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ESSAY

CHIEF JUSTICE ROBERTS'S *MARBURY* MOMENT: THE *AFFORDABLE CARE ACT CASE (NFIB V. SEBELIUS)*

*Stephen M. Feldman**

INTRODUCTION

Numerous commentators have described *National Federation of Independent Business v. Sebelius*,[1] the *Affordable Care Act Case* (*ACA Case*), as Chief Justice John Roberts's *Marbury* moment.[2] Why is this analogy between the *ACA Case* and *Marbury v. Madison* especially apt?[3]

Most lawyers remember (at least faintly) studying *Marbury* in their courses on constitutional law. But why do so many professors devote so much time to covering *Marbury*? To be sure, it's an important case from a doctrinal standpoint, given that it established the Supreme Court's power of judicial review over the

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[1] Nat'l Fed'n of Indep. Bus. v. Sebelius (*ACA Case*), 132 S. Ct. 2566 (2012).

[2] *E.g.*, *When Roberts Met Marshall: The Chief Justice's Marbury Moment*, MODEST COMMENTARY (Aug. 8, 2012, 8:52 PM), http://modestcommentary.wordpress.com/2012/08/08/when-roberts-met-marshall-the-chief-justices-marbury-moment/; Adam J. White, *Marshalling Precedent With Nod to Predecessor, Roberts Affirms Mandate*, THE WEEKLY STANDARD (June 28, 2012, 2:05 PM), http://www.weeklystandard.com/blogs/marshalling-precedent-nod-predecessor-roberts-affirms-mandate_647945.html; Mark J. Fitzgibbons, *Chief Justice Roberts' Marbury Moment*, AMERICAN THINKER (May 3, 2012), http://www.americanthinker.com/2012/05/chief_justice_roberts_marbury_moment.html.

[3] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). I do not intend to suggest that other commentators draw the analogy for the same reasons as I do.

coordinate branches of the national government. And it helped solidify Chief Justice John Marshall's position of leadership on the Court. From my perspective, however, *Marbury* is worth significant class time because it starkly illustrates the intersection of law and politics in constitutional law. By the time *Marbury* came to the Court—it was decided in 1803—the nation had been embroiled in a decade of volatile political battles, pitting two "proto-parties" against each other.[4] Alexander Hamilton and John Adams led the Federalists, while James Madison and Thomas Jefferson led the Republicans. Having swept the elections of 1800, the Republicans now controlled the executive branch and both houses of Congress. The Federalists, though, still held most federal judgeships, including those on the Supreme Court.[5]

The *Marbury* case arose when the lame-duck Adams administration was unable to deliver a few final (Federalist) commissions to federal judgeships. Upon taking office, the newly inaugurated President, Jefferson, and his Secretary of State, Madison, refused to deliver the remaining commissions. William Marbury had been appointed and confirmed to a position as a justice of the peace in Washington, D.C. When Marbury did not receive his expected commission, he sued, going straight to the Supreme Court and asking for a writ of mandamus that would order Madison to deliver the commission. The Court, thus, was thrown directly into a political crucible. The Federalist Chief Justice, Marshall, himself recently appointed, was Jefferson's blood relative and long-time political rival in Virginia.

Marshall, writing for a unanimous Court, managed not only to articulate crucial constitutional doctrine but also to do so in the most politically tactful manner imaginable. By establishing the Court's power of judicial review, Marshall unequivocally declared that the Court could invalidate unconstitutional congressional and executive actions. Moreover, the Court's power included the authority to be the final interpreter of the Constitution: The Court would determine which congressional and executive actions contravened constitutional provisions, even if the provisions seemed ambiguous. In short, Marshall's *Marbury* opinion manifested a bold assertion of judicial power vis-à-vis the coordinate branches. Yet, Marshall reached this conclusion without directly challenging the immediate political power of Jefferson, Madison, and the Republicans. In fact, the Republicans won the case. By ultimately reasoning that the Court lacked jurisdiction, Marshall handed Jefferson and Madison the result they had sought: Marbury, a Federalist, would not receive his commission.

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[4] JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC 8 (1993).

[5] For an excellent history of the 1790s, see STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM (1993).

