Not So Unprecedented: A Review of UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE by Josh Blackman

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I. Introduction

In his book, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE, Professor Josh Blackman presents a detailed account of the court battle to defeat the Patient Protection and Affordable Care Act of 2010 (ACA) (in popular terminology Obamacare) from the perspective of the challengers to the Act. Given his personal connections to the lawyers who mounted the constitutional challenge, Blackman gives us an inside-look at the strategy choices, and the highs and lows, of events surrounding the multiple cases involved in the ACA litigation.

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1 JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE (Public Affairs Books 2013). Professor Blackman is an Assistant Professor of Law at South Texas College of Law/Houston. The book has received rave reviews both from law professors on the left, such as Laurence Tribe, Carl M. Loeb University Professor and Professor of Constitutional Law, Harvard Law School, who has said, “This will surely be recognized as the definitive account of the [ACA litigation]”, and those on the right, such as Randy Barnett, Carmack Waterhouse Professor of Legal Theory, of Georgetown University Law Center, who has said, “Unprecedented is the definitive account of the historic constitutional challenge to Obamacare.” See Praise and Reviews for Unprecedented (available at www.unprecedentedcase.com/reviews).

2 See, e.g., id. at 305-07 (Professor Blackman lists many persons in the “Acknowledgments” section of the book, including Randy Barnett, Carmack Waterhouse Professor of Legal Theory, of Georgetown University Law Center; Todd Gaziano of the Heritage Foundation; and Ilya Shapiro of the Cato Institute, all associated with the ACA litigation and the conservative legal movement).
Professor Blackman’s account includes three major conclusions: (1) the ACA was unprecedented in a number of ways;³ (2) despite the Supreme Court eventually voting to uphold almost all of the ACA, the litigation was, in many respects, a substantial victory for the conservative legal movement;⁴ and (3) to the extent Chief Justice Roberts may have changed his position in the case sometime between his initial vote following oral argument and his final decision, it was likely the product of a desire to preserve long-term court legitimacy against a background of liberal political and media pressure.⁵

The intent of this review is to challenge each of these three conclusions, presenting the argument that: (1) the ACA, while a major piece of legislation, is not that unprecedented;⁶ (2) the litigation outcome was a substantial defeat for the conservative movement, while coming remarkably close to victory;⁷ and (3) the likely change in Chief Justice Roberts’ position was due more to the dynamics of internal Court draft-opinion writing, not outside political and media pressure.⁸ This last conclusion is based on the view that Chief Justice Roberts’ initial position likely was to strike down the individual mandate, but accept the United States government’s severability analysis, which would strike down the mandate, the required coverage of preexisting conditions, and the community

³ See infra Part IIA.
⁴ See infra Part IIB.
⁵ See infra Part IIC.
⁶ See infra Part IIIA.
⁷ See infra Part IIIB.
⁸ See infra Part IIIC.
pricing rules, but save the rest of the ACA. This would result, as Justice Kagan described it at oral argument, as “half a loaf is better than no loaf.”

Faced with a conservative critique that such a severability analysis was flawed and unworkable in practice, this left Roberts with a choice to join the four other Republican-appointed Justices (Scalia, Kennedy, Thomas, and Alito) and strike down the Act in its entirety, or find a way to join the four Democrat-appointed Justices (Ginsburg, Breyer, Sotomayor, and Kagan) and uphold the mandate, and thereby avoid a difficult severability problem.

To the consternation of the other conservatives on the Court, Roberts chose the second course.

II. Professor Blackman’s Conclusions

As noted in the Introduction, Professor Blackman’s discussion of the events surrounding the litigation of the Affordable Care Act includes three major conclusions: (1) the ACA was unprecedented in a number of ways; (2) despite the Supreme Court eventually voting to uphold almost all of the ACA, the litigation was, in many respects, a substantial victory for the conservative legal movement; and (3) to the extent Justice Roberts may have changed his position in the case sometime between his initial vote following oral argument and his final decision, it was likely the

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10 Id. at 12.

