

2012

To Tax, To Spend, To Regulate

Gillian E. Metzger

Columbia Law School, gmetzg1@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Administrative Law Commons](#), [Constitutional Law Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83 (2012).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/816

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact cls2184@columbia.edu.

TO TAX, TO SPEND, TO REGULATE

Gillian E. Metzger*

INTRODUCTION

Two very different visions of the national government underpin the ongoing battle over the Affordable Care Act¹ (ACA). President Obama and supporters of the ACA believe in the power of government to protect individuals through regulation and collective action.² By contrast, the ACA's Republican and Tea Party opponents see expanded government as a fundamental threat to individual liberty and view the requirement that individuals purchase minimum health insurance (the so-called "individual mandate") as the conscription of the healthy to subsidize the sick.³ This conflict over the federal government's proper role is, of course, not new; it has played out repeatedly over our nation's past.⁴ But rarely since the New Deal has it surfaced in such a distinctly constitutional guise with respect to economic legislation. Instead, after the Supreme Court sustained broad congressional power

* Vice Dean and Stanley H. Fuld Professor of Law, Columbia Law School. Special thanks to Sam Bagenstos, David Barron, Ariela Dubler, Henry Monaghan, and Trevor Morrison for very helpful comments on short notice and to Kathryn Benedict, Evan Ezray, Feifei Jiang, and Daniel Straus for superb and speedy research.

¹ Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

² See, e.g., President Barack Obama, Remarks by the President on Supreme Court Ruling on the Affordable Care Act (June 28, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/06/28/remarks-president-supreme-court-ruling-affordable-care-act> ("[T]oday's decision was a victory for people all over this country whose lives will be more secure because of this law . . ."); House Minority Leader Nancy Pelosi, Remarks at Weekly Press Conference (June 28, 2012), available at <http://pelosi.house.gov/news/press-releases/2012/06/transcript-of-pelosi-press-conference-today-19.shtml> ("We believe that a health care bill needed to be passed so that families would not be pauperized because they had a diagnosis or an accident that heaped health care costs on them. We believe it is about life, liberty, and the pursuit of happiness . . .").

³ See, e.g., Speaker of the House John Boehner, Remarks on CBS's *Face the Nation* (July 1, 2012), available at http://www.cbsnews.com/8301-3460_162-57464563/face-the-nation-transcripts-july-1-2012-speaker-boehner-senators-schumer-and-coburn-governors-walker-and-omalley ("This is government taking over the entire health insurance industry."); Robert Pear, *Repeal of Health Care Law Approved, Again, by House*, N.Y. TIMES, July 12, 2012, at A11 (reporting that the Republican-led House of Representatives voted for repeal of the ACA "to protect constituents from 'the tyranny of government overreach.'" (quoting Representative Ben Quayle)).

⁴ See, e.g., PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 33-37, 261-68 (5th ed. 2006) (recounting disagreement between Thomas Jefferson and Alexander Hamilton over the constitutional propriety of a national bank and discussing debates over the constitutionality of secession); see also 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 40-58 (1991) (discussing the transformation in the federal government's role and powers during Reconstruction, the New Deal, and the 1980s).

seventy-plus years ago,⁵ little doubt existed that the federal government generally had constitutional authority to regulate private activity if it chose to do so. The Rehnquist Court's reassertion of limits on congressional power under the Commerce Clause indicated that some measures may go too far.⁶ Still, the fight over the federal government's proper role in the economic sphere has been largely political, not constitutional.

*National Federation of Independent Business v. Sebelius*⁷ (*NFIB*) challenged this basic constitutional consensus, with the most significant social welfare reform legislation in decades hanging in the balance. Moreover, reopening that constitutional consensus focused national attention on the Supreme Court, with perceptions of the Court as ideologically driven reinforced by the close association between the constitutional challenges to the ACA and conservative political views.⁸ The country's obsession with the health care litigation provided a daily reminder of the extent to which the Court stood at the center of a political as well as a constitutional storm.

Against this backdrop, it is hard not to see Chief Justice Roberts's opinion in *NFIB* as a consummate act of institutional diplomacy. Although at times writing for himself only, the Chief Justice's opinion determined the Court's path. He avoided the unpalatable result of having the Court invalidate President Obama's signature achievement in the midst of a close reelection campaign by a 5–4 vote that would have mapped the Justices' ideological leanings. In the process, he managed to offer something to everyone: liberals got the vast majority of the ACA upheld;⁹ conservatives got new limits on Congress's regulatory and spending authority;¹⁰ states not only got the freedom to refuse to expand their Medicaid programs without risk of losing funds, but also kept the ability to expand (with generous federal subsidies) if they want to.¹¹ Chief Justice Roberts even used the opinion as an oppor-

⁵ See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 125, 127–28 (1942).

⁶ See *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (holding that Congress lacked power under the Commerce Clause to enact a civil remedy for victims of gender-motivated violence); *United States v. Lopez*, 514 U.S. 549, 559–61 (1995) (holding that Congress lacked power under the Commerce Clause to enact a law forbidding possession of handguns in a school zone).

⁷ 132 S. Ct. 2566 (2012).

⁸ See Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits Just 44% in Poll*, N.Y. TIMES, June 8, 2012, at A1 (reporting decline in public approval of the Court, with three-quarters of those polled saying Justices sometimes decide cases based on personal or political views).

⁹ *NFIB*, 132 S. Ct. at 2600 (upholding the individual mandate under the tax power).

¹⁰ See *id.* at 2589 (opinion of Roberts, C.J.) (“The Framers gave Congress the power to *regulate* commerce, not to *compel* it . . .”); *id.* at 2592–93 (arguing that Congress may not create commerce in order to regulate it); *id.* at 2606–07 (holding that Congress cannot induce states to accept Medicaid expansion by withholding preexisting Medicaid funds).

¹¹ *Id.* at 2604–08.

tunity to reassert the Court's preeminent role in enforcing the Constitution.¹² Reinforcing this institutionalist account are reports that his decision to uphold the mandate represented a change of heart after the initial conference.¹³ We thus may have a second putative "switch in time" to protect the Court, three-quarters of a century after an earlier Justice Roberts is alleged to have done the same.¹⁴

In short, the Chief Justice's opinion appears to be a jurisprudential compromise that allows the Court to straddle the rancorous political divide consuming the nation. At the same time, it has a legitimate legal basis. In upholding the mandate as a tax, Chief Justice Roberts acted in accordance with the Constitution's grant of a broad tax power, longstanding precedent, and the well-established presumption of constitutionality. But the Chief Justice's approach created an opinion whose different parts stand in considerable analytic tension. His flat rejection of all applications of the mandate under the commerce power contrasts with his willingness to preserve as much of the ACA as possible under Congress's tax and spending authority.¹⁵ His formalistic stance at the outset of the opinion becomes pragmatic and realist by the end, creating conceptual confusion along the way.¹⁶ At first glance, all that seems to tie these disparate features together is a commitment to preserving the Court as an institution, with the inconsistencies reflecting conflicting institutionalist imperatives: allowing the Court to rise above the political fray surrounding the challenges to the ACA's constitutionality while still reinforcing the Court's supremacy in constitutional interpretation.

Yet from another perspective, the Chief Justice's treatments of the commerce, tax, and spending powers are actually analytically consistent and closely linked. They share a libertarian resistance to compulsory measures in favor of choice and incentives.¹⁷ Underlying this view is the recognition that the progovernment/antigovernment framing of the ACA debate is incomplete. How the government regulates is

¹² See *id.* at 2579–80 (majority opinion) (“[T]here can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits.”).

¹³ See, e.g., Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 1, 2012, 1:29 PM), http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law.

¹⁴ And no doubt there will be similar debates over whether the Chief Justice really did switch, and the reasons for his switch, as there are about the earlier Justice Roberts. Compare WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 142–43 (1995), with BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* 18–24, 30–32 (1998). For an excellent account of the debate, see Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052 (2005).

¹⁵ See *infra* pp. 92–93.

¹⁶ See *infra* pp. 95–97.

¹⁷ See *infra* pp. 104–105.

as important as whether it regulates. Surprisingly, given the furor the ACA has provoked, a similar emphasis on incentives and private choice is prominent in the ACA itself.¹⁸ Nor is the ACA unique in this regard; it is part of a more general trend in regulatory governance toward more flexible, incentive-based, and indirect regulation. One effect is to downplay the collective and redistributive aspects of the health care reform; the ACA's goal becomes informing and empowering individuals more than affirming societal responsibility for meeting a basic human need. The Chief Justice's opinion elevates this individualistic motif even further: individuals and states can now choose to purchase or provide health insurance, but they have no collective obligation to do so.

A key element in this turn to indirect regulation is increased reliance on financial incentives and government funds as regulatory tools. Of course, the federal government has long used taxes, federal funds, money penalties, and even control of the money supply as means to achieve its programmatic goals. But money has become even more important in recent years, with the federal government increasingly opting to buy compliance with its policy goals or frame regulation around monetary incentives.¹⁹ Money has become particularly critical when applying federal requirements to the states, and cooperative federal-state programs supported by federal funds represent a large part of our national administrative state.

Resistance to regulatory compulsion and recognition of money's regulatory importance run throughout Chief Justice Roberts's opinion. These themes animate not just his rejection of the mandate based on the commerce power but also his acceptance of it as a tax, with Chief Justice Roberts making clear that the mandate's tax status depended on individuals' having a realistic choice to pay an annual penalty in lieu of buying insurance. Money can thus exert some regulatory pull, but not too much. A similar concern with cabinining the regulatory power of money dominates his treatment of the spending power and the Medicaid expansion. Indeed, the Chief Justice's rediscovery of the tax power's broad scope lends urgency to retraction of its constitutional companion, the power to spend, or else the federal government's vast financial resources will give it unlimited authority.

Both these accounts of Chief Justice Roberts's opinion — as institutionalist and as resisting government compulsion — are true. The opinion was plainly an effort to protect the Court, and equally plainly reflects his preference for indirect and voluntary measures over mandatory requirements. This latter aspect underlies conservatives'

¹⁸ See *infra* p. 107.

¹⁹ See *infra* pp. 108–109.

initial claims that they may have lost the battle over the individual mandate but won the constitutional war.²⁰ Some liberals have expressed concerns that indeed this assessment may be correct.²¹ But any effort to constrain Congress significantly and roll back the national administrative state will again put the Court's institutional legitimacy into question — and thus run headlong into the institution-protecting side of *NFIB*.

Moreover, *NFIB* may carry the seeds of its own irrelevance. By cabining money and potentially making it less effective as a regulatory tool, *NFIB* may encourage a return to centralized programs and direct regulatory approaches, or — more likely — a switch to more discretionary financial incentives. Such a move to greater discretion is already well afoot in many cooperative federalism contexts.²² The net result may well be a change in the form of federal measures, but little restriction on the scope of federal power.

I. INSTITUTIONALISM AND INCONSISTENCY

Chief Justice Roberts's attentiveness to *NFIB*'s significance for the Court as an institution of government is evident from the very outset of his opinion. He opened with a discourse on basic principles that centered on the role of the Court:

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.

