]

The joint dissent was even more concerned with the slippery slope. Referring to Justice Ginsburg's opinion as "The dissent," the actual dissenters wrote:

> The dissent dismisses the conclusion that the power to compel entry into the health-insurance market would include the power to compel entry into the new-car or broccoli markets. The latter purchasers, it says, "will be obliged to pay at the counter before receiving the vehicle or nourishment," whereas those refusing to purchase health-insurance will ultimately get treated anyway, at others' expense. "[T]he unique attributes of the health-care market . . . give rise to a significant free-riding problem that does not occur in other markets." And "a vegetable-purchase mandate" (or a car-purchase mandate) is not "likely to have a substantial effect on the health-care costs" borne by other Americans. Those differences make a very good argument by the dissent's own lights, since they show that the failure to purchase health insurance, unlike the failure to purchase

[89] *Id.*
[90] *Id.* (citations omitted).
[91] *Id.* at 2590–91.

> cars or broccoli, creates a national, social-welfare problem that is (in the dissent's view) included among the unenumerated "problems" that the Constitution authorizes the Federal Government to solve. But those differences do not show that the failure to enter the health-insurance market, unlike the failure to buy cars and broccoli, is an *activity* that Congress can "regulate." (Of course one day the failure of some of the public to purchase American cars may endanger the existence of domestic automobile manufacturers; or the failure of some to eat broccoli may be found to deprive them of a newly discovered cancer-fighting chemical which only that food contains, producing health-care costs that are a burden on the rest of us—in which case, under the theory of Justice G[insburg']s dissent, moving against those inactivities will also come within the Federal Government's unenumerated problem-solving powers).[92]

It is unclear at this point whether the newly announced limitation on the congressional powers is a harbinger of a new era of limited federal government or a narrowly drawn reaction to a singular piece of legislation, but the decision is clear on this: the federal government cannot directly compel individuals to purchase products under its Commerce Clause power.

B. On the Taxing Power: If It Looks Like a Duck . . .

Of course, Justice Roberts's decision did not end with the conclusion that the mandate to purchase health insurance was unconstitutional. Justice Roberts engaged in creative statutory construction to determine that the mandate was a permissible exercise of Congress's taxing power—not because it orders individuals to buy insurance, but because it essentially taxes those who do not buy insurance. Justice Roberts had to work fairly hard to so construe the statute. First, he had to explain away the first part of his decision, which held that the mandate was not a tax for purposes of the Anti-Injunction Act.[93] Second, he had to get around the express statutory language and legislative history assuring the

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[92] *Id.* at 2650 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (quoting Justice Ginsburg's opinion) (internal citations omitted).

[93] *Id.* at 2583–84 (majority opinion) (concluding that Congress could define what constitutes a tax under the Anti-Injunction Act because that Act is a legislative enactment, but only the Court could determine what is a tax under the Constitution). Thus, in this case, the mandate is not a tax under the statute, but is a tax for constitutional purposes.

American public that the mandate imposed a penalty, not a tax.[94] Roberts's normal allies—his conservative colleagues—accused the "government"[95] of asking the Court to "rewrite the statute," "perverting [its] purpose," and "doing violence to the fair meaning of the words used"[96] for pressing, however gently, the argument that the mandate was a tax.[97]

Nonetheless, Roberts concluded that the text of the statute did not matter. "The issue," he wrote, "is not whether Congress had the *power* to frame the minimum-coverage provision as a tax, but whether it *did* so."[98] He decided it did, stating that:

> [T]he shared responsibility payment may for constitutional purposes be considered a tax, not a penalty: First, for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more. . . . Second, the individual mandate contains no scienter requirement. Third, the payment is collected solely by the IRS through the normal means of taxation—except that the Service is *not* allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution.[99]

Thus, the mandate acts like a tax in every important respect, and therefore should be treated that way for constitutional purposes.

Roberts acknowledged that his holding allowed the government to do indirectly what it could not do directly—regulate individuals who do not purchase health insurance.

> None of this is to say that the payment is not intended to affect individual conduct. Although the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage. But taxes that seek to influence conduct are nothing new. Some of our earliest federal taxes sought to deter the purchase of imported manufactured goods in order to foster the growth of domestic industry. Today, federal and state taxes can compose more than half the retail price of cigarettes, not just to raise more money, but to encourage people to quit smoking. And we have upheld such obviously

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[94] *Id.*

[95] Oddly, the dissent called out Government, and not the Chief Judge, on this part of his decision, even though his disagreement with them on the taxing power was outcome determinative.