11 See National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2668-77 (2012) (joint opinion of Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (severability analysis of the joint dissent, concluding that if the individual mandate and the threat on Medicaid expansion were unconstitutional, the entire Act must be struck down as unconstitutional).

12 Id. at 2593-600 (Roberts, C.J., opinion for the Court) (individual mandate is constitutional under Congress’ power to tax).
product of a desire to preserve long-term court legitimacy against a background of liberal political and media pressure. Part II of this review will summarize each of these conclusions in turn.

A. The ACA is Unprecedented in Many Ways

Regarding the first major point, Professor Blackman notes that the ACA was unprecedented in terms of the legislative process that enacted it without a single Republican vote, the widespread and swift mobilization of citizens’ groups to oppose it, and the legal challenge to overturn it.\textsuperscript{13} As he states:

\begin{quote}
The individual mandate was unprecedented. Never before had Congress compelled individuals who chose to do nothing to buy a product. \\
The legislative process to enact Obamacare was unprecedented. Never before had such a monumental and transformational law been enacted so quickly with no support from the minority party. All previous landmark legislation was passed with strong bipartisan support. \\
The groups that opposed the law and rallied around the Constitution were unprecedented. Never before had constitutional social movements emerged and gained steam so quickly.\textsuperscript{14}
\end{quote}

Professor Blackman also discusses the machinations surrounding the passing of the ACA, particularly the use of the Senate reconciliation procedure to require only a majority of votes, not a filibuster-proof 60 votes, to get passed in the Senate the final parts of the Act.\textsuperscript{15} Blackman notes:

\begin{quote}
Once Senate Democrats lost their sixtieth vote [because of Republican Scott Brown’s election on January 19, 2010 in Massachusetts to replace the seat previously held by Democrat Senator Ted Kennedy], Senate Majority Leader Harry Reid could not pass any new versions of the [health] reform bill. . . . The easiest solution was for the House to simply pass the Senate bill. However, the House did not have the votes because members did not like many of its provisions.
\end{quote}

\textsuperscript{13} BLACKMAN, \textit{supra} note 1, at 25-79 (Chapter entitled “Part II: Unprecedented (January 21, 2009-March 23, 2010)).

\textsuperscript{14} \textit{Id.} at 300-01.

\textsuperscript{15} \textit{Id.} at 69-70.
. . . House Democrats devised a different parliamentary maneuver. . . . First, the House would pass the Senate bill, along with a separate act containing a number of "fixes" that remedied the problems that House Democrats had with the Senate bill. . . . Second, the president would be able to sign that bill [the original Senate bill], as it had cleared both the House and the Senate. Third, after the president had signed it into law, the Senate would pass a reconciliation bill accepting the changes in the House’s other bill [the “fixes”]. Critically, under Senate rules, a "reconciliation" would require only fifty-one votes rather than sixty. Then the president would sign the [“fixes”] bill, which had separately passed both houses, into law. In this way a House-Senate conference would be avoided, and the Senate would not need to revisit the ACA [which would have required sixty votes to pass something coming out of a House-Senate conference, which the Senate, after Scott Brown’s election, did not have].

This Democratic strategy was played out successfully, and President Obama signed the Patient Protection and Affordable Care Act of 2010 into law on March 23, 2010, and the Health Care and Education Reconciliation Act of 2010 into law on March 30, 2010.

B. The End Result of the Litigation Was a Substantial Victory for the Conservative Movement

Professor Blackman’s second main conclusion, one shared by Professor Randy Barnett, Carmack Waterhouse Professor of Legal Theory, of Georgetown University Law Center, in his Foreword to Blackman’s book, is that despite substantially losing in the Supreme Court in National Federation of Independent Business v. Sebelius (hereinafter NFIB), the litigation strategy and the events surrounding it were a substantial victory for the conservative legal movement. In his Foreword, Professor Randy Barnett notes six important victories for the conservative cause:

First, we prevailed in establishing that the federal government lacks the power to compel people to engage in economic activity. . . .