Our deference in matters of policy cannot, however, become abdication in matters of law. . . . Our respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed. . . . [I]t is the responsibility of this Court to enforce the limits on federal power²³

²⁰ See, e.g., Randy Barnett, *We Lost. But the Constitution Didn't.*, WASH. POST, July 1, 2012, at B1; Jonathan Adler, *Lose the Battle, Win the War?*, SCOTUSBLOG (June 28, 2012, 6:10 PM), <http://www.scotusblog.com/2012/06/lose-the-battle-win-the-war>; 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>. But see Drew Singer & Terry Baynes, *Analysis: Legal Eagles Redefine Healthcare Winners, Losers*, REUTERS, July 5, 2012, available at <http://www.reuters.com/assets/print?aid=USBRE86418K20120705> (noting that a few days after the decision, legal scholars on both the left and right were describing the ruling as "academic").

²¹ See, e.g., Pamela S. Karlan, *No Respite for Liberals*, N.Y. TIMES, June 30, 2012, <http://www.nytimes.com/2012/07/01/opinion/sunday/no-respite-for-liberals.html>; Andrew Koppelman, *Roberts' Crafty Victory*, SALON (July 5, 2012, 2:30 PM), http://www.salon.com/2012/07/05/roberts_crafty_victory.

²² See *infra* pp. 114–115.

²³ *NFIB*, 132 S. Ct. at 2579–80.

The Court thus faced two institutional imperatives: leaving policy and politics to the elected branches, and enforcing its claimed supremacy in constitutional interpretation. The Chief Justice took both these imperatives to heart, despite their evident tension here, where invalidation of major federal legislation was at stake and political battle lines were firmly drawn.²⁴ The net result, however, is an opinion marked by analytic inconsistency.

A. The Tax Power that Could and the Commerce Power that Couldn't

To some, Chief Justice Roberts's argument for sustaining the individual mandate as a tax seemed to come out of nowhere.²⁵ The Court received a total of 156 briefs related to the case, but only ten contained more than a passing discussion of the tax power argument, and the government devoted only fifteen pages to it.²⁶ Though raised throughout the litigation, the tax power argument was repeatedly rejected or not reached below and received only passing expressions of support.²⁷ Nor did the Court itself seem to show much interest; the question of whether the mandate represented an exercise of the tax power received less than fourteen minutes of sustained discussion at oral argument.²⁸ Indeed, the joint dissent dismissed the government's defense of the

²⁴ Dean Martha Minow captures this dynamic with her apt description of the Chief Justice's opinion as a convergence of the views of Justice Ginsburg, who comes down on the side of congressional deference, and the joint dissent, which was marked by insistence on judicial supremacy. See Martha Minow, *The Supreme Court, 2011 Term — Comment: Affordable Convergence: "Reasonable Interpretation" and the Affordable Care Act*, 126 HARV. L. REV. 117, 132 (2012). Although unlike Minow I view the Chief Justice's opinion as a compromise, I agree that both of these principles lie at the opinion's core.

²⁵ See, e.g., Charles Fried, *The June Surprises: Balls, Strikes, and the Fog of War*, SCOTUSBLOG (Aug. 2, 2012, 12:19 PM), <http://www.scotusblog.com/2012/08/the-june-surprises-balls-strikes-and-the-fog-of-war>.

²⁶ This information is based on a review of the briefs filed in the case, which may be accessed at ACA LITIG. BLOG, <http://acalitigationblog.blogspot.com> (last visited Sept. 29, 2012).

²⁷ See, e.g., *Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1314 (11th Cir. 2011) (rejecting claim that Congress invoked its tax power in adopting the mandate); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 552–53 (6th Cir. 2011) (Sutton, J., concurring in part) (suggesting that "if the legislature had used taxes in this part of the Affordable Care Act, the Act likely would be constitutional," but rejecting claim that Congress had invoked its tax power in adopting the penalty for nonpurchase of health insurance); *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 415 (4th Cir. 2011) (Wynn, J., concurring) ("[W]ere I to reach the merits, I would uphold the constitutionality of the Affordable Care Act on the basis that Congress had the authority to enact the individual and employer mandates under its plenary taxing power."); *Seven-Sky v. Holder*, 661 F.3d 1, 48 & n.38 (D.C. Cir. 2011) (Kavanaugh, J., dissenting as to jurisdiction and not deciding the merits) (stating that "just a minor tweak to the current statutory language would definitively establish the law's constitutionality under the Taxing Clause").

²⁸ This information is based on a review of the oral argument audio and transcripts, which can be found at *The Affordable Care Act Cases*, OYEZ, http://www.oyez.org/cases/2010-2019/2011/2011_11_400 (last visited Sept. 29, 2012).

mandate as a tax as an alternative argument tagged on to the end of its brief.²⁹

Yet the Constitution's grant to Congress of the power to tax was hardly an afterthought. Instead, providing a mechanism by which the federal government could raise revenue and pay its debts was a principal motivation behind the creation of a new constitutional order.³⁰ Under the Articles of Confederation, states had failed to meet congressional requisitions on a massive scale and Congress was bankrupt. The very ability of the federal government to survive and to be taken seriously by other countries was at stake.³¹ Moreover, the Framers agreed that this tax power must be expansive: "A complete power . . . to procure a regular and adequate supply of revenue . . . may be regarded as an indispensable ingredient in every constitution."³²

This agreement is reflected in the broad terms by which the tax power is granted. Congress is given power to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare," subject only to a requirement of uniformity (for duties, impost, and excises), a prohibition on taxing exports, and the need to apportion "direct" taxes.³³ The apportionment requirement entered the Constitution as part of the critical compromise over slavery, with southern states having to pay more in taxes for the three-fifths representation of slaves they demanded. But apportionment was required only of direct taxes to ensure the federal government's revenue-raising capacity would not be constrained.³⁴

²⁹ *NFIB*, 132 S. Ct. at 2655 (joint dissent) (noting particularly limited briefing on the direct tax question).

³⁰ ROGER H. BROWN, *REDEEMING THE REPUBLIC* 3 (1993) ("The experience with the breakdown of taxation . . . drove the constitutional Revolution of 1787."); Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 6 (1999) ("The Federalists . . . would never have launched their campaign against . . . the Articles of Confederation . . . had it not been for its failure to provide adequate fiscal powers for the national government.")

³¹ See BROWN, *supra* note 30, at 12–21.

³² THE FEDERALIST NO. 30, at 184 (Alexander Hamilton) (Clinton Rossiter ed., 2003); see also *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 540 (1869) ("[N]othing is clearer, from the discussions in the Convention and the discussions which preceded final ratification by the necessary number of States, than the purpose to give this power to Congress, as to the taxation of everything except exports, in its fullest extent.")

³³ U.S. CONST. art. I, § 8, cl. 1; *id.* § 9, cls. 4–5. What counted as a "direct tax" was obscure even at the Constitution's drafting. See Notes of James Madison (Aug. 20, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 350 (Max Farrand ed., rev. ed. 1966) ("Mr King asked what was the precise meaning of *direct* taxation? No one answd.")

³⁴ See Ackerman, *supra* note 30, at 7–13; Charles Bullock, *The Origin, Purpose and Effect of the Direct-Tax Clause of the Federal Constitution* (pt. 1), 15 POL. SCI. Q. 217, 222 (1900). But see Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2381–82, 2389 (1997) (suggesting that apportionment is a more significant limit on taxation, although acknowledging that the original understanding was that "direct taxation would not ordinarily be necessary").

The Supreme Court has long read the tax power with a breadth befitting its text and history. Three aspects of tax power jurisprudence are particularly salient. First, the Court has repeatedly insisted that this tax power is an independent source of authority and not limited to the scope of Congress's other powers.³⁵ Second, from its early days the Court has understood the class of direct taxes to be extremely narrow, limited to capitation and property taxes.³⁶ And third, the Court has consistently refused to invalidate tax measures simply because they were motivated by a regulatory purpose. Even in its most constrained approach to the tax power in the 1920s and 1930s, the Court did not invalidate taxes solely on this basis. Instead, decisions like *The Child Labor Tax Case (Bailey v. Drexel Furniture Co.)*³⁷ and *United States v. Constantine*³⁸ underscored that the high levels of the putative taxes at issue meant they were really penalties in disguise, aimed at compelling adherence to detailed regulatory schemes that Congress lacked authority to impose.³⁹

Against this background, the success of the tax defense should come as no surprise. Indeed, the tax power had ridden to the rescue of key federal reform initiatives before. In 1937, the Court was on the cusp of expanding the scope of the commerce power but had not yet fully overthrown its restrictive distinction between production, which Congress could not regulate, and commerce, which it could — a distinction that had proved a barrier to many national regulatory efforts.

³⁵ See, e.g., *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 738 (1950) (“[I]n conferring power upon Congress to tax . . . the Constitution delegates a power separate and distinct from those later enumerated, and one not restricted by them . . .”); *United States v. Sanchez*, 340 U.S. 42, 44 (1950) (“Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate.”).

³⁶ See *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Chase, J.) (suggesting that only two kinds of taxes — capitation taxes and taxes on land — constituted direct taxes); *id.* at 177 (opinion of Paterson, J.) (same); *id.* at 183 (opinion of Iredell, J.) (same). The one aberration was *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), in which the Court struck down the federal income tax on income derived from real and personal property as an unapportioned direct tax, and the nation responded by adopting the Sixteenth Amendment to authorize the income tax. See U.S. CONST. amend. XVI. For criticism of *Hylton* and discussion of the Court's approach to direct taxes, see Jensen, *supra* note 34, at 2350–77.

³⁷ 259 U.S. 20 (1922).

³⁸ 296 U.S. 287 (1935).

³⁹ *Constantine*, 296 U.S. at 295; *Child Labor Tax Case*, 259 U.S. at 36–38; see also *United States v. Butler*, 297 U.S. 1, 58–61 (1936) (invalidating the Agricultural Adjustment Act tax as regulatory, but emphasizing that the tax “plays an indispensable part in the plan of regulation,” the rate is fixed by price concerns, and “[t]he whole revenue from the levy is appropriated in aid of crop control,” *id.* at 59). Congress's use of taxes for regulatory ends beyond raising revenue is of similarly lengthy duration, sometimes including the draconian goal of entirely eliminating a disfavored activity. See R. ALTON LEE, A HISTORY OF REGULATORY TAXATION 6, 8–9, 213 (1973) (noting that “[f]rom the time [of] Alexander Hamilton's *Report on Manufactures* . . . the taxing power has been used to achieve policies beyond the purpose of raising revenue,” *id.* at 6, and identifying historical examples of draconian taxes).

Yet in *Steward Machine Co. v. Davis*⁴⁰ the Court sustained the unemployment provisions of the Social Security Act built around a federal tax on all employers with more than eight employees.⁴¹ The potency of Congress's tax authority was recognized by at least three Justices at the time. Both Justice Brandeis and Chief Justice Stone advocated its use to reformers, with then-Justice Stone famously telling Secretary of Labor Frances Perkins, who was struggling to find a constitutional basis for the Social Security Act: "The taxing power, my dear, the taxing power. You can do anything under the taxing power."⁴²

The joint dissent in *NFIB* insisted that the tax power's broad constitutional scope was of no moment, because Congress did not intend for the mandate to be a tax.⁴³ After all, Congress used the term penalty, not tax, to characterize the money individuals must pay for failing to purchase health insurance.⁴⁴ Congress also included several findings at the outset of § 5000A, the mandate provision, all of which spoke of economic activity and seemed clearly to invoke the commerce power.⁴⁵ Most importantly, the dissent viewed § 5000A as imposing an independent legal requirement, violation of which was unlawful and triggered a monetary penalty.⁴⁶

The joint dissent's effort to avoid the tax power's constitutional breadth was too glib, however. That breadth meant that the mandate could have been sustained had Congress done a better job in figuring out which constitutional head of authority to rely on. As Chief Justice Roberts himself put it, "[t]he joint dissenters . . . contend that even if the Constitution permits Congress to do exactly what we interpret this statute to do, the law must be struck down because Congress used the wrong labels."⁴⁷ From this perspective, the joint dissenters' rejection of the mandate has a spiteful edge that ill fits the respect due a coequal branch — all the more so given the Court's historical insistence that determinations of what constitutes a tax turn on functionality, not

⁴⁰ 301 U.S. 548 (1937).

