1-1-2013

Realism Over Formalism and the Presumption of Constitutionality: Chief Justice Roberts' Opinion Upholding the Individual Mandate

Wilson Huhn
University of Akron School of Law, huhnw@duq.edu

Recommended Citation

Wilson Huhn, *Realism Over Formalism and the Presumption of Constitutionality: Chief Justice Roberts' Opinion Upholding the Individual Mandate*, 46 Akron Law Review 117 (2014)

Realism Over Formalism and the Presumption of Constitutionality: Chief Justice Roberts' Opinion Upholding the Individual Mandate

Wilson Huhn*

Introduction

In *National Federation of Independent Business v. Sebelius*,[1] Chief Justice John Roberts cast the deciding vote to uphold the individual mandate of the Affordable Care Act. Speaking for the Court in Part III-C of his opinion, Roberts found that the individual mandate was properly enacted pursuant to the General Welfare Clause.[2] Two aspects of his opinion in particular drove this result. In deciding whether the individual mandate constitutes a "tax" within the meaning of the Constitution, the Chief Justice engaged in realistic analysis rather than legal formalism.[3] In addition, Roberts reasoned that, if fairly possible, the statute had to be construed in such a way as to render it constitutional.[4] The confluence of realist analysis and the presumption of constitutionality resulted in a decision ruling that the Court should uphold the individual mandate as a proper exercise of Congress's power to tax.[5]

Part I of this essay discusses the significance of this ruling in light of its political, medical, and economic consequences. Parts II and III contrast the formalist approach used by Justice Roberts in finding that the individual mandate was not a "tax" within the meaning of the Anti-Injunction Act with the functional approach he used in finding that the individual mandate is a tax for purposes of the General Welfare Clause. Part IV describes how Justice Roberts deferred to Congress in considering the constitutionality of the individual mandate.

I. THE SIGNIFICANCE OF THIS CASE

On June 28, 2012, the Supreme Court upheld the constitutionality of all but one provision of the Patient Protection and Affordable Care Act (PPACA).[6] The Court issued its decision in a set of consolidated appeals under the title *National Federation of Independent Business v. Sebelius*. The opinion of Chief Justice Roberts in this landmark case is the only opinion to even

---

* B.A. Yale University, 1972; J.D. Cornell Law School, 1977; C. Blake McDowell, Jr., Professor of Law, University of Akron School of Law. I wish to thank my research assistants, Jyme Mariani and Charles Ackman, for their dedicated and invaluable contributions to this article.

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

[2] *Id.* at 2594-2601.

[3] *Id.*

[4] *Id.*at 2600-02.

[5] *Id.*at 2601.

[6] *See id.* at 2608 (upholding the entirety of the Affordable Care Act except for a provision that would have allowed the federal government to withhold funding from the existing Medicaid program from any state that declined to enroll in the expanded Medicaid program).

partially command a majority of the justices. Four justices joined Part II and Part III-C of Roberts's opinion in finding that the federal Anti-Injunction Act did not apply[7] and in upholding the constitutionality of the "individual mandate," the requirement that all American citizens must have health insurance.[8] Moreover, it appears that the rest of Roberts's opinion constitutes the narrowest grounds for the Court's decision upholding the expansion of Medicaid;[9] ruling that the States are free to opt out of Medicaid expansion without losing existing funding[10] and finding the remainder of the PPACA is "severable" from the single provision that was struck down.[11] Accordingly, even though the remainder of Roberts's opinion is not joined by a majority of the justices, it may have precedential weight under *Marks v. United States*.[12]

The ruling of the Supreme Court in this case is of the utmost significance in a number of respects. Politically, universal health care has long been the holy grail of progressives in America.[13] The road toward universal health care had been slow but steady. In 1965, Congress

---

[7] *See id.* at 2582-84 (finding that the individual mandate is not a "tax" within the meaning of the Anti-Injunction Act).

[8] *See id.* at 2594-2600 (upholding the individual mandate as a "tax" within the meaning of the General Welfare Clause).

[9] *See id.* at 2603 (upholding the expansion of the Medicaid program).

[10] *See id.* at 2601-07 (striking down a provision of the Act that permitted the federal government to withhold existing Medicaid funding from a state that refused to expand its Medicaid program).

[11] *See id.* at 2607-08 (finding the remainder of the Act to be severable from the unconstitutional provision).

[12] *See* Marks v. United States, 430 U.S. 188, 193-94 (1977) (in the case of a split majority, the narrowest reasoning of the Justice supplying the decisive vote should be considered the reasoning of the Court.). *See also Nat'l Fed'n of Indep. Bus.*, 132 S.Ct. at 2585-93 (Roberts, C.J.) (finding that Congress lacked the power under the Commerce Clause and the Necessary and Proper Clause to enact the individual mandate). In Part III-A of his opinion the Chief Justice ruled that the individual mandate exceeded Congress's power to enact legislation under the Commerce Clause and the Necessary and Proper Clause, a conclusion that the four dissenting justices also arrived at. It is not clear whether this portion of the opinion represents a holding of the Court or whether it is *obiter dictum*. *Compare Nat'l Fed'n of Indep. Bus.*, 132 S.Ct. at 2600-01 (Roberts, C.J.) (contending that it was necessary to determine whether the individual mandate was constitutional under the Commerce Clause and Necessary and Proper Clause in order for the doctrine of constitutional avoidance to apply to the analysis under the General Welfare Clause), *with Nat'l Fed'n of Indep. Bus.*, 132 S.Ct. at 2629 fn. 12 (Ginsburg, J., concurring in part and dissenting in part) (stating, "I see no reason to undertake a Commerce Clause analysis that is not outcome determinative.").