[96] *Id.* at 2651 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (citations omitted) (internal quotation mark omitted).

[97] *Id.*

[98] *Id.* (majority opinion).

[99] *Id.* at 2595–96 (footnote omitted) (citations omitted).

> regulatory measures as taxes on selling marijuana and sawed-off shotguns. Indeed, "[e]very tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed." That § 5000A seeks to shape decisions about whether to buy health insurance does not mean that it cannot be a valid exercise of the taxing power.[100]

Roberts's decision to break from his conservative colleagues to save the ACA through aggressive statutory construction may signal many things. Some have speculated that it indicates Roberts's concern with the legacy of his Court;[101] others speculate that it signals a break from arch-conservative wing of the Court led by Anton Scalia.[102] What Roberts's own words tell us, however, is that he will go to whatever lengths necessary to preserve the ACA. Specifically, Roberts cited a number of canons of statutory construction instructing the Court to construe statutes to avoid constitutional problems.[103] Unlike in earlier cases in which he joined his conservative colleagues to strike down federal statutes,[104]

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[100] *Id.* at 2596 (quoting Sonzinsky v. United States, 300 U.S. 506, 513 (1937) (other internal citations omitted).

[101] *See* Jan Crawford, *Roberts Switched Views to Uphold Healthcare Law*, CBSNEWS (Jul. 1, 2012, 1:29 PM), http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law ("Roberts pays attention to media coverage. As chief justice, he is keenly aware of his leadership role on the court, and he also is sensitive to how the court is perceived by the public."); Mollie Reilly, *John Roberts Health Care Switch Detailed by Jeffrey Toobin in New Book*, HUFFINGTON POST (Sept. 15, 2012, 3:02 PM), http://www.huffingtonpost.com/2012/09/15/john-roberts-health-care_n_1886621.html ("Roberts' position turned 'wobbly' as he considered the implications the ruling would have on his legacy.").

[102] *See* Mike Allen, *Toobin Book: Roberts Switched!*, POLITICO (Sept. 15, 2012, 11:02 AM), http://www.politico.com/playbook/0912/playbook1920.html (suggesting the conservatives had overplayed their hand); *see also* Glenn Thrush, *John Roberts Court on Trial*, POLITICO (Mar. 28, 2012, 4:34 AM), http://www.politico.com/news/stories/0312/74570.html ("Shortly after Roberts was confirmed, he told ABC News that he didn't think it's appropriate to 'lobby' other justices but would try to make accommodations to ensure seven-, eight-, or even nine-vote majorities.").

[103] *NFIB*, 132 S. Ct. at 2593.

> [I]t is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so. Justice Story said that 180 years ago: "No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution." Justice Holmes made the same point a century later: "[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act."

Id. (internal citations omitted).

[104] *See, e.g.*, United States v. Stevens, 130 S. Ct. 1577, 1582 (2010) (striking down a federal animal cruelty statute); Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 886 (2010) (concurring with Kennedy's opinion to avoid using statutory construction to save a provision

Roberts showed he was willing to "resort[] to" "every reasonable construction" in order to save the ACA from unconstitutionality.[105] Thus, the take-away from this section of the Roberts's *NFIB* opinion is not about tax. The lesson is that Roberts is a solid vote to preserve the constitutionality of the ACA, regardless of the strength of attack.

C. The Medicaid Expansion: The Surprising and Vague Limitation on Congress's Spending Power

That Roberts is a solid vote for preserving the basic integrity of the ACA is confirmed in his writing on the Medicaid expansion. In it, he is joined by Justices Breyer and Kagan (and supported by the votes of the four joint dissenters) in holding for the first time ever that Congress had overplayed its hand when imposing conditions on the receipt of federal funds as part of its Spending Power.[106] Specifically, the Court held that the ACA's Medicaid expansion went too far in insisting that States expand the pool of Medicaid eligibility to include all residents with incomes of 133% or less of the poverty line or lose all existing Medicaid funds.[107] Such a condition was not an incentive, but coercion. "In this case," Roberts wrote, "the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head."[108] According to Roberts, the costs of failing to comply—the loss of existing Medicaid funds—was simply too high to present states with any real choice. "The threatened loss of over 10[%] of a State's overall budget . . . is economic dragooning that leave the States with no real option but to acquiesce in the Medicaid expansion."[109] Such federal overreaching violates the rights of the States. "Congress may use its spending power to create incentives for States to act in accordance with Federal policies. But when 'the pressure turns to compulsion,' the legislation runs contrary to our system of federalism."[110]

Despite the potentially far-reaching impact of the unprecedented limitation placed on the spending power, Roberts found no need to

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of federal campaign finance law).