⁴¹ *Id.* at 590–93.

⁴² Michelle Landis Dauber, *The Sympathetic State*, 23 LAW & HIST. REV. 387, 88 (2005) (quoting Frances Perkins, Address Delivered at Social Security Headquarters in Baltimore, Md.: The Roots of Social Security (Oct. 23, 1962)); see also *id.* at 390 (noting that Justice Brandeis and Chief Justice Hughes also took a broad view of the tax power). Justice Brandeis kept his advice within the family, suggesting use of the tax power to his daughter Elizabeth, who was an influential progressive reformer along with her husband Paul Rausenbush. See John Fabian Witt, *The Secret History of the Chief Justice's Obamacare Decision*, BALKINIZATION (June 29, 2012, 10:58 AM), <http://balkin.blogspot.com/2012/06/secret-history-of-chief-justices.html>.

⁴³ See *NFIB*, 132 S. Ct. at 2650–51 (joint dissent).

⁴⁴ *Id.* at 2652–53.

⁴⁵ *Id.* at 2652; see 42 U.S.C. §§ 18091(2)(H), 18091(3) (Supp. IV 2010).

⁴⁶ *NFIB*, 132 S. Ct. at 2652–55 (joint dissent).

⁴⁷ *Id.* at 2597 (majority opinion).

form.⁴⁸ Besides, § 5000A hardly holds itself aloof from taxes. It not only references the tax code and basic tax concepts like taxable income, but the penalty is also paid as part of most Americans' most basic tax action: filing their annual income tax returns.

In short, Chief Justice Roberts's willingness to view the mandate as a tax seems more like a proper refusal to sandbag the legislature than an illicit act of judicial rewriting.⁴⁹ It is of a piece with his later refusal to invalidate the Medicaid expansion despite finding that states could not constitutionally face loss of their preexisting Medicaid funds if they did not comply with the expansion. It is also in line with the Chief Justice's approach more generally: he has shown an occasional fondness for creative statutory interpretations that avoid constitutional invalidation of prominent legislation, even at the cost of some contortion of the text.⁵⁰ In past cases his fellow Justices often have been happy to go along, making the joint dissent's insistence on invalidating the entire ACA quite astonishing.⁵¹

The real question is why Chief Justice Roberts did not show similar restraint with respect to the Commerce and Necessary and Proper Clauses. Before ultimately upholding the mandate as constitutional under the tax power, the Chief Justice ruled that the mandate fell outside the bounds of Congress's authority under these other clauses be-

⁴⁸ See, e.g., *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 367 (1998) (“[W]e must regard things rather than names’ in determining whether an imposition on exports ranks as a tax.” (citation omitted) (quoting *Pace v. Burgess*, 92 U.S. 372, 376 (1876))); *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 220 (1996) (noting that the Supreme Court has often “looked behind the label placed on [an] exaction” in determining whether it is a tax).

⁴⁹ I cannot claim to be a neutral assessor here, because along with other constitutional law professors I filed a brief arguing that the presumption of constitutionality required the Court to uphold the mandate as a tax. See Brief of Constitutional Law Scholars as Amici Curiae in Support of Petitioners (Minimum Coverage Provision) at 19–33, *Dep’t of Health & Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11–398).

⁵⁰ See, e.g., *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 129 S. Ct. 2504, 2513–16 (2009) (invoking “the principle of constitutional avoidance,” *id.* at 2513, to resolve a constitutional challenge to the Voting Rights Act of 1965 with a statutory argument); *Boumediene v. Bush*, 128 S. Ct. 2229, 2290–92 (2008) (Roberts, C.J., dissenting) (arguing that the Detainee Treatment Act of 2005 could be read to satisfy the constitutional requirement of habeas corpus); see also Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 SMU L. REV. 281, 331 (2008) (arguing that Chief Justice Roberts “aggressively construed the DTA” in *Boumediene*); Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 201–06 (critiquing Chief Justice Roberts’s statutory interpretation of the Voting Rights Act in *NAMUDNO*). To be sure, there are also instances when the Chief Justice has refused to follow this path. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 919 (2010) (Roberts, C.J., concurring) (“It should go without saying, however, that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right.”).

⁵¹ For example, all the Justices except for Justice Thomas signed on to the Chief Justice’s opinion in *NAMUDNO*. See 129 S. Ct. at 2507.

cause it represented a regulation of inactivity.⁵² That approach is unusual to say the least, even for a Court that has been willing to reach out to decide issues that it could have avoided.⁵³ According to the Chief Justice, his commerce power analysis was necessary because “the statute reads more naturally as a command to buy insurance than as a tax.”⁵⁴ It was only because of the insufficiency of the Commerce Clause here that the tax power question needed to be reached.⁵⁵ If true, this approach would mean that the Court can consider possible saving interpretations of a statute only after having concluded that the most natural reading of it is unconstitutional — what Professor Adrian Vermeule has called “classical avoidance.”⁵⁶ But classical avoidance no longer represents the Court’s approach and has not for quite some time. Instead, the Court’s standard line is to adopt a plausible statutory interpretation that serves to avoid a constitutional question without actually holding that otherwise the statute would fail.⁵⁷

Perhaps more striking than his willingness to reach the question was Chief Justice Roberts’s conclusion that the mandate fell entirely outside Congress’s commerce and necessary and proper powers. Even under the activity/inactivity line, Congress should be able to require individuals to purchase health insurance or pay a penalty as a condition of their actually receiving health-related services; such a requirement would simply be a regulation of the activity of obtaining health care.⁵⁸ Chief Justice Roberts acknowledged that accessing health care constitutes activity, but insisted that “[t]he mandate primarily affects healthy, often young adults who are less likely to need significant health care” and thus “most of those regulated by the individual mandate are not currently engaged in any commercial activity involving health care.”⁵⁹ On its face, however, the mandate imposes an obliga-

⁵² *NFIB*, 132 S. Ct. at 2585–93 (opinion of Roberts, C.J.). Justice Ginsburg’s opinion demonstrates the deep flaws with this conclusion as a matter of constitutional text, original understanding, precedent, and economic reality. *See id.* at 2618–28 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

⁵³ *See* Henry Paul Monaghan, Essay, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 669, 685–711 (2012) (noting the Court’s recent proclivity for reaching constitutional issues, even when not raised by the parties in a case).

⁵⁴ *NFIB*, 132 S. Ct. at 2600 (opinion of Roberts, C.J.).

⁵⁵ *Id.*

⁵⁶ Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997). I thank Trevor Morrison for this point.

⁵⁷ *Id.*; *see also id.* at 1958 (tracing the switch to *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366 (1909)).

⁵⁸ Indeed, the law’s challengers conceded this point. *See* Transcript of Oral Argument at 54–55, *Florida v. Dep’t of Health and Human Servs.*, 132 S. Ct. 2566 (2012) (No. 11–398), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf (Paul Clement for respondents *Florida et al.*); *id.* at 100 (Michael Carvin for respondents *NFIB et al.*).

⁵⁹ *NFIB*, 132 S. Ct. at 2590 (opinion of Roberts, C.J.).

tion on almost all individuals to have minimally adequate insurance — it does not apply just to the young and healthy, nor just to the currently uninsured.⁶⁰ Moreover, evidence in the record demonstrated that indeed the uninsured are very active in seeking health care: Congress found that \$43 billion of uncompensated health care services were provided to the uninsured in 2008,⁶¹ and over 60% of the uninsured visit a hospital or doctor's office each year,⁶² with nearly 90% doing so within a five-year period.⁶³

Far from avoidance, this approach reads a statute to create constitutional problems. Chief Justice Roberts's characterization appears to rest on the economic logic underlying the mandate. The goal of requiring all individuals to purchase insurance is to bring healthy individuals into insurance pools to lower the cost of premiums, and thus in his view it is healthy individuals who are primarily affected. But the same is true of the Medicaid expansion; only states that do not want to expand their Medicaid programs experience the Medicaid funds cutoff as coercive. Yet there, the Chief Justice's response was simply to sever the unconstitutional applications. An equivalent approach here would have been to limit application of the mandate to those who seek health care.⁶⁴ Nor can this approach be justified by the fact that the Court routinely assesses Commerce Clause challenges on a facial basis,⁶⁵ because Chief Justice Roberts's approach is the opposite of a facial analysis. He assessed the mandate's constitutionality not according to its terms, but instead based solely on its application to a subset of those subject to its requirements — whereas under the Court's commonly

⁶⁰ See 26 U.S.C. § 5000A(a), 5000A(d) (Supp. IV 2010) (listing narrow exemptions from the minimum coverage requirement for religion, illegal alien status, and incarceration). Even if the provision is read to reference only those who are currently uninsured, that still leaves a vast and disparate group. See KAISER COMM'N ON MEDICAID & THE UNINSURED, THE UNINSURED: A PRIMER 6–7 (2011), available at <http://www.kff.org/uninsured/upload/7451-07.pdf> (noting that forty-five percent of the 49.1 million uninsured in 2011 were between the ages of thirty-five and sixty-four and were also racially and socioeconomically diverse).

⁶¹ 42 U.S.C. § 18,091(2)(F) (Supp. IV 2010).

⁶² NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEPT. OF HEALTH & HUMAN SERVS., HEALTH, UNITED STATES, 2011, at 282 tbl.83 (2011), available at <http://www.cdc.gov/nchs/data/hus/hus11.pdf>.

⁶³ NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEPT. OF HEALTH & HUMAN SERVS., SUMMARY HEALTH STATISTICS FOR U.S. ADULTS 125 tbl.37 (2010), available at http://www.cdc.gov/nchs/data/series/sr_10/sr10_249.pdf.

⁶⁴ Although limiting the mandate in this fashion might create implementation problems, that possibility is also true of making the Medicaid expansion optional. See *NFIB*, 132 S. Ct. at 2664–66 (joint dissent) (arguing that the statutory scheme demonstrates the extent to which Congress assumed all states would expand Medicaid).