[13] *See* Zoe Clark, *Congressman Dingell: "I know my father who started this fight is smiling from up above"*, MICH. RADIO NEWS FOR MICH. (June 28, 2012, 1:30 AM), http://michiganradio.org/post/congressman-dingell-i-know-my-father-who-started-fight-smiling-above; Julie Rovner, *Rep. Dingell: The House's Link To Health-Care History*, NPR (Nov. 6, 2009), http://www.npr.org/templates/story/story.php?storyId=120159308. Rovner states:

> Dingell's quest for universal health care began in 1932, when his father, John Dingell Sr., was first elected to the House from Michigan. The elder Dingell quickly became one of the architects of the New Deal.
>
> … In 1943, the elder Dingell, along with Senators Jim Murray of Montana and Robert Wagner of New York, introduced the first national health insurance bill. The so-called Wagner-Murray-Dingell bill was fought over for years, though it never became law.
>
> And when the elder Dingell died in 1955, John Dingell Jr. took over not only his father's seat, but also his quest for national health insurance.

enacted Medicare for the elderly and Medicaid for the indigent,[14] and over the years it has continuously expanded both of those programs.[15] Congress has also adopted several laws expanding protection for persons who have employer-provided health insurance, including ERISA (1974),[16] COBRA (1985),[17] and HIPAA (1996).[18] But the premise of the Patient Protection and Affordable Care Act is that *every* American should have access to comprehensive, high-quality health care through the subsidized purchase of affordable health insurance.[19] Generations of Americans have struggled to extend adequate health care to the working class.[20] This law is a very substantial step towards the ultimate goal of universal health care.

From the standpoint of public health, the United States ranks 37th in the world.[21] According to numerous studies, our nation trails nearly every other industrialized country in measures such as expected lifespan and infant mortality.[22] One leading study states "[i]t is hard

---

[14] *See* Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 2863 (July 30, 1965).

[15] *See*, *e.g.*, Medicare Prescription Drug Improvement and Modernization Act, Pub. L. No. 108-173, 117 Stat. 2066 (Dec. 8, 2003) (expanding Medicare coverage for prescription drugs).

[16] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (Sept. 2, 1974) (regulating the operation of employer health benefit plans).

[17] Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 (Apr. 7, 1986) (entitling employees to purchase continuing health insurance coverage after termination of employment).

[18] Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (Aug. 21, 1996) (improving medical privacy and limiting restrictions that group health plans can place on coverage for preexisting conditions).

[19] *See* Barack Obama, *President Obama Signs Health Reform into Law*, THE WHITE HOUSE (March 23, 2010), http://www.whitehouse.gov/photos-and-video/video/president-obama-signs-health-reform-law#transcript (stating, "And we have now just enshrined, as soon as I sign this bill, the core principle that everybody should have some basic security when it comes to their health care.").

[20] *See id.* President Obama stated:

> I'm signing this bill for all the leaders who took up this cause through the generations -- from Teddy Roosevelt to Franklin Roosevelt, from Harry Truman, to Lyndon Johnson, from Bill and Hillary Clinton, to one of the deans who's been fighting this so long, John Dingell. (Applause.) To Senator Ted Kennedy. (Applause.) And it's fitting that Ted's widow, Vicki, is here -- it's fitting that Teddy's widow, Vicki, is here; and his niece Caroline; his son Patrick, whose vote helped make this reform a reality. (Applause.).

See also note 13 *supra* and accompanying text.

[21] *See* World Health Org., *World Health Report 2000*, WORLD HEALTH ORG., *available at* http://www.who.int/whr/2000/en/ (last visited Oct. 28, 2012).

[22] *See* Org. for Econ. & Coop. Dev., *Health Status*, OECD.STAT EXTRACTS, http://stats.oecd.org/index.aspx?DataSetCode=HEALTH_STAT. (last visited Oct. 28, 2012) (showing lower life expectancy and higher infant mortality for Americans compared to the people of other industrialized countries); Ellen Nolte & Martin McKee, *Variations in Amenable Mortality—Trends in 16 High-Income Nations*, 103 HEALTH POL'Y 47, 47-52 (Sept. 12, 2011), *available at* http://www.commonwealthfund.org/Publications/In-the-Literature/2011/Sep/Variations-in-Amenable-Mortality.aspx (showing that America had the highest rate of "amendable mortality" that is, deaths that could have been prevented with appropriate health care); The Commonwealth Fund, *Mirror, Mirror on the Wall: How the Performance of the U.S. Health Care System Compares Internationally, 2010 Update*, THE COMMONWEALTH FUND (June 23, 2010), *available at* http://www.commonwealthfund.org/Content/Publications/Fund-Reports/2010/Jun/Mirror-Mirror-Update.aspx?page=all [hereinafter *Mirror, Mirror 2010*].