[105] *NFIB*, 132 S. Ct. at 2594 (quoting Hooper v. California, 155 U.S. 648, 657 (1895)).

[106] *NFIB*, 132 S. Ct. at 2607–08.

[107] *Id.* at 2581, 2607–08.

[108] *Id.* at 2604.

[109] *Id.* at 2605 (footnote omitted).

[110] *Id.* at 2602 (citation omitted).

fix a line to mark the distinction between encouragement and coercion. "It is enough for today," he wrote, "that wherever the line may be, this statute is surely beyond it. Congress may not simply 'conscript state [agencies] into the national bureaucratic army.'"[111]

At least as interesting as the Roberts's take on the proper role of the federal government in conditioning the receipt by states of federal funds, is his remedy to the purported overreach by Congress in the ACA Medicaid expansion. Unlike his conservative colleagues, who write in their dissent that it is "judicial usurpation to impose an entirely new mechanism for withdrawal of Medicaid funding,"[112] Justice Roberts crafted a creative remedy to save the Medicaid expansion and the ACA. In effect, he decided to save the carrot, but remove the stick. Specifically, he wrote:

> Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding. Section 1396c gives the Secretary of Health and Human Services the authority to do just that. It allows her to withhold *all* "further [Medicaid] payments . . . to the State" if she determines that the State is out of compliance with any Medicaid requirement, including those contained in the expansion. In light of the Court's holding, the Secretary cannot apply § 1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion.
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> That fully remedies the constitutional violation we have identified.[113]

Justice Roberts explains that severing the "stick" portion of the

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[111] *Id.* at 2606–07 (quoting FERC v. Mississippi, 456 U.S. 742, 775 (1982) (O'Connor, J., concurring in the judgment in part, dissenting in part)).

[112] *NFIB*, 132 S. Ct. at 2668 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

> The two pillars of the Act are the Individual Mandate and the expansion of coverage under Medicaid. In our view, both these central provisions of the Act—the Individual Mandate and Medicaid Expansion—are invalid. It follows, as some of the parties urge, that all other provisions of the Act must fall as well. The following section explains the severability principles that require this conclusion. This analysis also shows how closely interrelated the Act is, and this is all the more reason why it is judicial usurpation to impose an entirely new mechanism for withdrawal of Medicaid funding.

Id.

[113] *Id.* at 2607 (majority opinion) (citation omitted).

Medicaid expansion is required by the Medicaid statute.[114] He also explains that the remedy to the Medicaid problem does not answer the bigger question of severability:

> The question remains whether today's holding affects other provisions of the Affordable Care Act. In considering that question, "[w]e seek to determine what Congress would have intended in light of the Court's constitutional holding." Our "touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature." The question here is whether Congress would have wanted the rest of the Act to stand, had it known that States would have a genuine choice whether to participate in the new Medicaid expansion. Unless it is "evident" that the answer is no, we must leave the rest of the Act intact.[115]

Roberts concludes, "that Congress would have wanted to preserve the rest of the Act."[116] His conservative colleagues adamantly disagree. They claim the majority acted to

> save a statute Congress did not write. It rules that what the statute declares to be a requirement with a penalty is instead an option subject to a tax. And it changes the intentionally coercive sanction of a total cut-off of Medicaid funds to a supposedly noncoercive cut-off of only the incremental funds that the Act makes available.[117]

The dissent claims that Roberts's statutory interpretation "amounts . . . to a vast judicial overreaching. It creates a debilitated, inoperable version of health care regulation that Congress did not enact and the public does not expect."[118]

Regardless of whether the dissent's prediction of fiscal disaster

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[114] *See* 42 U.S.C. § 1396c (2006 & Supp. IV 2010); *NFIB*, 132 S. Ct. at 2607.

> The chapter of the United States Code that contains § 1396c includes a severability clause confirming that we need go no further. That clause specifies that "[i]f any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby." Today's holding does not affect the continued application of § 1396c to the existing Medicaid program. Nor does it affect the Secretary's ability to withdraw funds provided under the Affordable Care Act if a State that has chosen to participate in the expansion fails to comply with the requirements of that Act.