⁶⁵ For discussion of the Court's facial treatment of Commerce Clause challenges, see David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 47–53 (2006). See also Gillian E. Metzger, Essay, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 905–13 (2005) (comparing the Court's use of facial challenges in the commerce, spending, and Fourteenth Amendment Section 5 contexts).

invoked tests, a facial challenge should be upheld only if the challenged measure is unconstitutional in all or a large fraction of its applications.⁶⁶

More is at stake here than simply pointing out analytic inconsistencies. Instead, figuring out why the mandate regulates inactivity is critical to understanding what constitutes sufficient activity to support federal regulation. The joint dissent argued that even individuals active in the health care market generally are not actively seeking to purchase many of the different health care services that must be covered by minimally adequate insurance.⁶⁷ Put differently, in the dissenters' view, merely being active in the health care market generally is not enough; there must be a close nexus between the specific health care activities individuals engage in and the substance of congressional regulation. Such an approach could turn the activity/inactivity line into a significant constraint on Congress's regulatory authority. For example, this approach might suggest that Congress could not require that anyone purchasing a car purchase one that has seatbelts designed to secure an infant seat or other specific safety features, given that many car purchasers may not themselves use these features. It is not clear that the joint dissent actually intended to push the activity/inactivity line to such extremes. The joint dissent upheld Congress's power to require those who are commercial wheat growers to purchase wheat for home consumption,⁶⁸ even though growing wheat commercially and obtaining it for home consumption could be described as distinct activities. Notably, the Chief Justice did not take the restrictive approach suggested by the joint dissent. Instead, he relied on the claim that the purchase of health care services sometime in the past or future is not enough to make an individual active in the health care market. Still, his failure to consider whether the mandate can apply as a regulation of those actually seeking health care services leaves a question about what the activity requirement means in practice.

B. Formalism, Realism, and Judicial Supremacy

Equally evident is the contrasting analytic style with which Chief Justice Roberts approached the Commerce and Necessary and Proper

⁶⁶ See *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007). As Professor Richard Fallon has recently argued, the Court decides constitutional challenges on a facial basis far more frequently than this standard test would suggest. Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 923, 935–49 (2011). Chief Justice Roberts's approach thus may not be so unusual viewed broadly against the landscape of constitutional litigation, though the contrast with his own willingness to sever unconstitutional applications in the Medicaid context remains.

⁶⁷ See *NFIB*, 132 S. Ct. at 2647–48 (joint dissent).

⁶⁸ *Id.* at 2643, 2648.

Clauses compared to Congress's powers to tax and spend. Formalism was triumphant in his commerce power analysis. His rejection of the mandate under the Commerce Clause rested on conceptual categories and abstract principles. Activity is something that is fundamentally different from inactivity and Congress can only regulate the former:

To an economist, perhaps, there is no difference between activity and inactivity; both have measurable effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers The Framers gave Congress the power to *regulate* commerce, not to *compel* it, and for over 200 years both our decisions and Congress's actions have reflected this understanding.⁶⁹

Formalism also reigns supreme in the Chief Justice's insistence that those who do not purchase health insurance or seek health care are inactive, notwithstanding the economic costs that the uninsured impose on the nation's health care system through the uncompensated services they receive. In like vein, the Chief Justice rejected the Necessary and Proper Clause as a basis for the mandate by positing that congressional regulation of inactivity cannot be "proper" because it would "vest[] Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power."⁷⁰ Through this formalistic account of "proper," Chief Justice Roberts sidestepped the powerful argument that the mandate is necessary as a practical matter to ensure that the ACA actually operates to expand access to health insurance.⁷¹

Yet when it came to Congress's taxing and spending authority, the Chief Justice adopted a far more realist and pragmatic stance. In the tax context, he insisted that the Court's precedents "confirm [a] functional approach," one that emphasizes the "practical characteristics" of the measure at issue over the form that it takes.⁷² His treatment of the Medicaid expansion had some significant formalist elements, such as his positing of a firm distinction between the old and new Medicaid and between inducement and coercion, or his insistence that the amount of new burden imposed was irrelevant in assessing whether coercion exists.⁷³ But his conclusion that the Medicaid expansion crossed the line also turned on fact-dependent assessments of "the nature of the threat and the programs at issue" and the relationship of federal Medicaid funds to state budgets.⁷⁴ To be fair, Chief Justice Roberts was not alone in his formalist-realist inconsistency — the only

⁶⁹ *Id.* at 2589 (opinion of Roberts, C.J.).

⁷⁰ *Id.* at 2592.

⁷¹ *See id.* at 2625–28 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

⁷² *Id.* at 2595 (majority opinion).

⁷³ *See id.* at 2605–06 & 2605 n.12 (opinion of Roberts, C.J.).

⁷⁴ *Id.* at 2603–04, 2606.

Justices who were wholly consistent on this score were Justices Breyer and Kagan, who signed onto largely pragmatic constitutional opinions across the board.⁷⁵

Such conflicts between formalism and realism are well known to federalism jurisprudence.⁷⁶ The same analytic tension dominated fights over federal power at the time of the New Deal, when a formalistic insistence on whether activities affected interstate commerce directly or indirectly — with Congress limited to regulating only those that had a direct effect — gave way to a pragmatic emphasis on economic reality and effective governance.⁷⁷ What is striking about *NFIB* is that both approaches are so apparent within individual opinions, and particularly with respect to assessing the constitutionality of the same measure. In the latter respect, the Chief Justice did stand alone, as he was the only Justice to reject the mandate under a formalistic Commerce Clause analysis and also uphold it under a pragmatic assessment of the tax power. Chief Justice Roberts defended this result by emphasizing that the commerce and tax powers have different substantive scopes, and so they do.⁷⁸ But the tension in the Chief Justice's opinion stemmed as much from his approaching the mandate through two discordant analytic lenses as from the substance of the powers involved.

Another notable feature of *NFIB* is that the application of a realist approach in the Medicaid context led to limits on Congress. Overwhelmingly, in prior decisions, the opposite has been true. Formalist reasoning in federalism contexts has led to restrictions on congressional authority, whereas realism has resulted in expansion.⁷⁹ Much of the reason for this effect is that the realist approach is premised not simply

⁷⁵ The joint dissent's approach to Congress's commerce and spending powers reveals the same contrast as the Chief Justice's, whereas Justice Ginsburg took the reverse approach, though her formalism in the spending context was tempered by an emphasis on the substantial funds Congress offered to cover the costs of the Medicaid expansion. *Compare id.* at 2644, 2648–50, 2662–64 (joint dissent), *with id.* at 2631–32, 2635–36, 2638 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

⁷⁶ Inconsistency between formalist and more pragmatic or functionalist analyses also characterizes separation of powers jurisprudence. *See generally* Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions — A Foolish Inconsistency?*, 72 *CORNELL L. REV.* 488 (1987).

⁷⁷ *See Wickard v. Filburn*, 317 U.S. 111, 119–20 (1942). *See generally* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 *U. CHI. L. REV.* 1089 (2000).

⁷⁸ *NFIB*, 132 S. Ct. at 2599–2600.

⁷⁹ *See, e.g.,* Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 *GA. ST. U. L. REV.* 959, 961–69 (1997) (describing formalism of recent decisions striking down congressional measures on federalism grounds). One arguable exception is *Gonzales v. Raich*, 545 U.S. 1 (2005), in which the Court adopted a broad formal definition of what constitutes economic activity in sustaining application of federal regulation. *See id.* at 25–26. But *Raich* equally rested on the Court's conclusion that regulating intrastate possession of marijuana was practically necessary for effective regulation of the interstate market. *See id.* at 26–33.

on using economic effect as the measure of congressional power, but also on an appreciation of the Court's limited institutional capacity in assessing when a national response is justified or the actual dynamics underlying federal-state relationships.⁸⁰ That appreciation was largely absent from *NFIB*, surfacing only in Justice Ginsburg's cogently argued opinion.⁸¹

Instead, confidence in the Court's ability to police federalism represents a core undercurrent of both Chief Justice Roberts's opinion and the joint dissent. Despite his deference to Congress in sustaining the mandate under the tax power, the Chief Justice did not shy from articulating limits on Congress — insisting that “there can be no question that it is the responsibility of this Court to enforce the limits on federal power.”⁸² Not surprisingly, the citation that follows this statement is *Marbury v. Madison*,⁸³ the precedent that almost always accompanies assertions of strong judicial review authority.⁸⁴ By contrast, *Garcia v. San Antonio Metropolitan Transit Authority*,⁸⁵ the 1985 decision in which the Court held that “[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power,”⁸⁶ went unmentioned. *Garcia* did not even surface in Justice Ginsburg's opinion, demonstrating how far the Court has moved over the last twenty-five years toward judicial enforcement of constitutional federalism.

Yet another sign of the Court's assertiveness was its willingness to hold that Congress had transgressed fundamental constitutional boundaries without offering a clear account of what those boundaries are. Both the Chief Justice and the joint dissent limited Congress to regulating activity, but they provided little guidance on how to distinguish activity from inactivity. Similar ambiguity exists about why the Medicaid funds cutoff was coercive. The lack of clarity about what constitutes activity seems unlikely to prove significant, as both the Chief Justice and the joint dissent treated congressional regulation of inactivity as a novel phenomenon never before witnessed in our na-

⁸⁰ See, e.g., *Wickard*, 317 U.S. at 129; *United States v. Darby*, 312 U.S. 100, 115 (1941).

⁸¹ *NFIB*, 132 S. Ct. at 2641 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (arguing that the coercion inquiry into the Medicaid expansion “involve[s] political judgments that defy judicial calculation”).

⁸² *Id.* at 2579–80 (majority opinion); see also *id.* at 2659–60 (joint dissent).

⁸³ 5 U.S. (1 Cranch) 137 (1803).

⁸⁴ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (“When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*, 1 Cranch, at 177.”).

⁸⁵ 469 U.S. 528 (1985).

⁸⁶ *Id.* at 552.

tion's history.⁸⁷ Moreover, both opinions reaffirmed *Gonzales v. Raich*⁸⁸ and *Wickard v. Filburn*,⁸⁹ what the joint dissent termed the “*ne plus ultra* of expansive Commerce Clause jurisprudence.”⁹⁰

The same cannot be said of the newly invigorated concept of state funding coercion. Coercion is notoriously difficult to identify, in large part because no agreement exists on the proper baseline against which to assess if a state funding condition goes too far.⁹¹ This lack of baseline agreement was evident in *NFIB*. Seven Justices placed prime emphasis on the amount of money a state stands to lose, underscoring the unparalleled size of federal Medicaid funds as a percentage of state budgets and state expenditures.⁹² For the joint dissent, that determination was essentially the end of the inquiry; the combination of “large grants” supported by “a heavy federal tax” makes a condition one that states “as a practical matter, [may] be unable to refuse.”⁹³ Justice Ginsburg, by contrast, insisted that the proper baseline should include an assessment of the new burdens states were being asked to bear and the clarity with which Congress had reserved the right to alter the program, both of which here counted heavily against finding coercion.⁹⁴ She also suggested that the courts should take account of the states’ independent taxing authority.⁹⁵ And the Chief Justice, joined by Justices Breyer and Kagan, argued for a baseline that considers foreseeability as well as size. On his view, the expansion represented a “major” or “basic” change in the Medicaid program, one that the states could not reasonably have anticipated when they first signed on.⁹⁶ As a result, the threat to cut off preexisting Medicaid funds was tanta-

⁸⁷ *NFIB*, 132 S. Ct. at 2586 (opinion of Roberts, C.J.); *id.* at 2647–48 (joint dissent).

⁸⁸ 545 U.S. 1 (2005).

⁸⁹ 317 U.S. 111 (1942).

⁹⁰ *NFIB*, 132 S. Ct. at 2643 (joint dissent); *see also id.* at 2647; *id.* at 2587–88, 2592–93 (opinion of Roberts, C.J.).