to ignore that in 2006, the United States was number 1 in terms of health care spending per capita but ranked 39th for infant mortality, 43rd for adult female mortality, 42nd for adult male mortality, and 36th for life expectancy."[23]

The PPACA holds out the promise of alleviating the suffering of tens of millions of Americans.[24]

In addition, for better or for worse, this massive piece of legislation will also have dramatic economic consequences for the United States. The health care industry constitutes one-sixth – soon to be one-fifth – of the American economy.[25] It represents the largest component of government spending and is the principal driver of government budget deficits.[26] Over sixty percent of bankruptcies in the United States are caused in substantial part by health care costs.[27] Because the cost of health insurance has risen far faster than income,[28] there has opened a

---

[23] Christopher J.L. Murray & Julio Frenk, *Ranking 37th — Measuring the Performance of the U.S. Health Care System,* 362 NEW ENG. J. MED. 2010 98, 98-99 (January 14, 2010), *available at* http://www.nejm.org/doi/full/10.1056/NEJMp0910064#t=article.

[24] *See* Cathy Schoen, Michelle M. Doty, Ruth H. Robertson & Sara R. Collins, *Affordable Care Act Reforms Could Reduce the Number of Underinsured U.S. Adults by 70 Percent*, 30(9) HEALTH AFF. 1762, 1762-71 (Sept. 2011), *available at* http://www.commonwealthfund.org/Publications/In-the-Literature/2011/Sep/Reduce-Uninsured.aspx [hereinafter *Reduce Underinsured*].

[25] *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §1501(a)(2)(B), 124 Stat. 119, 243 (Mar. 23, 2010) (stating, "Health insurance and health care services are a significant part of the national economy. National health spending is projected to increase from $2,500,000,000,000, or 17.6 percent of the economy, in 2009 to $4,700,000,000,000 in 2019); CONGRESSIONAL BUDGET OFFICE, LETTER TO HONORABLE NANCY PELOSI, PRELIMINARY ESTIMATE OF THE EFFECTS OF THE INSURANCE COVERAGE PROVISIONS OF THE RECONCILIATION LEGISLATION COMBINED WITH H.R. 3590 AS PASSED BY THE SENATE (MARCH 18, 2010), *available at* http://www.cbo.gov/ftpdocs/113xx/doc11355/hr4872.pdf (showing health care spending is expected to grow to over 20% of American economy by 2020).

[26] *See* Christopher Chantrill, *US Health Spending*, GOV'T SPENDING IN AM., http://www.usgovernmentspending.com/us_health_care_spending_10.html (last visited Oct. 28, 2012) (showing health care expenditures as the largest single expenditure in federal spending); Andrew J. Rettenmeier, *Health Care Spending Forecasts*, NAT'L CTR. FOR POL'Y ANALYSIS (April 23, 2009), http://www.ncpa.org/pub/ba654. Rettenmeier states:

> Given that 45 percent of health care spending is currently funded by government payers, future budget implications are staggering. For example, in addition to dedicated payroll taxes and premium payments, federal spending on Medicare will:
>
> - Require funding equal to 36 percent of federal income taxes by 2030, based on the CMS forecast; and
> - Require funding equal to almost 70 percent of federal income taxes by midcentury, based on the CBO forecast.

[27] *See* Patient Protection and Affordable Care Act, §1501(a)(2)(E) (stating, "Half of all personal bankruptcies are caused in part by medical expenses."); David U. Himmelstein, Deborah Thorne, Elizabeth Warren & Steffi Woolhandler, *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122(8) AM. J. MED. 741, 741-46 (2009), *available at* http://www.pnhp.org/new_bankruptcy_study/Bankruptcy-2009.pdf (stating, "62.1% of all bankruptcies in 2007 were medical; 92% of these medical debtors had medical debts over $5000, or 10% of pretax family income.").

[28] *See* Kaiser Fam. Found., *Employer Health Benefits 2012 Annual Survey,* (Slides 59, 4) *available at* http://ehbs.kff.org/ (last visited Oct. 28, 2012) [hereinafter *2012 Annual Survey*].

yawning gap between high-income and low-income Americans in their access to health care.[29] The United States spends twice as much per capita on health care as other countries but the members of its workforce have shorter lives and are less healthy while they are alive.[30]

These problems have to be resolved or the United States will cease to be economically competitive with other nations.

In spite of the serious – even grave – medical and economic challenges that the PPACA was designed to address, the constitutionality of the "individual mandate," a key provision of the Affordable Care Act, was challenged, not on realistic grounds, but for semantic and formalistic reasons. In his interpretation of the General Welfare Clause, Chief Justice Roberts rejected these formalistic approaches to constitutional interpretation. He upheld the individual mandate because he chose to focus on the law's *actual operation*, not the *label* that Congress attached to it. His analysis made constitutionality turn upon the *actual effect* of the law, not the *category* that it might be relegated to.