Second, we were vindicated in our claim that the government’s authority to solve problems that affect the “national economy” is not a blank check for the expansion of federal power. . . .

\[16\] Id.

\[17\] 132 S. Ct. 2566 (2012).
Third, we established that Congress may not simply invoke the Necessary and Proper Clause to do an end-run around the limits of its commerce power. . . .

Fourth, we showed that Congress cannot avoid the limits the Constitution places on its powers to govern by simply calling something a “tax” after a law is enacted. . . . [Although Chief Justice Roberts upheld the individual mandate in the ACA as a tax,] he denied that a punitive tax that had the effect of mandating activity, which is beyond its commerce power, could simply be upheld by later calling the mandate a “tax.” Instead, he recognized a new, but limited, power to tax inactivity. So on this front, too, we scored a partial but significant victory.

Fifth, to be constitutional, any such tax must be low enough to be noncoercive and preserve the choice to conform or pay the fine. . . .

Sixth, we succeeded in showing that Congress’ power to compel states to accept federal money can be coercive and unconstitutional. Now the federal government will have to find more conciliatory means to engage the states through cooperative programs. No longer can Congress put a gun to the heads of the states and tell them, “Your money or your life.” This last victory was perhaps the most unexpected, but most resounding, win.18

Professor Blackman summarizes these successes this way:

[F]or the first time ever, limits have been placed on Congress’ power to condition its monetary grants to the states. . . .

. . . NFIB showed that the Supreme Court is willing to police the outer bounds of the federal government’s power, in terms of both federalism and enumerated powers, with the aim of preserving individual liberty. . . .

. . .

Future challenges to the scope of federal power are now less likely to be scoffed by the legal establishment. Movements will continue to advance understandings of constitutional norms consistent with a federal government of enumerated powers. . . .

[P]erhaps mostly importantly, NFIB put the government on notice that it will need to justify further expansions of federal power. . . . The government tried to argue in the lower courts that the ACA was already authorized by New Deal cases that gave broad deference to Congress’s powers. These efforts failed.19

18 BLACKMAN, supra note 1, at xii-xiv (Foreword by Randy Barnett).
19 Id. at 294-96.
Professor Blackman also notes that the visibility of these issues raised by the litigation helped to galvanize the conservative movement, particularly the Tea Party faction. Blackman states: “[T]he Republican Party rallied around this case at both the federal and state levels, uniting to oppose this law. In less than two years, a constitutional argument went from ‘off-the-wall’ (crazy) to ‘on-the-wall’ (plausible), ushered in by one of the strongest constitutional social movements in a generation – the Tea Party.”

C. Reasons for a Possible Shift in Chief Justice Roberts’ Position in the Case

There has been much speculation following the Supreme Court’s decision in NFIB concerning whether Chief Justice Roberts changed his position in the case sometime between his initial vote at conference following oral argument and his final decision. Regarding whether Roberts actually changed his position, Blackman reminds us:

On July 1, 2012, just three days after the decision in NFIB v. Sebelius, [CBS News Correspondent] Jan Crawford released a bombshell story. She reported that at the conference Roberts “initially sided with the Supreme Court’s four conservative justices to strike down the heart of President Obama’s health care reform law.” Roberts had agreed at the conference that Congress did not have the Commerce Clause power to enact the mandate, and “aligned with the four conservatives” to find the mandate unconstitutional on Commerce Clause grounds. Crawford reported that the chief justice was “less clear on whether . . . the rest of the law must fail.” Other issues, such as severability and the Medicaid expansion, were still in play.22

20 Id. at 300.

21 Any Internet search suing the key words “Roberts”, “Change”, and “Obamacare” will reveal multiple hits. See generally Todd C. Peppers, Of Leakers and Legal Briefers: The Modern Supreme Court Law Clerk, 7 Charleston L. Rev. 95, 95-98 (2012) (discussing events after the NFIB decision, suggesting that institutional norms at the Court mean that it is unlikely that any law clerks did the leaking in this case).