How, then, does the *ACA Case* parallel *Marbury*? Like Marshall in *Marbury*, Chief Justice Roberts established key constitutional doctrine—in this case, though, extremely conservative doctrine—yet he did so in a politically diplomatic manner. The Republican-appointed Roberts handed President Barack Obama and the Democrats the result that they wanted. He upheld the constitutionality of Obama's flagship legislation, the Patient Protection and Affordable Care Act of 2010.[6] In doing so, Roberts sidestepped the potentially vehement political condemnation that the Democrats undoubtedly would have heaped on him (and the Court) if he had reached the opposite result.

Part I of this essay briefly summarizes the *ACA Case*. Part II focuses on Congress's commerce power. It first examines the constitutional doctrine from before the *ACA Case*, and then explores how Roberts changed the doctrine. Parts III and IV follow a similar format, first examining pre-*ACA Case* doctrine and then exploring Roberts's changes. Part III focuses on the spending power, and Part IV focuses on the taxing power. The Conclusion discusses the politics of the case and emphasizes the irony of Roberts's *Marbury* moment.

To discuss the intersection of law and politics in the *ACA Case*, one must characterize the current justices' political orientations.[7] The justices can be roughly placed into three categories. Four justices—Antonin Scalia, Clarence Thomas, Samuel Alito, and Roberts—are Republican-appointed arch-conservatives (or neoconservatives).[8] Four justices—Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan—are Democratic-appointed liberals (or progressives). One justice, Anthony Kennedy, is a Republican-appointed conservative. Although more moderate than the other conservative justices, Kennedy usually votes with them in politically salient cases, but he occasionally sides with the liberals.[9]

I. *NFIB v. SEBELIUS*

Congress enacted the Patient Protection and Affordable Care Act (ACA) to increase the number of Americans covered by health insurance and to decrease the cost of health care. This Essay focuses on two key provisions in the statute: (1) the individual mandate, and (2) the Medicaid expansion. First, the individual mandate requires most Americans to maintain "minimum essential" health

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[6] Pub. L. No. 111-148; 124 Stat. 119.

[7] For political information on the justices, see *Perceived Qualifications and Ideology of Supreme Court Nominees, 1937-2012*, http://www.stonybrook.edu/commcms/polisci/jsegal/QualTable.pdf (last visited Dec. 3, 2012) (data drawn from Jeffrey Segal & Albert Cover, *Ideological Values and the Votes of Supreme Court Justices*, 83 AM. POL. SCI. REV. 557–65 (1989); updated in LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS (2005)).

[8] STEPHEN M. FELDMAN, NEOCONSERVATIVE POLITICS AND THE SUPREME COURT: LAW, POWER, AND DEMOCRACY (2013).

[9] *E.g.*, Lawrence v. Texas, 539 U.S. 558 (2003).

insurance coverage.[10] If an individual is not exempt from the mandate, he or she can satisfy it by purchasing insurance from a private company. Starting in 2014, individuals who do not comply with the mandate must pay a "penalty" to the Internal Revenue Service along with their taxes.[11] Second, the current Medicaid program offers federal funding to States primarily to assist the poor in obtaining medical care.[12] The ACA expands the scope of the Medicaid program by increasing the number of covered individuals. Roberts gives this example: "[T]he Act requires state programs to provide Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level, whereas many States now cover adults with children only if their income is considerably lower, and do not cover childless adults at all."[13]

Twenty-six states, several individuals, and other organizations challenged the ACA as being beyond congressional power. The justices dealt with several issues, but for purposes of this discussion, I will cover only those parts of the Court's decision dealing with congressional power, particularly those parts related to Congress's commerce, spending, and taxing powers. The Court upheld the individual mandate, invalidated the Medicaid expansion in part, and otherwise upheld the rest of the Act. Yet, in doing so, the justices were deeply divided. Roberts and the four other conservative justices (the joint dissenters), none of whom joined Roberts's opinion, held that the individual mandate was beyond Congress's commerce power. Roberts and the four liberal justices held that the individual mandate was a tax within Congress's taxing power. Roberts and six other justices (including all of the conservatives) held that the Medicaid expansion exceeded the scope of Congress's spending power, as interpreted in light of the Tenth Amendment. While Roberts, in effect, spoke for the Court, parts of his opinion were joined by no other justice.