Furthermore, in his opinion, Chief Justice Roberts repeatedly acknowledged the limited role that the courts must play in determining the constitutionality of laws like this.[31] In cases affecting the constitutional rights of individuals or relatively powerless minority groups, the courts must play a vital role.[32] In such cases, the courts must stand between the government and its citizens, and carefully scrutinize laws that threaten our individual rights or unfairly discriminate against classes of persons.[33] But economic legislation is presumed constitutional because the adoption of economic policy is a legislative and not a judicial function.[34] The purpose of economic policy is to adjust and compromise the interests of various groups in society, and the courts are institutionally incapable of making such adjustments and

---

[29] *See* Sara Collins, Michelle Doty, Ruth Robertson & Tracy Garber, *Help on the Horizon: How the Recession Has Left Millions of Workers Without Health Insurance, and How Health Reform Will Bring Relief - Findings from The Commonwealth Fund Biennial Health Insurance Survey of 2010,* THE COMMONWEALTH FUND (March 16, 2011), *available at* http://www.commonwealthfund.org/Publications/Fund-Reports/2011/Mar/Help-on-the-Horizon.aspx?page=all [hereinafter *Help on the Horizon*].

[30] *See* notes 21-24 *supra* and accompanying text. *See also* Mark Pearson, *Written Statement to Special Senate Commission on Aging: Disparities in health expenditure across OECD countries: Why does the United States spend so much more than other countries?*, ORG. FOR ECON. & COOP. DEV. (September 30, 2009), *available at* http://www.oecd.org/dataoecd/5/34/43800977.pdf.

[31] *See* notes 88-104 *infra* and accompanying text.

[32] *See* United States v. Carolene Products, 304 U.S. 144, 152 n. 4 (1938) (announcing that, while the constitutionality of economic legislation is to be evaluated under the rational basis test, laws affecting political rights, infringing the protections of the Bill of Rights, or invading the rights of "discrete and insular" minority groups, would "be subjected to more exacting judicial scrutiny").

[33] *See*, *e.g.*, Griswold v. Connecticut, 381 U.S. 479, 503-07 (1965) (invoking "strict scrutiny" in striking down a state statute making it illegal to use birth control); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667-71 (1966) (invoking strict scrutiny in striking down state poll tax); United States v. Virginia, 518 U.S. 515 (1996) (employing "intermediate scrutiny" in declaring that it was unconstitutional for a public university to refuse to admit women).

[34] *See*, *e.g., Carolene Products*, 304 U.S., at 152 (stating, "[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.").

compromises.[35] The decision of the Supreme Court in this case reflects the fundamental principle that the courts are prohibited from resolving questions of economic policy. Instead, these questions represent political judgments that are committed to the legislative process.

I. THE INTRODUCTION TO CHIEF JUSTICE ROBERTS' OPINION

The introductory portion of Chief Justice Roberts' opinion is written for a general audience. This portion of Roberts' opinion is joined by no other justice, and does not directly address the issue before the Court: the constitutionality of the Affordable Care Act.[36] However, Roberts' introductory remarks may well be remembered long after the nation has ceased to discuss the constitutionality of universal health care legislation.

This portion of Roberts' opinion is a primer on the structural principles of the United States Constitution – the concepts of federalism, enumeration of powers, and separation of powers.[37] It is clear, concise, and convincing. It deals with the fundamental principles of American Constitutional Law, yet it is written in such a simple, straightforward style that it could be included in a textbook for elementary school students. Chief Justice Roberts' language is not poetic or uplifting. He lacks the eloquence of Louis Brandeis, Oliver Wendell Holmes, or Robert Jackson. But while he may not inspire, he does inform.

Furthermore, in the introduction Roberts foreshadows his ruling upholding the Affordable Care Act.[38] Notice how the following passage references not only the constitutional limits on the power of Congress but also the limits on the power of the courts:

> In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. Nearly two centuries ago, Chief Justice Marshall observed that "the question respecting the extent of the powers actually granted" to the Federal Government "is perpetually arising, and will probably continue to arise, as long as our system shall exist." *McCulloch* v. *Maryland*, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819). In this case we must again determine whether the Constitution grants Congress powers it now asserts, but which many States and individuals believe it does not possess. Resolving this controversy requires us to examine both the limits of the Government's power, and our own limited role in policing those boundaries.[39]

---

[35] *See*, *e.g.*, Wickard v. Filburn, 317 U.S. 111, 129 (1942) (stating, "The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination.").

[36] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2577-80 (2012).

[37] *Id.*

[38] *Id.*

[39] *Id.* at 2577.

In the course of the introduction, Chief Justice Roberts discusses the handful of enumerated powers of Congress that are relevant to this case.[40] In addition to Congress's power to regulate economic activity under the Commerce Clause[41] and its power to enact supplementary legislation under the Necessary and Proper Clause,[42] Roberts offered this pithy explanation of Congress's power under the General Welfare Clause – commonly known as the "power of the purse:" "Put simply, Congress may tax and spend. This grant gives the Federal Government considerable influence even in areas where it cannot directly regulate. The Federal Government may enact a tax on an activity that it cannot authorize, forbid, or otherwise control."[43]

Near the close of his introductory remarks, Chief Justice Roberts describes the limited role that the courts must play in ruling on the constitutionality of laws such as the Affordable Care Act.[44] Roberts observes that questions of policy are to be determined by the political branches in accordance with the political choices of the citizenry:

> Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.[45]

Roberts's deference to Congress in this case was enough to tip the scales in favor of the law.

The following portions of this article describe the contrasting approaches that Justice Roberts followed and the contradictory results he reached in deciding whether the individual mandate is a "tax" for statutory and constitutional purposes.