⁹¹ *See* Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 372–74 (2008); *see also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1428, 1446, 1450 (1989) (arguing that accounts of coercion are inherently normative and underscoring difficulty in claiming that government funding conditions are coercive given that such grants of funds are understood to be gratuitous). *But see* Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 15–18 (2001) (arguing that the normativity problem can be addressed by specifying the discourse within which a threat of coercion should be assessed).

⁹² *NFIB*, 132 S. Ct. at 2605 (opinion of Roberts, C.J.) (describing “threatened loss of over 10 percent of a State’s overall budget” as “economic dragooning”); *id.* at 2662–66 (joint dissent).

⁹³ *Id.* at 2661 (joint dissent).

⁹⁴ *Id.* at 2631–33, 2638 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

⁹⁵ *Id.* at 2640.

⁹⁶ *Id.* at 2605–06 (opinion of Roberts, C.J.).

mount to imposing new conditions on "significant independent grants," a situation he equated with illegitimate pressure.⁹⁷

None of these baselines is obviously correct. Clearly the vast size of federal Medicaid funding looms large in state decisions. Yet, as Justice Ginsburg argued, basing a coercion analysis simply on the impact a federal condition has on the states is indefensibly one-sided.⁹⁸ Some consideration of the federal interests involved is required. Such an analysis would also mark a significant retraction of the federal spending power. For example, large grants and heavy taxes are equally present with respect to the preexisting Medicaid program, and thus the joint dissent's approach would seem to invalidate the Medicaid funds cutoff across the board. Justice Ginsburg's stance, by contrast, gave no weight to budgetary and political realities that meant states had little choice as a practical matter but to go along with the conditions, a situation that certainly has the feel of coercion. As for Chief Justice Roberts, his claim that the expansion represented a basic change that transformed Medicaid from a program aimed at the needy to a wide-ranging health care entitlement is surely questionable and the import of his approach is unclear. If Congress is precluded from enacting major programmatic changes in federally funded programs marked by substantial state reliance, that again would represent a significant curtailment of Congress's control of the federal fisc. Such a result is hard to square with the Chief Justice's statement that Congress can "condition the receipt of funds on the states' complying with restrictions on the use of those funds."⁹⁹ But if all Congress need do is enact a repeal of an existing program before reenacting it with new conditions, so that the new conditions are not an extension but rather part of the basic terms on which the funds are made available, then coercion becomes a constitutional formality.¹⁰⁰ In that scenario, the real constraints would be practical and political — as Chief Justice Roberts himself acknowledged.¹⁰¹

At a minimum, the net effect of the Chief Justice's analysis is to add yet another conceptual category to the mix: we now need to understand what counts as major programmatic change in order to identify coercion. Identifying such a change may prove to be quite difficult.¹⁰² Chief Justice Roberts's insistence that the Medicaid expansion

⁹⁷ *Id.* at 2604.

⁹⁸ *See id.* at 2636, 2640 n.26, 2640–41 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

⁹⁹ *Id.* at 2603–04 (opinion of Roberts, C.J.).

¹⁰⁰ *See id.* at 2629 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (describing a repeal and reenact requirement as "ritualistic").

¹⁰¹ *Id.* at 2606 n.14 (opinion of Roberts, C.J.).

¹⁰² As Justice Ginsburg incisively put it: "[H]ow would reviewing judges divine whether an Act of Congress, purporting to amend a law, is in reality not an amendment, but a new creation? At

represented “a shift in kind, not merely degree”¹⁰³ has an air of “I know it when I see it” jurisprudence.¹⁰⁴ Enactment of the No Child Left Behind Act¹⁰⁵ (NCLB) in 2001 dramatically altered the conditions under which federal K–12 education funding is made available to the states, adding significant performance and testing requirements.¹⁰⁶ Was that enactment a shift in kind sufficient to create coercion, particularly given that federal education funding represented nearly \$70.7 billion in fiscal year 2010, or just over twenty-one percent of state K–12 educational expenditures?¹⁰⁷ Or does NCLB simply represent Congress imposing conditions on the use of the funds that it is making available? What if Congress were to require states to make pre-kindergarten programs universally available as a condition for receiving K–12 funding, and provided additional funds to help cover the cost? Would that requirement count as an amendment of existing federal educational programs or the creation of a new program?¹⁰⁸

Thus, applying *NFIB*'s coercion ruling will be a challenge for lower courts. The conceptual difficulties involved in identifying what counts as unconstitutional coercion explain why judges have consistently refused to invalidate spending conditions on this ground.¹⁰⁹ Equally important, courts can police federal abuse of the spending power through another route: by reviewing administrative decisions to terminate funds and reversing termination decisions that are insuffi-

what point does an extension become so large that it ‘transforms’ the basic law?” *Id.* at 2636 (Ginsburg, J., concurring in part, concurring in the judgment in the judgment in part, and dissenting in part).

¹⁰³ *Id.* at 2605 (opinion of Roberts, C.J.).

¹⁰⁴ See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within [hardcore pornography] But I know it when I see it”).

¹⁰⁵ Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended primarily in scattered sections of 20 U.S.C.).

¹⁰⁶ See Patrick McGuinn, *The National Schoolmarm: No Child Left Behind and the New Educational Federalism*, 35 *PUBLIUS* 41, 41–44 (2005) (describing NCLB in the context of federal education funding); see also Michael Heise, *The Political Economy of Education Federalism*, 56 *EMORY L.J.* 125, 133–35, 141–50 (2006) (describing NCLB's requirements and coercive effects).

¹⁰⁷ See NAT'L ASS'N OF STATE BUDGET OFFICERS, 2010 STATE EXPENDITURE REPORT 14, 16 (2011), available at <http://www.nasbo.org/sites/default/files/2010%20State%20Expenditure%20Report.pdf>. The joint dissent distinguished federal educational funds from Medicaid funding, arguing that the amounts at stake in Medicaid were in a world of their own, see *NFIB*, 132 S. Ct. at 2663–64 (joint dissent), but it is not clear why these amounts were not sufficiently large that states might also feel that they had no choice but to go along with NCLB. Notably, despite substantial state complaints about NCLB, no state actually rejected federal funds under the statute. See Bryan Shelly, *Rebels and Their Causes: State Resistance to No Child Left Behind*, 38 *PUBLIUS* 444, 446–48 (2008) (describing actions states took in opposition to NCLB, including legislation and litigation but not funds rejection).

¹⁰⁸ I thank Sam Bagenstos for this example.

¹⁰⁹ See Bagenstos, *supra* note 91, at 372.

ciently attentive to federalism concerns.¹¹⁰ Under this approach, for example, a court might conclude that a funding termination was arbitrary because it was widely disproportionate, too precipitous, or insufficiently responsive to budgetary exigencies facing a state.¹¹¹

To be sure, this approach would not give states the right to resist the expansion outright and instead would reinforce the need for federal-state negotiation.¹¹² But such negotiation is the central dynamic of modern-day federalism and a context in which states can exert real influence.¹¹³ Given the obstacles to robust coercion scrutiny, an administrative review approach might well offer more protection to states in the end. It would, however, entail the Court ceding its preeminent role as constitutional enforcer in the cooperative federalism context; administrative agencies would instead have responsibility in the first instance to ensure adherence to constitutional constraints on spending. Indeed, the courts might well have little involvement at all, as federal agencies are quite reluctant to impose funding cutoffs on recalcitrant states. The Department of Health and Human Services (HHS) appears never to have done so under Medicaid.¹¹⁴ That the Court opted instead to breathe life into the problematic concept of coercion is yet another sign of its commitment to judicial constitutional supremacy.

¹¹⁰ For a general articulation of how administrative law can substitute for direct enforcement of constitutional federalism constraints and of how the Supreme Court has used administrative law in this fashion, see Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008). See also Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 610–19 (2011) [hereinafter Metzger, *Federalism Under Obama*] (discussing administrative avenues to addressing state interests under the ACA and other recent initiatives).

¹¹¹ Cf. *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 569 (4th Cir. 1997) (en banc) (Luttig, J., dissenting) (arguing that a decision to terminate all of Virginia's funds under the Individuals with Disabilities Education Act for failing to provide required services to less than one-tenth of one percent of eligible students was potentially coercive).

¹¹² Justice Breyer raised the possibility of an administrative law substitute at oral argument but seemed to argue that any termination of a state's preexisting Medicaid funds for failing to expand would be arbitrary. See Transcript of Oral Argument at 13–15, *Florida v. Dep't of Health & Human Servs.*, 132 S. Ct. 2566 (2012) (No. 11-400), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-400.pdf. As Justice Scalia responded, however, that approach is hard to square with ACA's clear statement that the Secretary of the Department of Health and Human Services (HHS) could terminate all Medicaid funds for states that fail to expand their programs. See *id.* at 16.

¹¹³ See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1271–84 (2009) (describing instances of state resistance from within federal programs); Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 3–6, 24–73 (2011) (arguing that federalism is best understood as an iterative process of negotiated bargaining between state and federal actors and providing numerous examples).

¹¹⁴ See Brief for Respondents at 41, *Dep't of Health & Human Servs.*, 132 S. Ct. 2566 (2012) (No. 11-400) (stating that “the Secretary’s withholding power remains largely untested” and noting that petitioners had not identified any instance of termination of a state’s Medicaid funding for noncompliance); Brief of Former HHS Officials as Amici Curiae in Support of Respondents at 22–25, *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204 (2012) (Nos. 09-958, 09-1158, 10-283) (arguing that HHS is particularly reluctant to withhold funds under Medicaid).

C. Institutional at Heart?

These analytic contrasts give credence to viewing Chief Justice Roberts's opinion as fundamentally a compromise intended to protect the Court. There is much to this view. Institutional concerns about the Court overstepping its role plainly animated the Chief Justice's resistance to rejecting the mandate when it could be sustained as a tax had Congress only chosen a better name. They likewise underlay his commitment to curing the constitutional problem with the Medicaid expansion through minimal cosmetic surgery rather than a stab to the heart. Even his rejection of the commerce power argument can be viewed as institution reinforcing, despite being an unnecessary assertion of judicial authority, because it emphasized the Court's role as constitutional guardian. The image of the Court that the Chief Justice sought to vindicate was that of a neutral constitutional enforcer, one that accommodates the policy choices of the elected branches to the greatest extent possible, yet does not shirk from ensuring that basic constitutional limitations are respected.

Yet, plainly, the institutional imperatives of deferring to the political branches and asserting judicial constitutional supremacy can pull in opposite directions. Hence the compromise character of Chief Justice Roberts's opinion, which sought to do both. The analytic contrasts described above can be understood as reflecting his effort to navigate between these two conflicting institutionalist concerns. To be sure, the Chief Justice could have deferred to Congress's policy choices and asserted judicial supremacy without inconsistency by holding that the mandate fell within the scope of the commerce power. After all, application of judicial constitutional supremacy can yield a broad view of congressional authority. But the Chief Justice clearly believed that the mandate exceeded the commerce power's constitutional bounds and that it was the Court's role to enforce those bounds here. Thus, for him, meeting both of these institutionalist goals was not so simple.

The internally conflicted character of Chief Justice Roberts's opinion can also be described in more prosaic terms: perhaps he sought to offer something to all constituencies battling over the ACA's health care reforms, in order to defuse perceptions of the Court as ideologically driven and keep the Court out of the political fray. Such a something-for-everyone approach may appear better suited to the political sphere than to the judicial one. Yet no clear line separates those arenas, and it is not at all obvious that the Court should always hew to analytic purity whatever the political cost. Doing so may win the battle for principle but lose the war for the Court's perceived legitimacy. Regardless, on either of these accounts, what best explains the analytic inconsistencies in the Chief Justice's opinion is that it represents a compromise to preserve the Court's institutional stature.