II. COMMERCE POWER

From the 1890s through 1936 (the *Lochner* era), the Court occasionally invalidated congressional actions by defining and enforcing *judicial* limits on the commerce power.[14] During this period, the justices typically reasoned pursuant to an a priori formalism. The justices claimed to discern the existence, content, and boundaries of certain preexisting categories of activities without inquiring into the consequences of the activities. For instance, manufacturing might be deemed

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[10] 26 U.S.C. § 5000A (2012).

[11] *Id.* §§ 5000A(c), (g)(1).

[12] 42 U.S.C. § 1396d(a). Within this broad category of the poor, the statute includes pregnant women, children, needy families, the blind, the elderly, and the disabled.

[13] Nat'l Fed'n of Indep. Bus. v. Sebelius (*ACA Case*), 132 S. Ct. 2566, 2581–82 (2012) (citing 42 U.S.C. §1396a(a)(10)(A)(i)(VIII)).

[14] U.S. CONST. art. I, § 8, cl. 3; Lochner v. New York, 198 U.S. 45 (1905).

to be an inherently local (or inherently national) activity, regardless of the product manufactured, the resources used, or the social effects of the manufacturing.[15] In *Carter v. Carter Coal Company*, the Court relied on such a priori formalism to invalidate the Bituminous Coal Conservation Act.[16] Mining, like manufacturing, growing crops, and other types of production, was "a purely local activity," the Court explained, and therefore beyond Congress's power to regulate interstate commerce.[17]

Starting in 1937, the Court repudiated such formalist reasoning in commerce power cases.[18] The justices instead usually articulated a rational basis test to determine the scope of Congress's power, but in application, this test became a judicial rubber stamp. Between 1937 and the early 1990s, the Court upheld every challenged congressional exercise of its commerce power, with the sole exception of a single 1976 case, which the Court overruled within a decade.[19] Limits on congressional power, therefore, arose from the democratic process, rather than by judicial imposition. As the Court explained in 1985, "the fundamental limitation that the constitutional scheme imposes on the Commerce Clause . . . is one of process rather than one of result."[20] For the most part, congressional overreaching would be checked at the ballot box, not by the Court. In other words, the Court would exercise judicial restraint and defer to congressional decisions.

By the 1990s, however, conservative constitutional theorists were arguing that the Court, once again, should impose judicial limits on Congress's commerce power, as the Court had done during the *Lochner* era.[21] From this perspective, the Court's rubber stamping of congressional actions amounted to an abdication of judicial duty. In 1992 and 1995, the Court decided cases that largely adopted this conservative approach.[22] The 1995 case, *United States v. Lopez*, was a landmark for commerce-power jurisprudence.[23] *Lopez* held that Congress had overstepped

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[15] *See generally* United States v. E. C. Knight Co., 156 U. S. 1 (1895).

[16] *See generally* 298 U.S. 238 (1936).

[17] *Id.* at 304. For another example of a priori formalist reasoning, see *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330, 374 (1935) (invalidating the Railroad Retirement Act as class legislation contravening the common good and thus beyond Congress's commerce power).

[18] *See generally* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[19] Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[20] *Garcia*, 469 U.S. at 554.

[21] *See generally* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

[22] *See generally* United States v. Lopez, 514 U.S. 549 (1995) (focusing on commerce power); New York v. United States, 505 U.S. 144 (1992) (focusing on Tenth Amendment).

[23] *See generally* 514 U.S. 549.

its power when it enacted the Gun-Free School Zones Act (GFSZA), a generally applicable law that proscribed the possession of firearms at school. Rehnquist's majority opinion, joined by Scalia, Thomas, Kennedy, and O'Connor, began by asserting that the Court would apply the rational basis test. The Court, though, significantly reformulated the doctrine to impose judicially enforceable limits on Congress. Under this new or modified rational basis test, as the Court explained, Congress can regulate "three broad categories of activity."[24]

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.[25]