II. ROBERTS' TEXTUAL APPROACH TO INTERPRETATION OF THE ANTI-INJUNCTION ACT

In Part II of his opinion, Chief Justice Roberts ruled that the federal Anti-Injunction Act does not bar the courts from hearing this case.[46] The four concurring justices joined this portion of his opinion,[47] and the four dissenting justices came to the same conclusion.[48] In this portion

---

[40] *Id.* at 2577-80.

[41] *See id.* at 2578-79.

[42] *See id.* at 2579.

[43] *Id.*

[44] *See id.* at 2579-80.

[45] *Id.* at 2579.

[46] *See id.* at 2582-84.

[47] *See id.* at 2609.

of his opinion Chief Justice Roberts avoids policy analysis and instead looks to the text of the statute and the intent of Congress to determine the meaning of the law.[49]

The federal Anti-Injunction Act[50] prohibits the courts from hearing lawsuits challenging tax laws until the taxes are paid. If the Anti-Injunction Act had applied to this case, the plaintiffs could not have filed suit until 2014 when the penalty for failing to have health insurance goes into effect.[51] Both sides in this dispute wanted the courts to determine the constitutionality of the Affordable Care Act before 2014.[52] Because both plaintiffs and defendants took the position that the Anti-Injunction Act did not apply, the Supreme Court appointed amicus counsel to formulate the strongest arguments in support of the proposition that the Act does apply and that the courts are prohibited from considering challenges to the Act at this time.[53]

In addressing this issue, the Supreme Court was called upon to interpret both the Affordable Care Act and the Anti-Injunction Act. Chief Justice Roberts first addressed the textual argument made by amicus counsel:

> *Amicus* contends that the Internal Revenue Code treats the penalty as a tax, and that the Anti-Injunction Act therefore bars this suit.
>
> The **text of the pertinent statutes** suggests otherwise. The Anti-Injunction Act applies to suits "for the purpose of restraining the assessment or collection of any *tax*." §7421(a) (emphasis added). **Congress, however, chose to describe the "[s]hared responsibility payment" imposed on those who forgo health insurance not as a "tax," but as a "penalty."** §§5000A(b), (g)(2). There is no immediate reason to think that a statute applying to "any tax" would apply to a "penalty."
>
> **Congress's decision to label this exaction a "penalty" rather than a "tax" is significant** because the Affordable Care Act describes many other exactions it creates as "taxes."[54] (emphasis added)

Justice Roberts pointed out that the language of the Internal Revenue Code acknowledges the distinction between a tax and a penalty:

---

[48] *See id.* at 2655-56.

[49] *See id.* at 2582-84.

[50] 26 U.S.C.A. § 7421(a) (West 2006).

[51] *See Nat'l Fed'n of Indep. Bus.*, 132 S.Ct. at 2582.

[52] *See id.*

[53] *See id.*

[54] *Id.* at 2582-83.

> In light of the Code's consistent distinction between the terms "tax" and "assessable penalty," we must accept the Government's interpretation: § 6201(a) instructs the Secretary that his authority to assess taxes includes the authority to assess penalties, but it does not equate assessable penalties to taxes for other purposes.[55]

The court-appointed amicus attorney urged the Court to adopt a "functional" definition of whether the individual mandate constitutes a tax: "*Amicus* argues that even though Congress did not label the shared responsibility payment a tax, we should treat it as such under the Anti–Injunction Act because it functions like a tax."[56]

Chief Justice Roberts rejected this "functional approach" to interpreting the meaning of the Affordable Care Act and the Anti-Injunction Act.[57] Instead, Roberts looked to more standard forms of statutory construction: legislative intent and the text of the statute.[58] Statutes are the voice of the people governing themselves, and, in the interpretation of statutes, the courts must respect the intent of people's elected representatives.[59] In attempting to discern Congress's intent in the interpretation of the Anti-Injunction Act and the Affordable Care Act, Justice Roberts looked primarily to the statutory text, calling it the "best evidence of Congress's intent": "The Anti-Injunction Act and the Affordable Care Act, however, are creatures of Congress's own creation. How they relate to each other is up to Congress, and **the best evidence of Congress's intent is the statutory text**."[60] (emphasis added)

Accordingly, in Part II of his opinion, Justice Roberts utilized a textual approach to statutory interpretation in ruling that the individual mandate of the Affordable Care Act is *not* a tax within the meaning of the Anti-Injunction Act.[61] However, in Part III-C of his opinion, the Chief Justice ruled that the individual mandate *is* a tax within the meaning of the General Welfare Clause![62] In arriving at this conclusion, Justice Roberts adopted a completely different interpretive approach. In place of a formalistic approach that focused on the words of the statute or the intent of Congress, Justice Roberts looked to how the law functions – the operation and effect of the law.

---

[55] *Id.* at 2584.

[56] *Id.* at 2583.

[57] *Id.* at 2583-84.

[58] *Id.*

[59] *See*, *e.g.*, Norman J. Singer and J.D. Shambie Singer, 2A SUTHERLAND STATUTORY CONSTRUCTION 28-29 (7th ed. 2007). The authors state:

> An overwhelming majority of judicial opinions considering statutory issues are written in the context of legislative intent. The reason for this lies in an assumption that an obligation to construe statutes so that they carry out the will, real or attributed, of the lawmaking branch of the government is mandated by principles of separation of powers.