22 BLACKMAN, supra note 1, at 220. This report was given extra credibility based on Jan Crawford’s long-time association with Justice Clarence Thomas and his wife, Ginni Thomas. See, e.g., Charles Lane, Court’s Slimy Leaks About John Roberts, Washington Post (July 5, 2012) (“Who are the Cassius and Brutus inside the court, creeping up behind the chief justice with their verbal daggers? I wouldn’t know. I do know that CBS’s reporter, Jan Crawford, is a fine journalist whose
Professor Blackman speculates on why, if true, Roberts might have changed his vote. Following oral arguments in the case on March 26-28, 2012, there was naturally a flood of comments, both by political figures and political/legal pundits, about how the Supreme Court should rule. Naturally, most comments from Democrats or left-leaning pundits supported the constitutionality of the ACA; most comments from Republicans and conservative-leaning pundits thought the entire ACA should be struck down.\textsuperscript{23} From the conservative perspective, the liberal commentary was a not-so-thinly-veiled attempt to influence Supreme Court decisionmaking. Blackman notes:

On May 22, 2012, Kathleen Parker’s article, “The Public Trial of Justice Roberts” was published in the Washington Post. “Novelist John Grisham could hardly spin a more provocative fiction: The president and his surrogates mount an aggressive campaign to intimidate the chief justice of the United States, implying ruin and ridicule should he fail to vote in a pivotal case according to the ruling political party’s wishes. If only it were fiction.” She alleged that the president was waging a “not-so-stealth” campaign to influence the Supreme Court” that was “obnoxious, if not unethical.” Parker closed with a pep talk to the chief justice: “its up to the chief justice to hold the bar high.”\textsuperscript{24}

Other conservative commentators and pundits quickly joined the fray.\textsuperscript{25} A typical article, by conservative columnist George Will, summarized the conservative position. Blackman states:

\begin{quote}
[O]n May 25, 2012, under the headline “Liberals Put the Squeeze to Justice Roberts” in his syndicated column, George Will claimed that progressives were “waging an embarrassingly obvious campaign, hoping [Roberts] will buckle beneath the pressure of their disapproval and good relationship with Justice Clarence Thomas and his wife, Tea Party booster and sometime Daily Caller correspondent Ginni Thomas, is widely known around the Supreme Court.”
\end{quote}

\textsuperscript{23} See BLACKMAN, supra note 1, at 221-31.

\textsuperscript{24} Id. at 228.

\textsuperscript{25} Id. at 228-31.
declare Obamacare constitutional. . . . They hope to secure it by causing Roberts to worry about his reputation and that of his institution.\textsuperscript{26}

This was based on a twin set of arguments. From legal commentator Jeffrey Rosen, of \textit{The New Republic}, came the observation, “[I]f the Roberts Court strikes down health care reform by a 5-4 vote, then the chief justice’s stated goal of presiding over a less divisive Court will be viewed as an irredeemable failure.”\textsuperscript{27} From Jan Crawford came the observation that other journalists have “suggested that if Roberts struck down the mandate, it would prove he had been deceitful during his confirmation hearings, when he explained a philosophy of judicial restraint.”\textsuperscript{28} Blackman concludes:

Chief Justice Roberts had to decide whether he wanted to swallow that bitter pill if he were to strike down the ACA. No doubt he was well aware of the statements of the president and others, especially since, “as Chief Justice, [he] is keenly aware of his leadership role on the court, and he also is sensitive to how the court is perceived by the public,” as Crawford put it. But we may never know for sure whether those statements had an impact on the chief justice.\textsuperscript{29}

We do know the final result in the case, which is that Chief Justice Roberts voted to uphold the individual mandate under Congress’ power to tax. Blackman speculates: “Roberts knew that there would be ‘hard feelings’ from his vote as he prepared to circulate his draft opinion by June 1. Yet he apparently chose to save the law in the short term in order to preserve what he believed to be the best interests of the Court in the long term.”\textsuperscript{30}

\begin{flushright}
\textsuperscript{26} \textit{Id.} at 230. \\
\textsuperscript{27} \textit{Id.} at 227 (citing a Jeffrey Rosen column). \\
\textsuperscript{28} \textit{Id.} (citing a report by Jan Crawford). \\
\textsuperscript{29} \textit{Id.} \\
\textsuperscript{30} \textit{Id.} at 233.
\end{flushright}
III. Counterarguments to Professor Blackman’s Conclusions

In Part III, this review responds to each of Professor Blackman’s conclusions stated in Part II. This Part indicates there are strong arguments to challenge each of Professor Blackman’s conclusions.