The Court quickly concluded that the GFSZA did not fit into the first two categories: By restricting the possession of firearms at schools, the law targeted neither the channels nor the instrumentalities of interstate commerce.[26] Consequently, the Court focused on the third and potentially broadest category: activities substantially affecting interstate commerce.[27] But the Court interpreted this third category in accordance with the type of a priori formalism that had characterized pre-1937 commerce power cases. Rehnquist's majority opinion, for instance, sharply distinguished between economic and non-economic activities. According to the Court, gun possession at schools is a non-economic enterprise that "has nothing to do with 'commerce.'"[28] Likewise, Rehnquist distinguished between national and local concerns. He maintained that gun possession at schools is a local rather than a national matter and thus falls outside Congress's commerce power. Indeed, his distinction between "what is truly national and what is truly local"[29] echoed the Court's pre-1937 language distinguishing "a purely federal matter"[30] from "a matter purely local in its character."[31]

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[24] *Id.* at 558.

[25] *Id.* at 558–59 (internal citations omitted).

[26] *Id.* at 559.

[27] *Id.* at 561–65.

[28] *Id.* at 561.

[29] *Id.* at 567–68.

[30] Hammer v. Dagenhart, 247 U.S. 251, 274 (1918).

[31] *Id.* at 276.

In the end, for the first time since 1937, the *Lopez* Court explicitly concluded that Congress had exceeded its commerce power.[32] Equally important, or perhaps even more so in the long term, *Lopez* revamped commerce-power doctrine in accordance with politically conservative views. Unsurprisingly, then, courts have followed this doctrine in subsequent cases and have reached conservative outcomes.[33]

The reformulated rational basis test of *Lopez*, however, became an obstacle for the conservative justices in the *ACA Case*. After all, conservative justices had crafted the doctrine as a means of diminishing congressional commerce power. Yet, one could strongly argue that, pursuant to the *Lopez* doctrine, the ACA—particularly, the individual mandate—was a constitutional exercise of the commerce power. Indeed, Justice Ginsburg articulated this precise argument in her opinion, concurring in part and dissenting in part. Under *Lopez*, any economic activity that has substantial effects on interstate commerce falls within Congress's power. Thus, Ginsburg wrote: "Straightforward application of these principles would require the Court to hold that the minimum coverage provision is proper Commerce Clause legislation."[34] The health care market is clearly economic. Moreover, those individuals who choose to go uninsured but inevitably, at some point, avail themselves of medical services, substantially affect commerce in the health care market. Specifically, health care providers raise their prices and insurance companies increase their premiums so that insured individuals pay extra, thus covering costs for the uninsured.[35] For example, "Congress found that the cost-shifting . . . 'increases family [insurance] premiums by on average over $1,000 a year.'"[36] Hence, Ginsburg maintained, quite reasonably, that "[b]eyond dispute, Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce."[37]

In sum, conservative justices had honed the *Lopez* doctrine to constrain Congress's commerce power, but in this case, the application of the reformulated rational basis test seemed to suggest that Congress had acted constitutionally. Yet,

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[32] 514 U.S. at 567–68. In two prior cases invalidating exercises of congressional power, the Court focused on limits imposed by the Tenth Amendment. *See* New York v. United States, 505 U.S. 144 (1992); Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[33] *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (invalidating the Violence Against Women Act); United States v. Wilkinson, 626 F. Supp. 2d 184, 185 (D. Mass. 2009) (invalidating the Jimmy Ryce provision of the Adam Walsh Act).

[34] Nat'l Fed'n of Indep. Bus. v. Sebelius (*ACA Case*), 132 S. Ct. 2566, 2617 (2012) (Ginsburg, J., concurring in part and dissenting in part).

[35] *Id.* at 2611.

[36] *Id.*

[37] *Id.* at 2617. Ginsburg added that these substantial effects are national in scope—that is, they affect more than one state. Many of the insurance companies are national, for instance. *See id.*

Roberts (and the other four conservative justices) held that Congress had exceeded its commerce power. How did Roberts, in particular, manage to reach this result? Basically, Roberts pushed the formalist reasoning that had characterized *Lopez* even further than the *Lopez* Court had pushed it.