[60] *See Nat'l Fed'n of Indep. Bus.*, 132 S.Ct. at 2583.

[61] *Id.* at 2583-84.

[62] *Id.* at 2600.

III – ROBERTS' "FUNCTIONAL APPROACH" TO THE INTERPRETATION OF THE GENERAL WELFARE CLAUSE

As noted above, in Part II of his opinion, Chief Justice Roberts ruled that the individual mandate is not a "tax" within the meaning of the federal Anti-Injunction Act.[63] However, in Part III-C of his opinion, Roberts found that the individual mandate *is* a "tax" within the meaning of the General Welfare Clause.[64] How did he arrive at this seemingly contradictory result?

This very point was raised at oral argument by Justice Samuel Alito in his questioning of Solicitor General Robert Verrilli:

> JUSTICE ALITO: General Verrilli, today you are arguing that the penalty is not a tax [under the Anti-Injunction Act]. Tomorrow you are going to be back and you be arguing that the penalty is a tax [under the General Welfare Clause]. Has the Court ever held that something that is a tax for purposes of the taxing power under the Constitution is not a tax under the Anti-Injunction Act?[65]

General Verrilli's response to Justice Alito may not be in the hard-hitting style that appeals to emotion and excites partisans,[66] but it is honest, nuanced, and elegant. Verrilli conceded that the Court had never ruled that a law could be a tax for purposes of the General Welfare Clause and not a tax for purposes of the Anti-Injunction Act, however, he distinguished questions of statutory interpretation from questions of constitutional interpretation:

> GENERAL VERRILLI: No, Justice Alito, but the Court has held in a (*sic*) license tax cases that something can be a constitutional exercise of the taxing power whether or not it is called a tax. And that's because the nature of the inquiry that we will conduct tomorrow is different from the nature of the inquiry that we will conduct today. Tomorrow the question is whether Congress has the authority under the taxing power to enact it and the form of words doesn't have a dispositive effect on that analysis. Today we are construing statutory text where the precise choice of words does have a dispositive effect on the analysis.[67]

In deciding whether the Anti-Injunction Act applied to this case, Justice Roberts observed that this was a matter that was committed solely to Congress.[68] The Court had to determine

---

[63] *Id.* at 2583-84.

[64] *Id.* at 2600.

[65] Transcript of Oral Argument at 31, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012) 2012 WL 993811, at *1.

[66] *See* John M. Broder, *Vindication for Maligned Lawyer in Yesterday's Decision*, N.Y. Times, June 29, 2012, http://www.nytimes.com/2012/06/30/us/in-health-ruling-vindication-for-donald-verrilli.html (stating that after oral argument "legal commentators heaped scorn on [Verrilli], declaring his performance a 'train wreck' and a 'flameout,' and he was lampooned by Jon Stewart").

[67] Transcript of Oral Argument at 31-32, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012) (No. 11-398), 2012 WL 993811, at *1.

[68] *See* text accompanying note 61 *supra*.

whether Congress intended to postpone judicial review of the individual mandate of the Affordable Care Act until 2014. It was a matter of congressional intent, and in resolving this question, the Court was necessarily bound by the words of the relevant statutes.[69] On the other hand, whether the General Welfare Clause of the Constitution empowers Congress to enact the Affordable Care Act is ultimately not a question of statutory construction but rather a matter of constitutional interpretation. The General Welfare Clause states: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States …."[70]

This provision of the Constitution grants Congress the power to "lay and collect taxes."[71] The constitutionality of the individual mandate depends upon whether it **is** or **is not** a tax, and that determination is not up to Congress. As Chief Justice Roberts noted, if Congress were to enact a law without indicating whether it was a tax, the courts would obviously have to determine whether it was a tax in determining whether it was a proper enactment under the General Welfare Clause.[72] Roberts offered the following example:

> An example may help illustrate why labels should not control here. Suppose Congress enacted a statute providing that every taxpayer who owns a house without energy efficient windows must pay $50 to the IRS. The amount due is adjusted based on factors such as taxable income and joint filing status, and is paid along with the taxpayer's income tax return. Those whose income is below the filing threshold need not pay. The required payment is not called a "tax," a "penalty," or anything else. No one would doubt that this law imposed a tax, and was within Congress's power to tax.[73]

Roberts then noted that such a law would be a "tax" for constitutional purposes even if Congress called it a "penalty."[74] Earlier in his opinion, Roberts had observed "Congress cannot change whether an exaction is a tax or a penalty for *constitutional* purposes simply by describing it as one or the other."[75]

In Part II of his opinion, dealing with statutory construction of the Affordable Care Act and the Anti-Injunction Act, Justice Roberts had emphasized the importance of the "label" that Congress attached to the law:

---

[69] *See* text accompanying note 61 *supra*.

[70] U.S. CONST. art. I, § 8, cl. 1.

[71] *Id.*

[72] *See Nat'l Fed'n of Indep. Bus.*, 132 S.Ct. at 2597-98.

[73] *Id.*

[74] *Id.* at 2598 (stating, "That conclusion should not change simply because Congress used the word "penalty" to describe the payment.").

[75] *Id.* at 2583.