II. INDIRECT REGULATION AND THE MONETIZATION OF GOVERNANCE

Institutionalism may be a prominent force behind Chief Justice Roberts's opinion, but it is not the opinion's only uniting feature. Despite their seeming inconsistency, the different pieces of his opinion in fact share a common theme: resistance to direct governmental compulsion in favor of indirect regulation through incentives and voluntary compliance.

Indeed, this anticompulsion theme surfaces constantly.¹¹⁵ In rejecting the Commerce Clause as a basis for the mandate, the Chief Justice repeatedly insisted that Congress lacks power "to compel" action that otherwise would not occur.¹¹⁶ Such arguments against the mandate are libertarian at their core, framed initially by a scholar who has argued for replacing the presumption of constitutionality with a presumption of liberty.¹¹⁷ Similarly, Chief Justice Roberts insisted that the potential loss of all Medicaid funds for not complying with the Medicaid expansion is not an "inducement" for states to participate but "a gun to the head."¹¹⁸ Such a draconian result is not a legitimate "incentive[]" but unconstitutional "compulsion."¹¹⁹ By contrast, according to the Chief Justice, a key feature of a tax is that it preserves choice: "[I]mposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice."¹²⁰ Thus, what fundamentally distinguishes Congress's tax and commerce powers is that "under the Commerce Clause, . . . Congress may simply command individuals to do as it directs," but under the tax power "Congress's authority . . . is limited to requiring an individual to pay money into the Federal Treasury, no

¹¹⁵ See Jeffrey Toobin, *Comment: To Your Health*, THE NEW YORKER (July 9, 2012), http://www.newyorker.com/talk/comment/2012/07/09/120709taco_talk_toobin ("[T]he key section of Roberts's opinion . . . was seemingly inspired more by Ayn Rand than by John Marshall . . .").

¹¹⁶ E.g., *NFIB*, 132 S. Ct. at 2586 (opinion of Roberts, C.J.) ("Congress has never attempted . . . to compel individuals not engaged in commerce to purchase an unwanted product."); *id.* at 2587 ("The individual mandate . . . compels individuals to *become* active . . ."); *id.* at 2589 ("Congress [cannot] . . . compel citizens to act as the Government would have them act."); *id.* ("The Framers gave Congress the Power to *regulate* commerce, not to *compel* it . . .").

¹¹⁷ See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 259–60 (2004). Professor Barnett was the main originator of the argument that the mandate was unconstitutional because it represented congressional regulation of inactivity. See Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581 (2010); Sheryl Gay Stolberg & Charlie Savage, *Vindication for Challenger of Health Care Law*, N.Y. TIMES, Mar. 27, 2012, at A1.

¹¹⁸ *NFIB*, 132 S. Ct. at 2604 (opinion of Roberts, C.J.).

¹¹⁹ *Id.* at 2602 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)) (internal quotation mark omitted); see also *id.* at 2602–03 (analogizing coercive spending to regulatory commandeering because states similarly have "no choice," *id.* at 2603, but to go along).

¹²⁰ *Id.* at 2600 (majority opinion).

more.”¹²¹ Moreover, “Congress may use its spending power to create incentives for States,”¹²² provided that “States . . . have a genuine choice whether to accept the offer.”¹²³ Once the Medicaid fund cutoff was limited to denying new Medicaid funding to states that refuse to expand, allowing the expansion provisions to stand meant that those states that “voluntarily” opt to participate can do so.¹²⁴

In short, by rejecting the mandate under commerce power but upholding it as a tax, and by precluding application of the Medicaid funds cutoff to preexisting funds but not invalidating the entire Medicaid expansion, Chief Justice Roberts sought to ensure that compliance with these measures is voluntary.¹²⁵ On this anticompulsion account, the opinion’s seeming inconsistencies are not so inconsistent after all. Instead, measures that would entail mandatory compliance are invalidated across the board. The Chief Justice’s uneven application of avoidance, severability, and formal and realist reasoning all can be seen as part of an effort to expand the range of individual and state choices.

This resistance to governmental compulsion has an antiregulatory feel, as regulation is often associated with mandatory governmental requirements. But characterizing the Chief Justice’s opinion as simply antiregulatory is inaccurate. Importantly, Chief Justice Roberts refused to preclude Congress from using its tax and spending powers for regulatory ends, provided Congress simply encourages compliance rather than compels it.¹²⁶ The truly antiregulatory *NFIB* opinion is instead the joint dissent. It not only rejected the mandate and Medicaid expansion on any terms but further insisted that the proper response whenever a “major provision” of an “omnibus enactment like the ACA” is unconstitutional is to invalidate the enactment in toto.¹²⁷ Given the crucial role that omnibus measures play today in getting legislation enacted, this approach would constitute a significant restriction on Congress’s ability to legislate.¹²⁸

¹²¹ *Id.*

¹²² *Id.* at 2602 (opinion of Roberts, C.J.).

¹²³ *Id.* at 2608.

¹²⁴ *Id.*

¹²⁵ A similar resistance to government compulsion, particularly compulsion aimed at individuals, was evident in *Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277, 2289–91 (2012), which expressed doubt that a system that allows a union to use compulsory union dues and requires nonmembers to opt out of paying amounts that are used to pay for the union’s political and ideological activities should be constitutional.

¹²⁶ See *NFIB*, 132 S. Ct. at 2596, 2599 (majority opinion); *id.* at 2602 (opinion of Roberts, C.J.).

¹²⁷ *Id.* at 2675 (joint dissent).

¹²⁸ See GLEN S. KRUTZ, *HITCHING A RIDE* 1–11 (2001) (describing the rise in omnibus legislation, particularly in conjunction with the budget process); BARBARA SINCLAIR, *UNORTHODOX LAWMAKING* 111–33, 154–56 (4th ed. 2012) (same).

In prioritizing incentives and voluntary compliance over direct compulsion, the Chief Justice's opinion accords with longstanding trends in regulatory governance. Over the last few decades, scholars have documented a move away from "command-and-control" regimes that impose detailed, mandatory requirements to flexible, "incentive-based" schemes that rely more on market mechanisms to achieve regulatory goals.¹²⁹ Accompanying this move is greater reliance on self-regulation and devolution, with regulated entities and states having more flexibility to design programs and the federal government playing more of a monitoring role.¹³⁰ Both the terms and extent of this shift, as well as its desirability, are matters of debate.¹³¹ Even a market-based approach that relies on tradeable emission permits involves direct regulation in the form of government specification of overall emission levels, and more traditional regulation often incorporates performance-based or outcome-based measures that allow for some flexibility.¹³² Moreover, command-and-control arrangements have hardly fallen by the wayside, and regulatory initiatives often contain both detailed regulatory requirements and incentive-based measures.¹³³ Yet whether or not it has led to a regulatory transformation, an emphasis on greater use of incentives and flexible regimes over detailed directives is evident in many contexts, and is incorpo-

¹²⁹ Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1174 (1998); see Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1235-52 (1995).

¹³⁰ See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 373-404 (2004); see also Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO L.J. 53, 64-65, 78-82 (2011) (contrasting minimalist systems that rely on market-based regulatory mechanisms with experimentalist systems that rely on decentralization, monitoring, continuous revision, and stakeholder participation as two different alternatives to command and control).

¹³¹ For just a sample of the substantial and now-dated debate over desirability of market-based approaches, which has often focused on environmental regulation, compare Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms*, 37 STAN. L. REV. 1267, 1271-72 (1985), which describes advantages of command-and-control regimes over incentive-based approaches, and Sidney A. Shapiro & Thomas O. McGarity, Comment, *Not So Paradoxical: The Rationale for Technology-Based Regulation*, 1991 DUKE L.J. 729, 729-30, 741-42, 747-51, which identifies some advantages of technology-based regulation over incentive-based approaches, with Bruce A. Ackerman & Richard B. Stewart, Comment, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1334 (1985), which defends market-based approaches. See generally IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* (1992).

¹³² See David M. Driesen, *Is Emissions Trading an Economic Incentive Program?: Replacing the Command and Control/Economic Incentive Dichotomy*, 55 WASH. & LEE L. REV. 289, 297-98 (1998).

¹³³ See Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 22-26 (2001).

rated in the Executive Order that has governed federal regulatory initiatives since the early 1990s.¹³⁴

Indeed, the individual mandate and the ACA as a whole are part and parcel of this trend. The irony of the struggle over the mandate is that requiring individuals to purchase insurance or pay a penalty was the creation of a conservative think tank and was advocated by Republicans as an alternative to President Clinton's proposed health care reforms.¹³⁵ Although the ACA contains many direct regulatory requirements and prohibitions, such as its limitations on the factors that insurance companies can use to set premiums and deny coverage, it is also a market-based regime. Rather than creating a national single-payer system of health care or health insurance, the ACA relies on private health insurance and seeks to improve consumers' market power through health exchanges and subsidies.¹³⁶ The ACA also reflects a move toward devolved regulation and away from centralized national control, with the states being expected to play a major role through the health exchanges, Medicaid expansion, and insurance regulation.¹³⁷ Indeed, for all the *Sturm und Drang* that the ACA has provoked, it is worth emphasizing how narrow the field of contestation is against the range of theoretically possible health reforms. Democrats were not willing to push for a public insurance option for fear that it might defeat the entire reform measure,¹³⁸ and today single-payer health insurance lives on only in the aspirations of Vermont.¹³⁹

By sustaining the mandate as a tax, Chief Justice Roberts not only preserved the viability of the ACA's market-driven approach but also forestalled any pressure to address the problem of the uninsured through a centralized government program like Medicare or Social Security. Such programs, supported through broad-based income taxes and run entirely at the national level, are plainly constitutional to-

¹³⁴ See Exec. Order No. 12,866 § 1(b)(3), (8), 3 C.F.R. 638, 639 (1993), *reprinted as amended in* 5 U.S.C. § 601 app. at 83–87 (2006); see also Exec. Order No. 13,563 § 4, 3 C.F.R. 215, 216 (2011) (encouraging agencies to consider regulatory approaches that preserve flexibility and choice).

¹³⁵ Ezra Klein, *Unpopular Mandate: Why Do Politicians Reverse Their Positions?*, NEW YORKER, June 25, 2012, at 30. The individual mandate was first proposed by Stuart Butler of the Heritage Foundation. See Stuart M. Butler, *A Framework for Reform, in* A NATIONAL HEALTH SYSTEM FOR AMERICA 35, 48–53 (Stuart M. Butler & Edmund F. Haislmaier eds., 1989).

¹³⁶ See, e.g., Brief for Petitioners (Minimum Coverage Provision) at 9–12, *Dep't of Health & Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11–398); WASH. POST, LANDMARK 66–69 (2010).

¹³⁷ See Metzger, *Federalism Under Obama*, *supra* note 110, at 573–81.

¹³⁸ See David M. Herszenhorn, *A Grand Achievement, or a Lost Opportunity?*, N.Y. TIMES, Mar. 25, 2010, at A21.