NFIB, 132 S. Ct. at 2607 (quoting 42 U.S.C. § 1303 (2006)).

[115] *NFIB*, 132 S. Ct. at 2607 (citations omitted).

[116] *Id.* at 2608.

[117] *Id.* at 2676 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

[118] *Id.*

resulting from the Roberts remedy on the Medicaid is accurate or hyperbolic, Roberts's resolve and creativity in upholding the ACA are now established. The principle that the ACA must be preserved, even if parts of it cannot withstand constitutional challenge should inoculate the law as a whole in future cases challenging its parts.

III. THE BRILLIANT OPINION BY JUSTICE GINSBURG

Before considering more explicitly what *NFIB* means for future cases, it is worth taking time to consider the brilliant opinion by Justice Ginsburg. The opinion is wholly grounded in precedent.[119] It is intellectually honest. And it is impeccably reasoned.[120] The opinion is also scathing and funny in its response to unprecedented offerings of the Chief Justice and his conservative colleagues who together undermined nearly a hundred years of precedent on the Commerce Clause in a case that was decided on entirely independent grounds. And at least in one respect, Ginsburg's opinion reveals one thing about how the Court will handle the next constitutional challenge to the ACA (likely concerning the contraceptive mandate)[121]: five members of the Court will not consider themselves bound by precedent or scholarly analysis.

Justice Ginsburg's opinion considers carefully the market for

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[119] *Id.* at 2609 (Ginsburg, J., concurring in part, concurring in the judgment, dissenting in part) (citing United States v. Darby, 312 U.S. 100, 115 (1941)) ("Since 1937, our precedent has recognized Congress' large authority to set the Nation's course in the economic and social welfare realm."); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937); R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 362 (1935)).

[120] It is also worth noting that Ginsburg's opinion appears to have been written as *the* dissent of the Court. That is, she appears to have written it—and the joint dissenters treated it—as a dissent written in response to a majority opinion striking down the ACA as unconstitutional. The hints are most obvious in the joint dissent, which directs its ire at Ginsburg and the government, rather than the Chief Justice—and refers repeatedly to the Ginsburg's opinion as "the dissent." *See, e.g.*, *NFIB*, 132 S. Ct. at 2648–49 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting). Indeed, media reports confirm that Justice Roberts changed his position *after* he voted with the four dissenters to strike down the ACA—and Justice Ginsburg dissented. *See* Sam Baker, *Justice Ginsburg Drafted Healthcare Dissent Before Seeing Roberts's Opinion*, THE HILL (Aug. 8, 2012, 10:22 AM), http://thehill.com/blogs/healthwatch/legal-challenges/242909-justice-ginsburg-drafted-healthcare-dissent-before-seeing-roberts-opinion

[121] *See infra* Part IV; *see also* Stuart Taylor Jr., *More ACA Lawsuits: The "Contraceptive Mandate" Versus Religious Freedom (Analysis)*, KAISER HEALTH NEWS (Dec. 13, 2012), http://www.kaiserhealthnews.org/Stories/2012/December/14/legal-challenges-to-birth-control-mandate.aspx (discussing the mandate, which requires employers to provide, as a part of women's preventative care, insurance without copays or deductibles on a wide range of contraceptives and how it may be a source of dispute at the Supreme Court in the near future).

health care, and Congress's role in it.[122] She makes the case that Congress correctly found that "a national solution was required"[123] for the problematic market, and that:

> Congress could have taken over the health-insurance market by establishing a tax-and-spend federal program like Social Security. Such a program, commonly referred to as a single-payer system (where the sole payer is the Federal Government), would have left little, if any, room for private enterprise.[124]

She notes that Congress did not go this "route," but instead enacted the ACA to preserve a role for States and private insurers in the health-care market.[125] In this context, Ginsburg explained how individuals' decisions to forgo health insurance directly affect the market for health care, and are as such an appropriate target to federal regulation, noting:

> [T]heir inability to pay for a significant portion of that consumption drives up market prices, foists costs on other consumers, and reduces market efficiency and stability. Given these far-reaching effects on interstate commerce, the decision to forgo insurance is hardly inconsequential or equivalent to "doing nothing," it is, instead, an economic decision Congress has the authority to address under the Commerce Clause.
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> The minimum coverage provision, furthermore, bears a "reasonable connection" to Congress' goal of protecting the health-care market from the disruption caused by individuals who fail to obtain insurance.[126]