> Congress's decision to label this exaction a "penalty" rather than a "tax" is significant because the Affordable Care Act describes many other exactions it creates as "taxes." Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.[76]

However, in Part III of his opinion, dealing with the constitutionality of the individual mandate, Justice Roberts repeatedly and emphatically rejected the contention of the dissent that the question could be determined solely by reference to the "label" that Congress attached to this enactment. Roberts stated:

> It is of course true that the Act describes the payment as a "penalty," not a "tax." But while that label is fatal to the application of the Anti–Injunction Act, it does not determine whether the payment may be viewed as an exercise of Congress's taxing power. It is up to Congress whether to apply the Anti–Injunction Act to any particular statute, so it makes sense to be guided by Congress's choice of label on that question. That choice does not, however, control whether an exaction is within Congress's constitutional power to tax.[77]

The Chief Justice's "functional approach" consisted of three separate arguments. First, he listed several ways in which the individual mandate "looks like a tax:"[78]

> The exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects. The "[s]hared responsibility payment," as the statute entitles it, is paid into the Treasury by "taxpayer[s]" when they file their tax returns. It does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code. For taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status. The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which—as we previously explained—must assess and collect it "in the same manner as taxes." This process yields the essential feature of any tax: it produces at least some revenue for the Government. Indeed, the payment is expected to raise about $4 billion per year by 2017.[79]

---

[76] *Id.* (citation omitted).

[77] *Id.* at 2594 (internal citation omitted).

[78] *Id.*

[79] *Id.* (citations omitted).

In the second passage, Justice Roberts identified three factors that distinguish a "tax" from a "penalty," and found that the individual mandate satisfied all three elements.[80] A "tax," reasoned Justice Roberts, is in an amount that is not so large as to utterly discourage the activity altogether; it is collected by the taxing authorities; and it is imposed on a strict liability basis regardless of the taxpayer's state of mind or level of culpability.[81]

The individual mandate meets all three of these elements: the amount that is due is far less than the cost of health insurance,[82] the amount is collected by the Internal Revenue Service,[83] and the amount is owed if the taxpayer does not have health insurance, regardless of whether this omission was intentional, knowing, reckless, negligent, or without any fault of the taxpayer.[84]

In the third passage that betokened a "functional approach" Justice Roberts concluded that the individual mandate is not a "penalty" because under the Affordable Care Act people who decline to obtain health insurance are not considered "outlaws."[85] Instead, the Affordable Care Act gives people the choice of either obtaining health insurance or paying the amount specified.[86] This means that the individual mandate was a tax on certain conduct rather than a penalty for violating the law.[87]

Another factor that determined the result in this case is that the Chief Justice gave the statute the benefit of the doubt. Roberts' deference to Congress is the subject of the next portion of this essay.

IV. ROBERTS' DEFERENCE TO CONGRESS IN DETERMINING THE CONSTITUTIONALITY OF THE AFFORDABLE CARE ACT

One of the most significant factors that drove the Court to acknowledge the constitutionality of the Affordable Care Act is the deference that the Court showed to Congress. Chief Justice Roberts invoked two principles that contributed to this deference: the canon of

---

[80] *See id.* at 2595-96.

[81] *See id.* at 2595.

[82] *See id.* at 2595-96.

[83] *See id.* at 2596.

[84] *See id.*

[85] *Id.* at 2596-97. Justice Roberts stated:

> Indeed, it is estimated that four million people each year will choose to pay the IRS rather than buy insurance. See Congressional Budget Office, *supra,* at 71. We would expect Congress to be troubled by that prospect if such conduct were unlawful. That Congress apparently regards such extensive failure to comply with the mandate as tolerable suggests that Congress did not think it was creating four million outlaws. It suggests instead that the shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance.

[86] *See id.*

[87] *See id.* at 2596-2600.

constitutional avoidance and the principle that questions of policy are for Congress and not the courts to determine.

American courts have the power of "judicial review" – the authority to declare statutes unconstitutional.[88] But the principle of Separation of Powers cautions respect for the people's political choices and places a brake on the power of judicial review. One doctrine that was relied upon in this case was the interpretive canon of "constitutional avoidance." This is the guideline that instructs the courts to, if possible, construe a statute in such a way as to render it constitutional. As Chief Justice Roberts said, "[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."[89] Roberts quoted well-known passages by Justices Joseph Story and Oliver Wendell Holmes in support of this proposition.[90]

In this case, the doctrine of constitutional avoidance enabled the Court to uphold the individual mandate as a tax. Roberts explained that even though this might not be "the most natural interpretation of the mandate," nevertheless the Court had the duty to ask whether it was "fairly possible" to construe that requirement to be a tax:

> [I]f the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress's constitutional power to tax. The question is not whether that is the most natural interpretation of the mandate, but only whether it is a "fairly possible" one. As we have explained, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution.[91]

Roberts added, "[g]ranting the Act the full measure of deference owed to federal statutes, it can be so read…."[92]

---

[88] *See* Marbury v. Madison, 5 U.S. 137, 177-79 (1803) (declaring the power of the courts to strike down laws that are unconstitutional); *Nat'l Fed'n of Indep. Bus.*, 132 S.Ct. at 2579-80 (acknowledging the same).