A. The ACA Was Not That Unprecedented

While it is a major piece of legislation, the passing of the Patient Protection and Affordable Care Act of 2010 (ACA) was not particularly unprecedented, either in terms of process or substance. Regarding process, Professor Blackman accurately notes that the House’s “fixes” to the Act passed the Senate under a “reconciliation” bill with only a majority of 50 votes required, bypassing the filibuster requirement of 60 votes. Reconciliation is an accepted and legitimate form of legislation when dealing with budget issues. For example, both of President George W. Bush’s tax-cutting bills, the Economic Growth and Tax Relief Reconciliation Act of 2001, and the Jobs and Growth Tax Relief Reconciliation Act of 2003, were passed by reconciliation, with only a bare majority required for passing. With regard to the ACA, the original Senate bill was passed with 60 votes in the Senate, as Blackman acknowledges. The requirement that any “fixes” in the reconciliation bill be germane to budget issues limited dramatically the changes the House could make in the

31 Id. at 69-70.


33 BLACKMAN, supra note 1, at 58-59.
Senate bill. But consistent with legislative process, the Democrats abided by those limitations.\textsuperscript{34} Thus, both President Bush’s and President Obama’s signature domestic accomplishments were achieved by using the reconciliation process.

It is also not unprecedented for a major piece of legislation to have little, or no, bipartisan support. No Republicans in the House or Senate voted for President Clinton’s tax-raising Omnibus Budget Reconciliation Act of 1993.\textsuperscript{35} Virtually no Democrats voted for President Bush’s Jobs and Growth Tax Relief Reconciliation Act of 2003.\textsuperscript{36} Nonetheless, both were passed by majorities in the House and Senate, and signed by the President, thus satisfying the constitutional requirements of Bicameralism and Presentment for legislation to be valid.\textsuperscript{37}

While it is true that introduction of Social Security, Medicare, and Medicaid had greater bipartisan support, as Professor Blackman notes,\textsuperscript{38} those Acts were passed at a time when the two

\textsuperscript{34} See Health Care and Education Reconciliation Act of 2010, Pub.-L 111-152, 124 Stat. 1029 (March 30, 2010) (available at http://www.dpc.senate.gov/healthreformbill/healthbill61.pdf) (listing provisions of the Act, which deal with budgetary/fiscal matters regarding coverage under the ACA; Medicare; Medicaid; fraud, waste, and abuse; revenue; higher education funding; and eliminating certain special financial deals given to certain states, such as Senator Ben Nelson of Nebraska’s “Cornhusker Kickback.”).


\textsuperscript{36} Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub.-L 108-27, 117 Stat. 752 (May 28, 2003) (available at https://www.govtrack.us/congress/bills/108/hr2) (noting the House vote on final passage was 222-203, with 218 Republicans and only 4 Democrats voting for the bill. The Senate on final passage was 51-49, with 48 Republicans and only 3 Democrats voting for the bill).

\textsuperscript{37} U.S. Const. Art. I, § 7 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; if he approve he shall sign it . . . .”).