When applying the reformulated rational basis test in the *ACA Case*, Roberts invoked two formalist distinctions that the *Lopez* Court had not mentioned. First, Roberts distinguished action from inaction. He reasoned that Congress has always been limited to regulating *activity* under its commerce power; Congress cannot regulate *inactivity.* But under the ACA, the individual mandate would force inactive individuals to enter or become active in the health insurance market. People who had not bought and did not want to buy health insurance would be forced to do so.[38] The other conservative justices (the joint dissenters) completely agreed with Roberts on this point, even though they did not join his opinion.[39] Meanwhile, Ginsburg argued otherwise. She pointed out that Congress, on multiple occasions in the past, had in fact ordered individuals to act, even when the individuals might prefer not to do so.[40] She offered several examples, including the 1792 Militia Act, which required individuals "to purchase firearms and gear in anticipation of service in the Militia."[41] Roberts responded by reasoning that in none of these instances, including the Militia Act, had Congress acted pursuant to its commerce power. In other words, from Roberts's perspective, Congress could in general force individuals to take action, but Congress could not do so when invoking its commerce power.[42]

Roberts also relied on a formalist distinction between regulation and creation. The Constitution grants Congress the power to "regulate commerce," Roberts reasoned, but not to create it.[43] Under the ACA, he continued, Congress was attempting to create commercial activity where none previously existed. And again, the other conservative justices completely agreed with Roberts on this point.[44]

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[38] *Id.* at 2586–87 (opinion of Roberts, C.J.). "But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product." *Id.* at 2586.

[39] *Id.* at 2644, 2648–49 (joint dissent). The joint dissent emphasized that some people are not part of the health care market: "But the health care 'market' that is the object of the Individual Mandate not only includes but principally consists of goods and services that the young people primarily affected by the Mandate *do not purchase*. They are quite simply not participants in that market . . . ." *Id.* at 2648.

[40] *Id.* at 2627 n.10 (Ginsburg, J., concurring in part and dissenting in part).

[41] *Id.* (citing the Uniform Militia Act of 1792, 1 Stat. 271).

[42] *Id.* at 2586 n.3 (opinion of Roberts, C.J.).

[43] *Id.* at 2586 (quoting U.S. CONST. art. I, § 8, cl. 3).

[44] *Id.* at 2644, 2647 (joint dissent).

"To be sure," wrote the joint dissenters, "purchasing insurance is 'Commerce'; but one does not regulate commerce that does not exist by compelling its existence."[45]

Thus, in the *ACA Case*, Roberts unequivocally relied on the formalist-style reasoning that had characterized *Lopez*, but a large ambiguity remains. Namely, how do the new *ACA Case* distinctions or categories—action versus inaction, and regulation versus creation—fit within the *Lopez* doctrine that has governed commerce power issues since 1995? For instance, the new distinctions might be conceptualized to be additional guidelines to the third *Lopez* category: the substantial effects prong. By this reasoning, a court should not find substantial effects on interstate commerce if Congress is attempting to regulate inactivity or to create commerce. Yet, at one point in his opinion, Roberts suggested more. He appeared to maintain that these new distinctions are in addition to the *Lopez* doctrine. That is, from this perspective, the new distinctions would bar congressional action even if such action would otherwise fit within or satisfy the substantial effects prong.

> People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—*can readily have a substantial effect on interstate commerce*. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.
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> That is not the country the Framers of our Constitution envisioned.[46]

Regardless of how the new distinctions fit vis-à-vis the reformulated rational basis test, there is little doubt that the *ACA Case* marks a doctrinal turn that can restrain congressional power even more so than *Lopez* had previously done. First, the justices (or other judges) might invoke the specific *ACA Case* distinctions or categories in future cases as a means to limit Congress. Second, the justices have demonstrated their ready willingness to use formalist-style reasoning to generate additional categories that can further constrain congressional power. Thus, in a

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[45] *Id.* at 2644. The joint dissent continued by arguing that Ginsburg had mistakenly defined the regulated market of the ACA (the health care market). *Id.* at 2647–48. Thus, the joint dissent further followed the formalist reasoning of Roberts and the *Lopez* Court by attempting to impose an a priori categorical definition on the market.