Ginsburg takes Roberts to task for insisting that the uninsured cannot be considered active in the market for health care, because "[t]he proximity and degree of connection between the [uninsured today] and [their] subsequent commercial activity is too lacking."[127] First, she notes that

> more than 60% of those without insurance visit a hospital or doctor's office each year. Nearly 90% will within five years. An uninsured's consumption of health care is thus quite

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[122] *See NFIB*, 132 S. Ct. at 2610 (Ginsburg, J., concurring in part, concurring in the judgment, dissenting in part) (citing current statistics concerning the health care industry).

[123] *Id.* at 2612.

[124] *Id.*

[125] *Id.*

[126] *Id.* at 2617 (citations omitted).

[127] *Id.* at 2618 (quoting the majority opinion) (internal quotation marks omitted).

> proximate: It is virtually certain to occur in the next five years and more likely than not to occur this year.[128]

Second, she points out that it is up to Congress, not the judiciary, to define the market to be regulated. Roberts

> defines the health-care market as including only those transactions that will occur either in the next instant or within some (unspecified) proximity to the next instant. But Congress could reasonably have viewed the market from a long-term perspective, encompassing all transactions virtually certain to occur over the next decade, not just those occurring here and now.[129]

Finally, she notes that *Wickard* and *Raich* directly support "[t]he proposition that Congress may dictate the conduct of an individual today because of prophesied future activity."[130]

Her analysis on the merits is buttressed by her complete evisceration of Roberts's comparison of the market for health care to the market for vegetables or cars:

> The analogy is inapt. The inevitable yet unpredictable need for medical care and the guarantee that emergency care will be provided when required are conditions nonexistent in other markets. That is so of the market for cars, and of the market for broccoli as well. Although an individual *might* buy a car or a crown of broccoli one day, there is no certainty she will ever do so. And if she eventually wants a car or has a craving for broccoli, she will be obliged to pay at the counter before receiving the vehicle or nourishment. She will get no free ride or food, at the expense of another consumer forced to pay an inflated price. Upholding the minimum coverage provision on the ground that all are

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[128] *Id.* (footnote omitted).

[129] *Id.* at 2619 (citing the majority opinion).

[130] *Id.* (internal quotation marks omitted).

In *Wickard*, the Court upheld a penalty the federal government imposed on a farmer who grew more wheat than he was permitted to grow under the Agricultural Adjustment Act of 1938 (AAA). He could not be penalized, the farmer argued, as he was growing the wheat for home consumption, not for sale on the open market. The Court rejected this argument. Wheat intended for home consumption, the Court noted, "overhangs the market, and if induced by rising prices, tends to flow into the market and check price increases [intended by the AAA]."

Similar reasoning supported the Court's judgment in *Raich*, which upheld Congress's authority to regulate marijuana grown for personal use. Homegrown marijuana substantially affects the interstate market for marijuana, we observed, for "the high demand in the interstate market will [likely] draw such marijuana into that market."

Id. (internal citations omitted).

> participants or will be participants in the health-care market would therefore carry no implication that Congress may justify under the Commerce Clause a mandate to buy other products and services.
>
> Nor is it accurate to say that the minimum coverage provision "compel[s] individuals . . . to purchase an unwanted product," or "suite of products." If unwanted today, medical service secured by insurance may be desperately needed tomorrow. Virtually everyone, I reiterate, consumes health care at some point in his or her life. Health insurance is a means of paying for this care, nothing more. In requiring individuals to obtain insurance, Congress is therefore not mandating the purchase of a discrete, unwanted product. Rather, Congress is merely defining the terms on which individuals pay for an interstate good they consume: Persons subject to the mandate must now pay for medical care in advance (instead of at the point of service) and through insurance (instead of out of pocket). Establishing payment terms for goods in or affecting interstate commerce is quintessential to economic regulation well within Congress' domain.[131]

On "the broccoli horrible," she is unrelenting. Ginsburg writes:

> Consider the chain of inferences the Court would have to accept to conclude that a vegetable-purchase mandate was likely to have a substantial effect on the health-care costs borne by lithe Americans. The Court would have to believe that individuals forced to buy vegetables would then eat them (instead of throwing or giving them away), would prepare the vegetables in a healthy way (steamed or raw, not deep-fried), would cut back on unhealthy foods, and would not allow other factors (such as lack of exercise or little sleep) to trump the improved diet. Such "pil[ing of] inference upon inference" is just what the Court refused to do in *Lopez* and *Morrison.*[132]

Not only is the fear of the slippery slope unwarranted, writes Ginsburg, the slippery slope is checked by other provisions of the Constitution,[133] and by the democratic process.[134] On this point,

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[131] *Id.* at 2619–20 (internal citations omitted).