¹³⁹ Zach Howard, *New Bill Puts Vermont on Road to Single-Payer Health Care*, REUTERS (May 26, 2011), <http://www.reuters.com/article/2011/05/26/us-vermont-healthcare-idUSTRE74P61120110526>.

day.¹⁴⁰ They are also plainly emblematic of a national and collective commitment to meeting certain basic needs¹⁴¹ — more so than the ACA. Despite representing a huge national investment, the ACA downplays the scope of this commitment to securing access to health care by funneling the substantial financial resources involved through a market-based, individualized framework and through programs run by the states.¹⁴²

The Chief Justice's opinion erased the national and collective underpinnings of the ACA still further. No longer do individuals have an obligation to obtain insurance so as to help subsidize access to health insurance for all, or even so as to avoid potentially imposing costs on the national health care system. Instead, individuals have a choice to simply pay a tax, and Chief Justice Roberts suggested that they will (and should) make that choice based on financial self-interest.¹⁴³ Similarly, no longer do states have an obligation to expand their Medicaid programs to ensure that low-income families subsisting just above the poverty line have access to health care. Instead, they can choose to turn down the generous federal funding made available for this purpose and decide that their priorities lie elsewhere.¹⁴⁴

The Chief Justice's opinion also highlights another result of the turn to indirect regulation: the rise of money as a regulatory tool. To be sure, money has always been both at the core of how government operates and an important mechanism of national regulation.¹⁴⁵ Still,

¹⁴⁰ See, e.g., *Helvering v. Davis*, 301 U.S. 619, 634–36, 640–41, 645 (1937) (upholding Social Security old age benefits and taxes as within Congress's powers).

¹⁴¹ See MARTHA DERTHICK, *POLICY MAKING FOR SOCIAL SECURITY* 213–368 (1979) (describing Social Security's combined reliance on ideas of equity and adequacy, with equity represented by the fact that individuals must contribute to receive benefits when they retire and adequacy by the fact that aged individuals receive minimum income and support necessary to meet their needs, and noting the increased emphasis on adequacy beginning with early amendments to the program).

¹⁴² Cf. Theodore R. Marmor & Jerry L. Mashaw, *Understanding Social Insurance: Fairness, Affordability, and the "Modernization" of Social Security and Medicare*, 15 *ELDER L.J.* 123, 124–26, 129–32 (2007) (contrasting the collective understanding of fairness that underlies social insurance with the individualistic understanding of fairness that underlies market-based proposals for Social Security).

¹⁴³ See *NFIB*, 132 S. Ct. at 2595–96.

¹⁴⁴ See *id.* at 2601–02, 2607 (opinion of Roberts, C.J.). Several state governors have already announced they will not expand their Medicaid programs. See Michael Cooper, *Many Governors Are Still Unsure About Medicaid Expansion*, *N.Y. TIMES*, July 15, 2012, at A17.

¹⁴⁵ The importance of financial incentives as a regulatory tool is evident in the long history of federal regulatory taxes and the growth in conditional spending over the last century. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985) (noting that federal grants to states and localities grew from \$7 billion to \$96 billion in the twenty-five years before 1985). See generally LEE, *supra* note 39 (discussing several examples of regulatory taxes from the 1880s onward). Indeed, money is even a basic aspect of traditional command-and-control legislation, given that monetary fines and penalties are the predominant mechanisms of enforcement. See Driesen, *supra* note 132, at 323.

money appears to be playing a more dominant regulatory role today, with the federal government wielding government funds and monetary incentives to achieve its regulatory goals. Market-based approaches are all about harnessing regulated parties' financial interests, which can mean dispensing with those regulatory goals that do not map well onto private financial incentives in favor of those goals that do.¹⁴⁶ Government funds played a particularly overt role in the federal government's response to the recent financial crisis, with the federal government spending vast amounts on financial-industry bailouts and the economic stimulus.¹⁴⁷ Money also is increasingly the mechanism by which government regulates itself. Congress has turned to money as a means by which to rein in the federal administrative state, using appropriations riders to prohibit or delay regulatory initiatives instead of forestalling such initiatives through substantive legislation.¹⁴⁸ Governments at all levels are privatizing services and programs, with the stated aim of improving government programs through profit incentives, and often serving other, less transparent policy goals.¹⁴⁹ Privatization through government vouchers and subsidies in lieu of direct service provision represents an even more direct translation of government programs into a monetary form, often justified in part as a means of enhancing individual choice.¹⁵⁰

Government funds and financial incentives are particularly dominant when it comes to federal regulation of the states. This is in part a

¹⁴⁶ See Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 115–17 (1998) (noting this trade-off aspect of market-based approaches, as evidenced by the possibility that a market-based system for emissions regulation may create hot spots of high pollution unless supplemented with other constraints).

¹⁴⁷ Although money's centrality in these contexts was in part a reflection of the economic nature of the underlying problems, the federal government also leveraged its funds to achieve the specific outcomes it wanted and its broader policy goals. See Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 466–67, 518–23, 530–31, 536 (2009) (noting the federal government's use of financial leverage from control of government funds during the financial crisis); Olatunde C.A. Johnson, Essay, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154, 189–204 (2011) (analyzing ways in which the stimulus was implemented to advance racial equity goals); Metzger, *Federalism Under Obama*, *supra* note 110, at 587–93 (discussing the use of stimulus funds to achieve education goals).

¹⁴⁸ See Thomas O. McGarity, *Deregulatory Riders Redux*, 1 MICH. J. ENVTL. & ADMIN. L. 33, 36–39, 51–70 (2012).

¹⁴⁹ See Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 189–197 (2000) (discussing the regulatory potential of contracts); Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 718–19 (2010) (describing the often-hidden policy goals in privatization contexts); Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1451–53 (2003) (arguing for privatization because of benefits from profit incentives).

¹⁵⁰ See David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. 815, 818 (2004).

result of the federal government's longstanding reliance on the states to operate many federal programs,¹⁵¹ but it also stems from doctrinal developments under the Rehnquist Court. Congress's power to directly regulate the states was limited by new prohibitions on federal commandeering of state government, the revival of the Eleventh Amendment, and retractions in Congress's power under Section 5 of the Fourteenth Amendment.¹⁵² These limitations leave spending as the most obvious means by which the federal government can impose obligations on the states.¹⁵³ Federal grants to the states are already vast and are only getting bigger,¹⁵⁴ as the Medicaid expansion demonstrates. The federal government has also experimented with new funding structures, providing some funds through competitive grant processes rather than making them available to all states on a categorical or formula basis.¹⁵⁵ A prime example is the "Race to the Top" program that the Department of Education created using stimulus money, which led numerous states to change key aspects of their educational systems in order to win some part of an over \$4 billion pool of federal educational aid.¹⁵⁶

This rise in money's regulatory role creates a challenge for Chief Justice Roberts. On the one hand, buying regulatory compliance rather than ordering it accords with his resistance to compulsion. Those offered money can always turn it down; individuals and states can continue to engage in disfavored activities even if they face a financial price for doing so. As a result, anticompulsion instincts should en-

¹⁵¹ See Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 668–72 (2001) (describing federal reliance on the states to operate federal programs going back to the New Deal); see also Daniel J. Elazar, *Federal-State Collaboration in the Nineteenth-Century United States*, 79 POL. SCI. Q. 248, 249 (1964) (contending that cooperative federalism was established "in the first decades after the adoption of the Constitution"). But see Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619, 633–34 (1978) (contending that there is little evidence of cooperative federalism in the pre-1861 period).

¹⁵² See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (holding that Title I of the Americans with Disabilities Act was not congruent and proportional to remedying unconstitutional discrimination against disabled individuals and exceeds Congress's power under Section 5 of the Fourteenth Amendment); *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress cannot commandeer state officers); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996) (holding that the Eleventh Amendment prevents Congress from using its Article I powers to abrogate state sovereign immunity); *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that Congress cannot commandeer the states to enact its regulatory programs).

¹⁵³ See Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 499–504 (2003).

¹⁵⁴ See William T. Gormley, Jr., *Money and Mandates: The Politics of Intergovernmental Conflict*, 36 PUBLIUS 523, 527 tbl.1 (2006) (showing data demonstrating change in federal grants to the states in several policy areas from 1981–2005).

¹⁵⁵ See Metzger, *Federalism Under Obama*, *supra* note 110, at 590.

¹⁵⁶ See *id.*

courage the use of financial incentives in lieu of mandatory requirements. On the other hand, such incentives can be a potent force, and an unlimited ability to tax and spend for regulatory ends risks giving Congress a de facto capacity to compel. Put differently, if the goal is to constrain federal power and not simply redirect it into different forms, then money's rise as the *lingua franca* of governance necessitates going beyond restricting Congress's direct regulatory authority. Hence, to ensure that choice remains a realistic option, and not just a formal one, the Chief Justice had to both encourage and cabin the government's use of financial incentives.

Recognition of this challenge gives the Chief Justice's opinion a double-edged character. At the same time that he upheld the availability of tax and spending as indirect regulatory methods, Chief Justice Roberts also imposed new limits on their use: measures must preserve genuine choice in order to be constitutional under the tax and spending powers. In the spending context, this requirement entails invalidation of coercive conditions on federal funds, though the point at which funding conditions cross the line from persuasion to coercion is hardly clear. In the tax context, what genuine choice means is also murky. Two factors that the Chief Justice flagged as evidence that the mandate preserved choice were its limited financial burden and lack of punitive or additional legal consequences. He remarked that under the mandate "[i]t may often be a reasonable financial decision to make the payment rather than purchase insurance."¹⁵⁷ Both of these factors appear to be doctrinal innovations. Although previous tax power decisions have emphasized disproportionate size as a factor, the Court has found financial impositions to be taxes even though payment was surely not a realistic choice and even though failure to pay the tax was expressly deemed "unlawful."¹⁵⁸

Yet it is not clear the Chief Justice's effort to simultaneously encourage and cabin will work. If these limits on Congress's tax and spending powers turn out to have legs, they could undermine the viability of the indirect regulatory options that Chief Justice Roberts defends. Placing significant restrictions on funding conditions, or on what can count as a tax, risks rendering these financial inducements ineffectual as mechanisms for achieving regulatory aims. In response, Congress

¹⁵⁷ *NFIB*, 132 S. Ct. at 2596.

¹⁵⁸ See, e.g., *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 780–81 (1994) (noting that the high rate of a tax is relevant but not determinative in assessing whether the tax is punitive); *United States v. Kahriger*, 345 U.S. 22, 28 (1953) ("It is axiomatic that the power of Congress to tax is extensive and sometimes falls with crushing effect on businesses deemed unessential or inimical to the public welfare . . ."); *United States v. Doremus*, 249 U.S. 86, 90–93, 95 (1919) (sustaining under the tax power a measure making it unlawful for an individual to transfer opiates except by using Internal Revenue Service forms).

might resort to more directive measures under the commerce power, or opt for centralized programs run directly by the federal government and funded by broad-based taxes. But if these new tax and spending limits prove largely nominal, Congress will be able to regulate as it wants through money. This possibility was raised by Justice Ginsburg's suggestion that all Congress need do to avoid running afoul of *NFIB*'s coercion constraint is to "repeal and reenact."¹⁵⁹ The Chief Justice offered no robust response, which suggests that he was well aware that imposing meaningful judicial constraints on Congress's spending power may require going further than the Court did in *NFIB*.