[46] *Id.* at 2589 (opinion of Roberts, C.J.) (emphasis added).

future case, one should not be surprised if the justices invalidate a congressional action by invoking a formalist distinction or category that appears in neither *Lopez* nor the *ACA Case*.[47]

III. SPENDING POWER

Congress invoked its spending power to justify its enactment of the Medicaid expansion.[48] Before 1937, the Court had held that Congress had a broad power to spend, but also that the Tenth Amendment protection of state sovereignty limited such power. In *United States v. Butler*, the Court held unconstitutional the Agricultural Adjustment Act of 1933, which provided subsidies to farmers in order to stabilize agricultural production.[49] In the first part of the opinion, the *Butler* Court reasoned that Congress's spending did not have to be directly linked to or in furtherance of Congress's other expressly enumerated powers.[50] Instead, Congress could spend for the general welfare. Nonetheless, the Court continued by applying the Tenth Amendment protection of state sovereignty in a formalist fashion.[51] Specifically, the Court reasoned that all forms of "production,"[52] including agricultural production, were inherently a matter of "state concern" and thus beyond congressional control.[53]

Starting in 1937, however, the Court continued to recognize a broad spending power in Congress while repudiating its formalist approach to the Tenth Amendment.[54] As with the commerce power, then, limitations on the spending power arose from the democratic process, rather than by judicial imposition.[55] All congressional spending for the general welfare would be upheld, so long as the congressional act did not violate another constitutional provision, such as the First Amendment.[56] Moreover, pursuant to its broad spending power,

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[47] Ginsburg criticized Roberts precisely for relying on such formalist reasoning. *Id*. at 2622 (Ginsburg, J., concurring in part and dissenting in part). Justice Thomas wrote a short separate opinion to reiterate that he has always found the substantial effects prong of *Lopez* unacceptable. *Id.* at 2677 (Thomas, J., dissenting).

[48] The spending clause states that Congress has the power "to pay the Debts and provide for the . . . general Welfare of the United States." U.S. CONST., art. I, § 8, cl. 1.

[49] 297 U.S. 1, 53–56 (1936); *see also* 48 Stat. 31.

[50] *Butler*, 297 U.S. at 65–66.

[51] *Id.* at 68–73.

[52] *Id.* at 68, 73.

[53] *Id.* at 70. For another example of a formalist application of the Tenth Amendment, see *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

[54] *See generally* Helvering v. Davis, 301 U.S. 619 (1937); Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

[55] South Dakota v. Dole, 483 U. S. 203, 211 (1987).

[56] *Id.* at 210–11.

Congress could attach conditions to grants or subsidies that it offered to state and local governments. In such instances, Congress had to express the condition "unambiguously."[57] Furthermore, the condition had to be related to the purpose of the spending program, broadly construed. For instance, Congress could condition funding to state governments for highways by requiring the states to set certain speed limits, but Congress could not condition highway funds on a state's expressed stance on abortion.[58] In one case, the Court upheld a condition on highway funds that required states to set a twenty-one year-old drinking age because, the Court reasoned, drinking was related to highway safety.[59]

Despite Congress's expansive spending power, Roberts (and the other four conservative justices) held that Congress had exceeded its power by enacting the Medicaid expansion. How did Roberts reach this result? He began by acknowledging that, since 1937, the Court had not invalidated exercises of Congress's spending power, but he then emphasized that the Court had never stated that the spending power was judicially unlimited.[60] Limits, Roberts explained, arise from the Tenth Amendment concern with protecting "the status of the States as independent sovereigns in our federal system."[61] Thus, as in the commerce power realm, Roberts here returned to a pre-1937 emphasis. Moreover, in interpreting the specific limits that the Tenth Amendment imposes on Congress's spending power, Roberts continued along this pre-1937 path by once again invoking a formalist distinction. He distinguished congressional "pressure" from congressional "compulsion,"[62] or as he phrased it elsewhere in his opinion, "encouragement" versus "coercion."[63] In other words, Congress can provide financial incentives that pressure or encourage states to take certain actions, but Congress cannot compel or coerce state governmental actions. At some point, Roberts reasoned, congressional (financial) incentives cross the line from encouragement to compulsion.[64]

In this case, Congress claimed that the ACA merely modified the Medicaid program. The Act encouraged states to expand the scope of Medicaid by providing additional funds. But Roberts reasoned that the ACA imposed such severe costs on non-complying states that the Act's Medicaid expansion should be deemed a completely separate program (rather than a modification of the existing Medicaid

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[57] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

[58] *See generally* Oklahoma v. U.S. Civil Serv. Comm'n, 330 U.S. 127 (1947) (upholding conditions on highway funds).