[132] *Id.* at 2624.

[133] *See id.* ("Other provisions of the Constitution also check congressional overreaching. A mandate to purchase a particular product would be unconstitutional if, for example, the edict

Ginsburg is unusually sharp:

> When contemplated in its extreme, almost any power looks dangerous. The commerce power, hypothetically, would enable Congress to prohibit the purchase and home production of all meat, fish, and dairy goods, effectively compelling Americans to eat only vegetables. Yet no one would offer the "hypothetical and unreal possibilit[y]," of a vegetarian state as a credible reason to deny Congress the authority ever to ban the possession and sale of goods. The C[hief] J[ustice] accepts just such specious logic when he cites the broccoli horrible as a reason to deny Congress the power to pass the individual mandate.[135]

To top it off, in a parenthetical for the ages, Ginsburg mocks the joint dissent for "asserting, outlandishly, that if the minimum coverage provision is sustained, then Congress could make 'breathing in and out the basis for federal prescription.'"[136]

Of course, Ginsburg's opinion on the Commerce Clause did not carry the day. Rather, the Chief Justice and his dissenting brethren crafted a new constitutional doctrine, something they are likely to do again as politically contentious cases come before the Court.

IV. THE WAR IS NOT OVER: THE ACA'S OTHER MANDATE AND RELIGIOUS EMPLOYERS

It appears likely that the Supreme Court is likely to consider at least one politically contentious case involving the ACA in the near future.[137] As of this writing, more than forty cases challenging the

impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause.").

[134] *Id.*

> Supplementing these legal restraints is a formidable check on congressional power: the democratic process. As the controversy surrounding the passage of the Affordable Care Act attests, purchase mandates are likely to engender political resistance. This prospect is borne out by the behavior of state legislators. Despite their possession of unquestioned authority to impose mandates, state governments have rarely done so.

Id. (internal citations omitted).

[135] *Id.* at 2625.

[136] *Id.*

[137] *See* Sarah Kliff, *SCOTUS Opens Door to a New Obamacare Challenge*, WASH. POST (Nov. 26, 2012, 11:09 AM), http://www.washingtonpost.com/blogs/wonkblog/wp/2012/11/26/scotus-opens-doors-to-a-new-obamacare-challenge/?hpid=z5 ("The Supreme Court has ordered an appeals court to reopen arguments on the Affordable Care Act's employer mandate and contraceptive coverage provisions, opening a potential path back to the highest court by late 2013."); Timothy Jost,

requirement that employers who provide health insurance must provide contraceptive coverage are already winding their way through the courts.[138] Although most have been unsuccessful, opponents have convinced three federal district court judges to issue preliminary injunctions staying implementation of the contraceptive mandate, suggesting the possibility that the lower courts will split on their resolutions of the issues raised, triggering the need for Supreme Court review.[139] Moreover, on November 26, 2012, the Supreme Court took the unusual step of ordering the Fourth Circuit Court of Appeals to reconsider a constitutional challenge against the ACA that focuses on whether the Act's employer insurance coverage mandate violates the First Amendment rights of employers.[140] And even Justice Ginsburg left the door open for a religiously based challenge to the mandate when she wrote, "[a] mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause."[141]

If the Supreme Court does grant certiorari to review one of these cases, commentators will surely turn to *NFIB* for some indication of how the Court will resolve the cases. While *NFIB* provides little guidance on how the Court will analyze the merits of the religiously-based challenges, it does suggest at least two things about how the Court will handle the cases. First, at least five

The March of Affordable Care Act Litigation Goes On, HEALTH AFFAIRS BLOG (Sept. 9, 2012), http://healthaffairs.org/blog/2012/09/09/the-march-of-affordable-care-act-litigation-goes-on ("In the wake of the June 28, 2012 decision, the courts continue to decide ACA cases and new cases continue to be filed.").