In short, any serious effort to resist federal regulatory compulsion will require a sustained attack on federal power. Not only greater limitations on Congress's powers to tax and spend, but also greater retraction of its commerce power would be needed. Such an across-the-board curtailment of federal authority, however, would force a substantial change in national government and society. Among other things, core aspects of the national administrative state, including major federal regulatory schemes, could be called into constitutional question.¹⁶⁰ So far only Justice Thomas has suggested that the Court should impose such a transformation on the country.¹⁶¹

III. CONCLUSION: PREDICTING THE FUTURE

Two different impulses — institutionalism and anticomulsion — are thus at work in *NFIB*, and they produce two different predictions of the decision's future impact. If Chief Justice Roberts's anticomulsion concern proves vibrant and extends beyond limiting Congress's ability to directly regulate, *NFIB* could stand as the first step toward a major retraction of federal power. But any effort to significantly constrain Congress will again put the Court's institutional legitimacy into question. If the institutionalism concern ultimately prevails, it will be difficult for the Court to impose meaningful limits on Congress.

Predicting *NFIB*'s future impact entails choosing between these two distinct accounts of the Chief Justice's opinion and of Chief Jus-

¹⁵⁹ *NFIB*, 132 S. Ct. at 2629 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹⁶⁰ See, e.g., Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 379–81 (2005) (contending that limitations on commerce and spending powers could substantially impact federal environmental legislation, though environmental protection might benefit); Herbert Hovenkamp, Essay, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213, 2226–28 (1996) (contending that denying Congress the authority to regulate intrastate activities that substantially affect interstate commerce would call into question federal civil rights and antitrust laws and the Fair Labor Standards Act).

¹⁶¹ See *NFIB*, 132 S. Ct. at 2677 (Thomas, J., dissenting) (rejecting Congress's power to regulate intrastate economic activity that substantially affects interstate commerce).

tice Roberts as a jurist. Is he fundamentally a libertarian, more incrementalist perhaps than his conservative brethren, but nonetheless arriving at the same place in the end? Or is he at heart an institutionalist, willing to put the legitimacy needs of the Court (and his legacy as Chief Justice) over his own ideological leanings? I suspect that Chief Justice Roberts's institutionalist impulse will prove triumphant when it comes to the scope of federal power. Indeed, it is not at all clear that there is substantial sentiment on the Court for curbing the national government in favor of the states. Not only did no other Justice sign on to Justice Thomas's narrow view of the commerce power, but several members of the Court — including Chief Justice Roberts — have shown themselves quite willing to sustain claims of federal preemption.¹⁶² Strikingly, in *Arizona v. United States*,¹⁶³ decided a few days before *NFIB*, the Court by a 5–3 vote upheld broad federal authority to preempt state law in the immigration context.¹⁶⁴ This suggests that *NFIB* will not be a foretaste of a newly retrenched federal government, but instead at most a crimping at the edges.¹⁶⁵

A limited impact seems particularly likely with respect to the Commerce Clause. *Wickard*'s reaffirmance by all the Justices suggests that Congress can regulate instances of inactivity that occur within an overall context of existing economic activity, and such activity should not be hard to find.¹⁶⁶ Where the decision may have a significant effect is on federal-state relationships based on conditional spending. Many other federal measures contain fund cut-offs similar to Medic-

¹⁶² Preemption claims were sustained in seven, or fifty-eight percent, of the twelve preemption cases the Roberts Court heard from the 2005 through 2008 Terms, with Chief Justice Roberts and Justice Alito the most frequent supporters of preemption. See Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 10 n.30 (2011) (discussing data compiled by Michael Greve and Michael Petrino); see also Michael Greve, Presentation at the Northwestern University Law School Judicial Education Program Symposium: Preemption in the Rehnquist and Roberts Courts (Dec. 7, 2009), available at http://www.law.northwestern.edu/jep/symposia/documents/JEP_CJ_2009_Greve.pdf. While in the 2008 Term the Court rejected preemption claims in three contentious cases, in the 2010 Term it sustained preemption claims in three out of the five preemption cases it heard. See Metzger, *supra*, at 9–13 (discussing the 2008 Term preemption decisions); Ernest A. Young, "The Ordinary Diet of the Law": *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 283–302 (discussing the 2010 Term preemption decisions).

¹⁶³ 132 S. Ct. 2492 (2012).

¹⁶⁴ *Id.* at 2498–2501. Justice Kagan recused herself from the case.

¹⁶⁵ Oddly enough, what seem most threatened by *NFIB* are conservative efforts to replace centralized programs run by the federal government with market-based alternatives that require individual action, such as proposals to partially privatize Social Security by scaling back Social Security taxes and requiring individuals instead to put those funds in private savings accounts. See Paul Starr, *Supreme Surprise*, AM. PROSPECT (June 29, 2012), <http://prospect.org/article/supreme-surprise> (noting potential implications for conservative proposals to privatize Social Security).

¹⁶⁶ See *Wickard v. Filburn*, 317 U.S. 111, 124–25 (1942); sources cited *supra* note 91.

aid's and involve substantial amounts of money.¹⁶⁷ State claims of coercion seem likely to surface, whether or not they succeed. At a minimum, *NFIB* appears to give the states greater leverage in resisting the imposition of new conditions attached to extant federal funds.

States' ability to exercise this leverage in court, however, is likely to remain constrained. Again, the history of federal education funding is instructive. Faced with tough performance requirements under NCLB that they could not meet, many states refused to comply and the Department of Education responded by granting them waivers.¹⁶⁸ These waivers not only exempt states from core features of NCLB, but they also add new requirements — requirements that the Obama Administration previously made the basis for grants under the stimulus-funded Race to the Top program and that the Administration would like to have incorporated in new NCLB reauthorizing legislation.¹⁶⁹ Claims of coercion would seem harder to make when the federal government has stated its willingness to bend statutory requirements, and even harder once a state has applied for and been granted a waiver. Moreover, foregoing a likely waiver in favor of uncertain success in court on a coercion claim is an unappealing proposition for a state.¹⁷⁰

Such waivers are hardly unique to NCLB and education funding.¹⁷¹ Notably, waivers are also endemic in the Medicaid context,

¹⁶⁷ See, e.g., 20 U.S.C. § 6311(g)(2) (2006) (granting the Secretary of Education discretion to withhold a state's federal education funding for failure to comply with the No Child Left Behind Act); *supra* p. 101 (describing the performance and testing requirements associated with federal K–12 educational funding, which totaled \$70.7 billion in fiscal year 2010); see also 29 U.S.C. § 794(a) (2006) (prohibiting any program or activity receiving federal funding from discriminating against individuals due to disability); 42 U.S.C. § 2000d-1 (2006) (authorizing the termination or denial of federal funding for violation of Title VI of the Civil Rights Act of 1964).

¹⁶⁸ See Motoko Rich, *'No Child' Law Whittled Down by White House*, N.Y. TIMES, July 6, 2012, at A1; see also Alyson Klein, *Six More States, District of Columbia Get NCLB Waivers*, EDUC. WK. (July 19, 2012, 12:01 AM), http://blogs.edweek.org/edweek/campaign-k-12/2012/07/six_states_arizona_kansas_michi.html (noting that thirty-two states and the District of Columbia have been granted NCLB waivers and three states' applications are still pending).

¹⁶⁹ See Sean Cavanagh, *NCLB Waivers Point to National Curriculum, Report Argues*, EDUC. WK. (Feb. 10, 2012, 12:40 PM), http://blogs.edweek.org/edweek/state_edwatch/2012/02/nclb_waivers_encourage_national_curriculum_report_argues.html (noting critics' claim that both the NCLB waivers and the Race to the Top program pressure states to adopt multistate curriculum standards and tests); see also Sam Dillon, *Obama to Waive Parts of No Child Left Behind*, N.Y. TIMES, Sept. 22, 2011, at A19 (describing waiver plan as freeing states from NCLB if they embrace President Obama's education agenda).

¹⁷⁰ Coercion likewise seems hard to claim under a competitive grant program like Race to the Top, where the very terms of the program underscore that no state can legitimately claim an entitlement to federal funds and grants can be made on a non-recurring basis. See generally Paul Manna & Laura L. Ryan, *Competitive Grants and Educational Federalism: President Obama's Race to the Top Program in Theory and Practice*, 41 PUBLIUS 522 (2011).

¹⁷¹ For a discussion of the increasing use of waivers under the Obama Administration, see David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver* (July 9, 2012) (unpublished manuscript) (on file with the Harvard Law School Library).

where twenty-eight states and the District of Columbia rely on HHS waivers to operate their Medicaid programs in a way that deviates from federal statutory requirements.¹⁷² The ACA itself contains a waiver provision, under which states could seek a waiver from basic requirements — including the requirement that their citizens abide by the mandate — if they offer an alternative approach that would ensure equivalent coverage of the uninsured without increasing the federal deficit.¹⁷³ Perhaps, therefore, *NFIB* will presage not a reduction in federal spending conditions on the states but a transformation of spending programs into a more discretionary guise. If so, the true winner might be not the states but the President. Greater discretion, whether in the form of waivers or competitive grants, means that executive branch officials have more control over the shape of cooperative federal-state programs. This dynamic is clear with respect to education, where waivers and competitive grants have allowed President Obama to redirect federal education policy toward his own priorities.¹⁷⁴

The real lesson to be gleaned from the NCLB waivers, however, is in their illumination of an alternative — and by some measures, more successful — strategy that states may use to respond to federal legislation they find onerous and overreaching. Whereas the ACA generated litigation that resulted in an assertion of direct, judicially enforced federalism, the NCLB waiver program allowed states to signal their refusal to comply and wait for the political branches of the federal government to respond. This administrative route yielded no broad pronouncements on the scope of federal power as in *NFIB*, nor as many opportunities for political grandstanding, but produced similarly effective substantive relief and greater state input into the shape of the resulting programs.

States now refusing to participate in the ACA reforms, whether by expanding Medicaid or running health exchanges, might want to learn from this example. Although they succeeded in challenging mandatory Medicaid expansion in *NFIB*, they may be better able to craft modern-day federalism to their liking in the administrative arena than in the courtroom. Indeed, the decision's main import may be in enhancing states' negotiating position with federal agencies over the shape of cooperatively run programs, as the potential for litigation over whether funding conditions are coercive may well give them more leverage.

¹⁷² See *Waivers*, MEDICAID.GOV, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/Waivers.html?filterBy=1115#wavers> (last visited September 29, 2012) (listing the states currently participating in the § 1115 program, which allows alternative approaches to Medicaid financing).

¹⁷³ 42 U.S.C. § 18052 (Supp. IV 2010).

¹⁷⁴ See Rich, *supra* note 168, at A1.

Chief Justice Roberts and the rest of the Court should take note as well. In a world where federal-state relationships are forged through administrative interactions, primary responsibility for protecting federalism inevitably falls to the political branches.¹⁷⁵ The courts still have an important role to play, but often it takes the form of reviewing administrative decisions with federalism implications rather than directly enforcing federalism constraints in the first instance.¹⁷⁶ Ironically, then, if *NFIB* pushes the federal government away from legislatively mandated funding conditions and toward greater administrative discretion in cooperative federalism programs, its assertion of the Court's primacy in policing constitutional federalism may turn out to have the opposite effect.

¹⁷⁵ See Metzger, *Federalism Under Obama*, *supra* note 110, at 616–19.

¹⁷⁶ *Id.*