[59] *Dole*, 483 U. S. at 208–09 (1987).

[60] Nat'l Fed'n of Indep. Bus. v. Sebelius (*ACA Case*), 132 S. Ct. 2566, 2601–03 (2012).

[61] *Id.* at 2602.

[62] *Id.*

[63] *Id.* at 2603.

[64] *Id.*

program).[65] Any state that did not comply with the Medicaid expansion would not merely lose the funding that Congress had offered for the expansion; the state would also lose all of its current Medicaid funding. Thus, according to Roberts, the potential loss in federal funding for the states was so severe as to preclude any real choice. As Roberts put it, the Medicaid expansion was "a gun to the head."[66] Imagine that you are walking down the street when a thief jumps out of the shadows, points a gun at you, and says, 'Give me your wallet.' In a sense, you can choose whether or not to give the thief your wallet. Yet, this predicament does not present a true choice because you do not have a reasonable alternative to relinquishing your wallet. Thus, Roberts concluded that, in the ACA Medicaid expansion, Congress had crossed the line from encouragement to coercion. And again, the joint dissenters agreed with Roberts on this point,[67] while also admitting that this conclusion was novel in the post-1937 legal world.[68]

As with the commerce power, the precise implications of the *ACA Case* for the spending power remain ambiguous. Much will depend on how the Court subsequently interprets the distinction between encouragement and coercion. Unquestionably, though, in the *ACA Case*, the Court further constrained congressional power by articulating (or resurrecting) formalist limits that harken back to the pre-1937 era.

IV. TAXING POWER

Congress invoked not only its commerce power but also its taxing power in enacting the ACA's individual mandate. Given that Article I, Section 8, Clause 1, refers jointly to Congress's powers to tax and to spend, the two powers are typically lumped together: Congress's taxing and spending power.[69] Consequently, much of the discussion of the history of the spending power is similarly true of the taxing power. After 1937, the Court interpreted congressional taxing power broadly. Congress has the power to tax for the general welfare so long as the congressional act does not violate another constitutional provision, such as the First Amendment.[70] Congress is not limited to taxing in furtherance of the other enumerated powers. Article I, Section 9, though, expressly imposes a limitation

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[65] *Id.* at 2604–05.

[66] *Id*. at 2604.

[67] *Id.* at 2662 (joint dissent). Breyer and Kagan also joined Roberts's opinion on this point. Meanwhile, Ginsburg argued that Congress merely amended the already existing Medicaid law, as it has done in the past; Roberts's approach forces Congress to take wasteful steps by first repealing the law and then reenacting it. *Id*. at 2629–30 (Ginsburg, J., concurring in part and dissenting in part).

[68] *See id.* at 2658 (joint dissent).

[69] *See* U.S. CONST., art. I, § 8, cl. 1.

[70] *See generally, e.g.*, United States v. Kahriger, 345 U.S. 22 (1953); Sonzinsky v. United States, 300 U.S. 506 (1937).

on the taxing power: Any capitation or direct tax, such as one on real property, must be allocated proportionally among the states based on population.[71] Even so, case law has undermined any distinction between direct and indirect taxes.[72] Thus, for the most part, limitations on the taxing power have arisen from the democratic process, rather than from judicial decisions. If citizens do not like federal taxes, then their recourse is to vote for different governmental officials.

Significantly, Roberts and the Court—the four liberal justices joined Roberts—did not diminish Congress's taxing power. Instead, Roberts explained that the individual mandate was within the scope of the taxing power. Much of Roberts's opinion on this issue revolved around statutory construction and the question whether the individual mandate should be categorized as a tax. In fact, this question of statutory construction was the crux of the disagreement between Roberts and the other conservative justices (the joint dissenters). Unlike Roberts, the joint dissenters did not interpret the individual mandate to be a tax. They reasoned that it must be either a tax or a penalty; it could not be both.[73] Since, from their perspective, it was clearly a penalty, it logically could not be a tax.[74] Thus, they did not even consider whether the mandate was within Congress's taxing power. Meanwhile, once Roberts deemed the mandate to be a tax, he emphasized that Congress could tax inactivity even though, by his reasoning, Congress could not reach such inactivity pursuant to its commerce power.[75]