[138] *See* HHS Mandate Information Central, BECKET FUND, http://www.becketfund.org/hhsinformationcentral (last visited Jan. 29, 2013) (tracking the progress of the cases challenging the contraceptive mandate). But note, the Obama administration altered its birth control rules in an attempt to allay religious objection on February 1, 2013. *See* Robert Pear, *Compromise Idea For the Insuring Of Birth Control*, N.Y. TIMES, Feb. 2, 2013, A1. Religious leaders claim the revised rules do not obviate their objections. *See id.*

[139] *See* Tyndale House Publishers, Inc., v. Sebelius, No. 12-1635(RBW), 2012 WL 5817323 (D.D.C. Nov. 16, 2012); Legatus v. Sebelius, No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012); Newland v. Sebelius, No. 1:12-cv-1123-JLK, 2012 WL 3069154 (D. Colo. July 27, 2012).

[140] Liberty Univ. v. Geithner, No. 11-438 (U.S. Sup. Ct. Nov. 26, 2012), http://www.supremecourt.gov/orders/courtorders/100112zor.pdf (returning the case to the Fourth Circuit for further review); Lyle Denniston, *Way Cleared for Health Care Challenge*, SCOTUSBLOG (Nov. 26, 2012, 9:33 AM), http://www.scotusblog.com/2012/11/way-cleared-for-health-care-challenge (discussing how unusual it is for the Court to grant such an order).

[141] *NFIB*, 132 S. Ct. 2566, 2624 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, dissenting in part).

Justices—including Chief Justice Roberts—will not feel constrained by precedent or the weight of authority when determining the constitutional issues. Second, at least five Justices—again including Chief Justice Roberts—will use statutory construction, severance, or some other limiting principle to ensure the continued vitality of the ACA even if the cases reveal a defect with one or more of its provisions.

On the merits, many of the challenges to the so-called contraception mandate are aimed at a federal regulation that defines contraception as part of the "women's preventive care and screening" required under the ACA as a category of mandated preventive services.[142] Others, including the case remanded to the Fourth Circuit by the Supreme Court, sweep more broadly and claim that the ACA's employer mandate itself is unconstitutional. The basic claim is that the mandate violates the First Amendment by requiring religiously affiliated employers to violate their beliefs by subsidizing insurance plans that provide the objectionable services (contraceptives, abortifacients, and sterilizations) to their employees free of charge.[143] A secondary claim is that the mandate violates the Religious Freedom Restoration Act (RFRA).[144] If

[142] Coverage of Preventive Services Under the ACA, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (to be codified at 29 C.F.R. pt. 54). Enacted through the ACA, section 2713 of the Public Health Services Act requires insurers to cover women's "preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." Public Health Services Act, § 2713(a)(4), 42 U.S.C. § 300gg-13(a)(4) (2010). Preventive care includes "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." *Women's Preventive Services: Required Health Plan Coverage Guide Lines*, HEALTH RESOURCES & SERVICES ADMIN., http://www.hrsa.gov/womensguidelines (last visited Jan. 29, 2013) [hereinafter *HRSA Coverage Guidelines*]; *see* News Release, Dep't of Health & Human Servs., Statement of Kathleen Sebelius (Jan. 20, 2012), http://www.hhs.gov/news/press/2012pres/01/20120120a.html (adding an additional element allowing nonprofit employers, who based on religious beliefs did not provide contraception coverage, an additional year to comply with the new health care law); *see also* Coverage of Preventive Services Under the ACA, 77 Fed. Reg. at 8728 (describing required coverage for women's preventative services); Timothy S. Jost, *Analysis of the Obama Administration's Updated Contraception Rule*, WASH. & LEE U., http://law.wlu.edu/faculty/facultydocuments/jost/contraception.pdf (analyzing the coverage mandate guidelines).

[143] For a fuller explanation of the arguments, see Angela C. Thompson, *Obamacare's Birth-Control Mandate is Unconstitutional*, U.S. JUST. FOUND. (Feb. 21, 2012), https://usjf.net/2012/02/obamacares-birth-control-mandate-is-unconstitutional.