[89] *Nat'l Fed'n of Indep. Bus.*, 132 S.Ct. at 2593.

[90] *Id.* Roberts stated:

> 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." *Parsons* v. *Bedford*, 3 Pet. 433, 448–449, 7 L.Ed. 732 (1830). 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." *Blodgett* v. *Holden*, 275 U. S. 142, 148, 48 S.Ct. 105, 72 L.Ed. 206 (1927) (concurring opinion).

[91] *Id.* at 2594 (citations omitted).

[92] *Id.*

Roberts'~~s~~ invocation of "constitutional avoidance" to preserve the individual mandate of the Affordable Care Act is at all not surprising. In recent years, the Supreme Court has frequently construed statutes so as to preserve their constitutionality.[93] For example, in 2009 in *Northwest Austin Utility District No. One v. Holder*,[94] the Court, in an opinion by Chief Justice Roberts, narrowly construed a provision of the 1965 Voting Rights Act in order to avoid striking it down as unconstitutional.[95] In his opinion for the Court in *Northwest Austin*, Justice Roberts acknowledged that the doctrine of constitutional avoidance arises from the respect that is due Congress as a coequal branch:

> We fully appreciate that judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called on to perform." "The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States."[96]

The doctrine of constitutional avoidance is not the only interpretive principle that restrained the Court's power of judicial review in this case. Of equal or greater importance is the principle that the courts must defer to Congress on matters of economic policy, and the individual mandate of the Affordable Care Act represents a fundamental decision affecting national economic policy. The ACA seeks to regulate myriad aspects of the health care industry, which constitutes one-sixth of the American economy.[97] Nor was this policy choice lightly taken. Congress and the American people have struggled with the problem of expanding access to health care for generations and spent more than a year debating the contours of the ACA.[98] Nor was the policy choice simple and straightforward. The ACA contains hundreds of provisions, representing myriad and complex compromises, balancing the interests of consumers, providers, employers and insurers.[99] This law is fraught with vast consequences (for good or ill) for the American people.

Over a century ago, in his dissenting opinion in *Lochner v. New York*,[100] Justice Oliver Wendell Holmes eloquently expressed the principle that economic policy is to be determined by the people acting through the legislative branch, not by the courts in the interpretation of the Constitution:

---

[93] *See, e.g.,* Skilling v. United States, 130 S.Ct. 2896, 2929-30 (2010) (narrowly construing a federal criminal fraud statute to preserve its constitutionality against a vagueness challenge).

[94] Nw. Austin Mun. Util. Dist. No. One. v. Holder, 557 U.S. 193 (2009).

[95] *See id.* at 206-11.

[96] *Id.* at 204-05 (citations omitted).

[97] *See* note 25 *supra*.

[98] *See* notes 13, 20 *supra*.

[99] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2670 (2012) (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (describing the "complex" interrelated provisions of the law and stating, "the Act attempts to achieve near-universal health insurance coverage by spreading its costs to individuals, insurers, governments, hospitals, and employers—while, at the same time, offsetting significant portions of those costs with new benefits to each group.").

[100] Lochner v. New York, 198 U.S. 45 (1905) (striking down maximum hour law as unconstitutional).

> [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[101]

After 1937, the Supreme Court embraced Holmes's understanding of the Constitution and it has reiterated this principle innumerable times.[102] At several points in his opinion, Justice Roberts acknowledged that questions of policy are left to Congress, not to the courts. In the introduction to his opinion Roberts stated:

> Our permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Nation's elected leaders. "Proper respect for a coordinate branch of the government" requires that we strike down an Act of Congress only if "the lack of constitutional authority to pass [the] act in question is clearly demonstrated." Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.[103]

Deferring to Congress, Justice Roberts concluded that the individual mandate could reasonably be construed as a tax, and that it was constitutional.[104]

CONCLUSION

Chief Justice John Roberts upheld the individual mandate of the Affordable Care Act because he rejected formalism and embraced realism in constitutional analysis, and because he deferred to Congress, acknowledging its right to make policy choices.

---

[101] *Id.* at 75-76 (Holmes, J., dissenting).

[102] *See*, *e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."). *See generally* Brief for Constitutional Law and Economics Professors as Amicus Curiae Supporting Petitioners (Minimum Coverage Provision) at 2, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, (2012) (No. 11-398), 2012 WL 135046, at *i (contending that "[t]he principle of Separation of Powers requires the courts to defer to Congress on questions of economic policy.").

[103] *See Nat'l Fed'n of Indep. Bus.*, 132 S.Ct. at 2579 (citation omitted).

[104] *Id.* at 2608 (stating, "In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress's power to tax.").

There are several other significant aspects of Justice Roberts' ruling upholding the individual mandate. For instance, Justice Roberts reaffirmed the principle that Congress has the power to impose "regulatory taxes" under the General Welfare Clause,[105] and he contended that the power to tax is narrower than the power to regulate[106] – but those points will have to be addressed in another article.

[105] *See id.* at 2596 (stating, "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." *Sonzinsky*, *supra*, at 513, 57 S.Ct. 554. That [the individual mandate] seeks to shape decisions about whether to buy health insurance does not mean that it cannot be a valid exercise of the taxing power.").

[106] *See id.* at 2600 (stating, "although the breadth of Congress's power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior.").