V. CONCLUSION: THE IRONY OF ROBERTS'S *MARBURY* MOMENT

Like Marshall in *Marbury v. Madison*, Roberts established key constitutional doctrine in the *ACA Case*—doctrine that could have provoked explosive political reactions—but Roberts did so with great political delicacy. In particular, as this essay has explained, Roberts articulated conservative constitutional doctrines regarding Congress's commerce and spending powers. The unequivocal political slant of Roberts's opinion was anti-government: He emphasized the judicial definition and enforcement of a priori formalist constraints on congressional power. In some ways, Roberts's doctrinal statements went beyond any judicial limits previously imposed on Congress since the 1937 turn. And Roberts's doctrines are likely to produce conservative judicial outcomes for years to come. Significantly, these conservative aspects of the *ACA Case* were eminently predictable.

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[71] U.S. CONST., art. I, § 9, cl. 4.

[72] *See generally* New York *ex rel.* Cohn v. Graves, 300 U.S. 308 (1937); Flint v. Stone Tracy Co., 220 U.S. 107 (1911).

[73] *ACA Case*, 132 S. Ct. at 2650–55 (joint dissent).

[74] Roberts acknowledged that, at some point, a tax might become so burdensome that it is transformed into a mere penalty. *Id.* at 2599–600 (majority opinion).

[75] *Id.*

Of course, while Roberts was articulating conservative constitutional doctrines, he was simultaneously proclaiming that the Court must decide the *ACA Case* without regard for politics. In three instances, Roberts explicitly stated that the justices should not consider the political wisdom of the ACA.[76] From his perspective—at least as he professed it—political decisions are left to Congress and the people. The Court's determination of the constitutional scope of congressional power was purely a legal issue, divorced from other considerations.

In most instances, Roberts's proclamations of apolitical decision making would be dismissed as empty judicial platitudes. But Roberts did not leave his political maneuvering at such an ineffective ending. Instead, he concluded that most of the ACA, including the individual mandate, was constitutional pursuant to Congress's taxing power. By unexpectedly reaching this ostensibly liberal result—upholding the ACA—Roberts will likely shield the Court from intense political scrutiny and criticism for the near future. Nowadays, every Court observer knows that the current Court majority leans strongly conservative. If the Court had handed down another overtly conservative decision in the *ACA Case*, liberals would have loudly and persistently denounced the decision and the Court. They would have denigrated the case as another *Bush v. Gore*, which handed the 2000 election to George W. Bush.[77] They would have condemned the Court as just another conservative political organ doing the bidding of the far right. But now, with Roberts's *ACA Case* opinion and decision, the Court has reinforced its claim that it decides according to law, uninfluenced by politics.[78] The irony of the case is sharp: Roberts's deft political shuffling will shield the Court from political scrutiny, at least temporarily.

Remarkably, Roberts's political and legal feints and dodges continued even beyond this point. The precise legal ground that Roberts chose to stand on when upholding the ACA was itself politically salient. He categorized the individual mandate as a *tax*. In other words, he neatly placed the ACA in one of the most unacceptable of current political boxes. 'Aha,' conservatives did not hesitate to declare when they saw Roberts's opinion, 'Obama and the Democrats raised taxes!'[79]

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[76] *Id.* at 2577, 2579, 2608. For instance, Roberts wrote: "We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions." *Id.* at 2577.

[77] *See generally* 531 U.S. 98 (2000). Even those scholars who believe that law ordinarily shapes the Court's decisions argued that this case could not be explained in any way other than as a pure partisan power grab. *E.g.*, Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 759 (2001).

[78] Roberts has famously proclaimed, "Judges are like umpires—umpires don't make the rules; they apply them." Robert Schwartz, *Like They See 'Em*, N.Y. TIMES, Oct. 6, 2005, at A37, *available at* http://www.nytimes.com/2005/10/06/opinion/06schwartz.html?_r=0.

[79] *See, e.g.*, Moe Lane, *Repeat After Me: The Obamacare Mandate Was Actually a Tax*, REDSTATE (July 1, 2012, 10:00 AM), http://www.redstate.com/moe_lane/2012/07/01/repeat-after-me-the-obamacare-mandate-was-actually-a-tax/.