\textsuperscript{38} BLACKMAN, supra note 1, at 283 (“The Social Security Act of 1935 was supported by 77 Republicans in the House, who joined 288 Democrats. In the Senate, 15 Republicans joined 60
major political parties were not as ideologically pure as they are today. From the 1930's through the 1960's, the Democratic party had a liberal wing, particularly in the North, and a more conservative Dixiecrat wing in the South. The Republican party had a conservative wing in the South and West, but a more moderate Rockefeller Republican wing in the Midwest and Northeast. In such a situation, bipartisan action is easier and will be more common. Following President Nixon’s Southern Strategy of the late 1960's to lure conservative Southern Dixiecrats to the Republican party, the Republican party has gradually become more conservative over the last 50 years. This has resulted in a number of Rockefeller Republicans deciding to vote for Democratic candidates. The Democratic Party today is thus more liberal than it was in the 1960's, since most Southern conservatives have left the party, and moderate Midwest and Northeasterners have replaced them. Given these shifting political realities, the desire to have most major legislation be passed in a bipartisan manner is unrealistic, although perhaps possible in isolated cases. The experience with Democrats... The Social Security Amendments of 1965, which created Medicaid and Medicare, passed the House by a vote of 307-116, with 70 Republicans voting in favor. This monumental health care legislation cleared the Senate by a vote of 70-24; 13 Republicans crossed the aisle.

For example, as Professor Blackman notes, the Civil Rights Act of 1964 got passed because a coalition of liberal Democrats and moderate Republicans overcame the Dixiecrat filibuster of the Act. Id. (“A bold coalition of 27 Republicans and 44 Democrats united to break a segregationist-led filibuster [of the Civil Rights Act of 1964].”).

See, e.g., Ian F. Haney Lopez, Is the “Post” in Post-Racial the “Blind” in Colorblind?, 32 Cardozo L. Rev. 807, 812 (2011) (“They point to the triumph of Richard Nixon's ‘Southern strategy,’ whereby the Republican Party gained ascendance by attracting previously Democratic voters from the South as well as the working and middle classes nationally . . . .”).

See generally Michael W. McConnell, Moderation and Coherence in American Democracy, 99 Cal. L. Rev. 373, 375-76 (2011) (discussing the evolution since 1960 where “the two parties have evolved from miscellaneous coalitions of regional interests spanning the ideological spectrum into two unified and ideologically coherent political parties . . . . [This] helps to explain why significant legislation in recent years is typically adopted on nearly a party-line vote.”).
immigration reform suggests how difficult bipartisanship is in the modern political climate. In today’s political climate, any political rule that change can only come in a bipartisan manner would favor conservatives, who resist change, rather than following the normal democratic understanding that, if constitutional, majority will controls.

Regarding substance, a concern with ensuring individuals, no matter what their economic circumstances, have access to basic social services is not unprecedented. Social Security, Medicare, Medicaid, the Food Stamp program, the Social Security Disability program, and other social welfare enactments underscore that fact. Of course, from one perspective, every time a new program is adopted it is “unprecedented,” to the extent that it did not exist before. But that would make all new programs, including each of the social welfare programs listed above, equally “unprecedented.” Such a definition would rob the term “unprecedented” of any real meaning.

More narrowly, the argument could be made that requiring individuals to do something, rather than regulating their chosen action, is “unprecedented.” But that is not true. Numerous congressional acts require individual action, such as requirements to file a tax return, to register for


43 See generally Taunya Lovell Banks, A Few Random Thoughts About Socio-Economic Rights in the United States in Light of the 2008 Financial Meltdown, 24 Md. J. Int’l L. 169, 176-77, 181 (2009) (discussing existing long-term entitlement programs like Social Security, Food Stamps, Medicaid, and Medicare, and noting, “During the 2008 U.S. presidential election, and even before the financial meltdown became apparent, there were serious discussions about, and strong public support of “universal” healthcare. . . . [A]ccess to food, housing, and healthcare, and not simply the opportunity to obtain them, is a universal requirement for ensuring human dignity.”).

Of course, it is true that all of the above requirements do not involve the Commerce Clause, but other clauses in the Constitution, where congressional power is phrased more broadly (power to tax, raise armies, provide for organizing and training of State Militias, and right to a jury trial, rather than regulating commerce). This was the first time Congress had tried to require individuals...