[144] RFRA directs that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the Government "demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1 (2006 & Supp. IV 2010).

precedent is any guide, the merit-based arguments in the cases should be easily dismissed.[145] Similar rules requiring contraceptive coverage have withstood constitutional challenges in twenty states.[146] The rules are carefully crafted to exempt churches, mosques, and other houses of worship.[147] They are neutral in their application, and they further the government's efforts to expand women's access to health care and to prevent sex discrimination.[148] Thus, under established precedent holding that the First Amendment does not exempt individuals or entities from complying with neutral laws of general applicability, the rules are plainly constitutional.[149] And the claims that the rules violate RFRA are equally untenable. RFRA prohibits the government from substantially burdening a person's religious exercise unless the government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[150] Given the numerous accommodations granted to religious employers, there is simply no precedent supporting the claim that the requirement substantially burdens

[145] *See, e.g.*, Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459, 465 (N.Y. 2006); Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 77 (Cal. 2004). *See also* Emp't Div. v. Smith, 494 U.S. 872, 878–79 (1990) (holding that laws that apply generally and do not single out religious groups may be upheld even if they intrude on religious practices), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012); Tony and Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 303 (1985) (holding that religious organizations must pay their workers minimum wages despite a religious protest); United States v. Lee, 455 U.S. 252, 261 (1982) (holding that an employer must pay Social Security and unemployment taxes despite a religious objection).

[146] *See, e.g.*, *Catholic Charities of the Dioceses of Albany*, 859 N.E.2d at 469 ("A legislative decision not to extend an accommodation to all kinds of religious organizations does not violate the Establishment Clause."); *Catholic Charities*, 85 P.3d at 108 ("The state has produced no substantial evidence that the exemption of Catholic Charities from this particular mandate would render the whole scheme ineffective or would be so administratively burdensome as to preclude enforcement.").

[147] HHS defines "religious employers" as organizations that have the inculcation of religious values as their primary purpose, primarily employ and serve people who share religious tenets, and are nonprofit organizations considered to be churches, under the tax code. 45 C.F.R. § 147.130 (2012).

[148] The EEOC made it clear that an employer's failure to cover contraception when it covers other prescription drugs and preventive care violates protections against sex discrimination under Title VII of the Rights Act. Decision on Contraception, EEOC, Dec. 14, 2000, http://www.eeoc.gov/policy/docs/decision-contraception.html.

[149] *See Smith*, 494 U.S. at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'") (citations omitted).

[150] 42 U.S.C. § 2000bb-1 (2006 & Supp. IV 2010).

religious exercise.

Although the arguments pushed by opponents of the contraception mandate find little support in the law, the fact that three federal courts have issued injunctions, suggests that the arguments pushed by opponents might be gaining traction. And if we have learned nothing else from its treatment of the Commerce Clause in *NFIB*, however, it is that the Roberts Court does not deem itself bound by precedent or the consensus of the constitutional scholars, especially in the face of strong political pressure. Thus, it is quite possible the Court will use a challenge to the contraception mandate as an opportunity to craft a new constitutional doctrine modifying *Employment Division v. Smith*, and strike down the contraceptive mandate.

If the Court does deem the contraceptive mandate unconstitutional (or in violation of RFRA), then it will again need to decide on an appropriate remedy. While opponents of the ACA might hope that such a holding would give the Court a chance to invalidate the entire statute, *NFIB* indicates it will not. Although four Justices were ready to strike down the entire statute in *NFIB*, Chief Justice Roberts directed that the statute (as a whole) must be preserved, if at all possible. When deciding to sever part of the Medicaid expansion, Roberts wrote, "[t]he question . . . is whether Congress would have wanted the rest of the Act to stand" when part of it fell.[151] Given that Congress delegated to an administrative agency the task of defining whether contraceptive coverage was part of a mandatory package of preventive care benefits, the answer to that question is an easy yes. Reading the statute to save it would be easier with respect to the contraceptive mandate than it was with the Medicaid expansion. The Court could simply exempt religiously affiliated employers from the requirement, or could strip the requirement from the statute. In any case, a successful challenge to the contraceptive mandate will not bring down the ACA.

V. CONCLUSION

The ACA barely survived constitutional scrutiny in *NFIB*, but survive it did. With the help of creative, even aggressive statutory interpretation by the Chief Justice, the shared responsibility provision survived as a tax, and the Medicaid expansion survived as

[151] *NFIB*, 132 S. Ct. 2566, 2607 (2012) (citations omitted); *see* discussion *supra* Part III.C.

an appealing option for the states. Of course, opponents of the ACA will continue to attack the statute in both the political arena and in the courts. With the re-election of President Obama, complete repeal seems unlikely, although political maneuvering to prevent funding may impede implementation. In the courts, the challenges will progress. Some may even be successful. But given its instruction on severance, *NFIB* will protect the integrity of the ACA.