45 The Militia Act of 1792, Second Congress, Session I, Chapter XXVIII (Passed May 8, 1792) (“I. . . . That each and every free able-bodied white male citizen of the respective States, resident therein, who is or shall be of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia . . . . That every citizen, so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch, with a box therein, to contain not less than twenty four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of power and ball; or with a good rifle, knapsack, shot-pouch, and power-horn, twenty balls suited to the bore of his rifle, and a quarter of a power of power.”).

46 Compare U.S Const. Art. I, § 8, cl.1 (“Power To lay and collect Taxes”); cl.12 (“To raise and support Armies”); cl.13 (“To provide and maintain a Navy”); cl.16 (“To provide for organizing,
to purchase objects through a Commerce Clause justification. There is perhaps something to the argument, first made to my knowledge by Professor Randy Barnett, that the word “regulate” in the Commerce Clause has some limiting meaning. He noted, “The term ‘regulate’ appears fifty-five times in all the records we have of the deliberations in the states [ratifying the Constitution]. In every case where the context makes the meaning clear, the term connotes ‘subject to a rule’ or ‘make regular’ in the sense that ‘if you want to do something, here is how you should do it.’” Chief Justice Roberts, in a viewed shared by the other four Republican-appointed Justices on the Court, similarly concluded the mandate was not a “regulation” of commerce, but rather “mandating” commerce, since it required individuals to purchase insurance, rather than telling them, in Professor Barnett’s words, “if you want to do something, here is how you should do it.” Since the text of the Commerce Clause only gives Congress the power “To regulate Commerce,” these five Justices concluded that the mandate could not be authorized by the Commerce Clause.

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48 Id. at 142.

49 Id. at 2586-93 (Roberts, C.J., announced the judgment of the Court, and delivered the opinion of the Court with respect to Part I, II, and III-C); id. at 2642-43 (joint opinion of Scalia, Kennedy, Thomas & Alito, JJ., dissenting). The Court’s Commerce Clause jurisprudence will likely not adopt Professor Barnett’s additional argument that “regulate” does not include the power to “prohibit.” See Barnett, supra note 47, at 139-42. Lots of regulations banning certain commercial activities, such as prostitution, gambling, or buying marijuana or other illegal drugs, are routinely viewed by the Court as constitutional. See, e.g., Gonzales v. Raich, 545 U.S. 1 (2005) (federal Controlled Substances Act, banning sale and consumption of marijuana and other illegal drugs, constitutional as applied to intrastate growers and users of marijuana for medical purposes under California law); Caminetti v. United States, 242 U.S. 470 (1913) (interpreting the Mann Act, which
That narrow holding, however, does not mean the government’s regulation was unprecedented in terms of its impact. It merely means that there are some limitations under the Commerce Clause where Congress cannot regulate. One limitation, under National Federation of Independent Business v. Sebelius, is that Congress cannot mandate commerce. A second limitation, under United States v. Morrison, is that under the “substantial affects” part of Commerce Clause doctrine Congress must regulate in some respect economic activity, not pure non-economic activity. A third limitation, under United States v. Lopez, is that under the “substantial affects” part of Commerce Clause doctrine Congress cannot regulate if the activity does not have a “substantial affect” on interstate commerce. As discussed in Part IIIB(1), these limitations are not likely to have much effect in practice in terms of limiting Congressional power to regulate under the Commerce Clause.

prohibits transportation of women across state lines for the purpose of prostitution); Champion v. Ames, 181 U.S. 321 (1903) (constitutional for Congress to ban the carrying of a lottery ticket across state lines).

50 132 S. Ct. 2566, 2586-93 (2012) (Roberts, C.J., announced the judgment of the Court, and delivered the opinion of the Court with respect to Part I, II, and III-C).

51 529 U.S. 598, 613 (2000) (Congress may not regulate “noneconomic, violent criminal conduct based solely on that conduct’s aggregate affect on interstate commerce.”).

52 514 U.S. 549, 563-68 (1995) (No “substantial affects” on interstate commerce from the mere possession of a gun around a school). The government alleged in Lopez that possession of a gun in a school zone may result in violent crime, which could impact the insurance rates in the community; or reduce the willingness of individuals to travel to that community and thus spend money in that community; or handicap the learning environment, resulting in less educated graduates, which might result in a less productive citizenry, which would have a substantial affect on the Nation’s economic well-being over the long-term. Id. at 563-64. Faced with such attenuated chains of causation, Chief Justice Rehnquist concluded in Lopez that if the government’s argument was accepted “it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where states historically have been sovereign. Thus, if we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.” Id. at 564.
B. *NFIB* Was Not a Substantial Victory for the Conservative Legal Movement

Despite Professor Barnett’s and Professor Blackman’s conclusions in Part IIB above, the result of the ACA litigation was no substantial victory for the conservative movement for four reasons: (1) the limitation on the Commerce Clause power imposed in *NFIB* is not likely to be an issue in any future case, as Congress is not likely to have a sufficient motivation to require individuals to purchase products, since in all other areas there is not the same free-rider problem that exists in the health care industry; (2) because of the focus on the Commerce Clause in the *NFIB* litigation, the arguments regarding the taxing power were undeveloped, and the argument regarding the Due Process Clause was not brought at all to the Supreme Court, thus not helping to develop conservative legal doctrine in those areas; (3) the striking down of the threat in the ACA that a state would lose its existing Medicaid funding if it did not agree to ACA expansion of Medicaid will likely have limited impact in any later Spending Clause case; and (4) the sense, shared by Professors Barnett and Blackman, that the limitations on the Commerce Clause and the Spending Clause made in *NFIB* are significant achievements may have, if shared by Chief Justice Roberts, made it easier for Roberts to vote the way he did and not view himself as a “traitor” to the conservative movement.

(1) Limited Impact of the Restrictions on the Commerce Clause in *NFIB*

As we now know, in *National Federation of Independent Business v. Sebelius*,\(^{53}\) a 5-Justice majority voted to uphold the constitutionality of the individual mandate provision of the Patient Protection and Affordable Care Act of 2010, so-called Obamacare. These five Justices included the four Democrat-appointed Justices to the Court (Justices Ginsburg, Breyer, Sotomayor, and Kagan), and Chief Justice Roberts. The four Democrat-appointed Justices would have upheld the mandate

provision, which requires individuals to purchase health insurance by 2014 or pay a penalty, under the Commerce Clause. In their view, the insurance mandate was a regulation of commerce, since at some point in their lives every individual will need health care, and thus individuals by being alive should be viewed as participating in the health care market.54

As noted above,55 Chief Justice Roberts rejected this view, and joined the four other Republican-appointed Justices (Justices Scalia, Kennedy, Thomas, and Alito) to hold that the individual mandate could not be ruled constitutional under the Commerce Clause. Unlike these four other Justices, however, Chief Justice Roberts then adopted the judicial restraint maxim stated in *Ashwander v. Tennessee Valley Authority*,56 that “[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” Applying that maxim, Chief Justice Roberts concluded that the mandate could be viewed as a tax on individuals who do not have health insurance, since “functionally” the provision operates as a tax, is collected by the IRS like a tax, and the amount of the payment varies depending on a person’s income, just like a tax. Thus, the mandate was constitutional under Congress’ broad power to tax.57 The Court has always held that Congress has

54 *Id.* at 2609 (Ginsburg, J., joined by Sotomayor, J., and joined as to Parts I, II, III, IV by Breyer & Kagan, JJ., concurring in part, concurring in the judgment in part, and dissenting in part).

55 See supra text accompanying note 49.


57 *NFIB*, 132 S. Ct. at 2593-600 (Roberts, C.J., announced the judgment of the Court, and delivered the opinion of the Court with respect to Part I, II, and III-C).
the power to tax generally, and is not limited to taxing to advance other congressional powers in Article I, § 8.58

Regarding the Commerce Clause, it is not clear how important the distinction between “regulating” versus “mandating” commerce will be in later cases. Congress had never before passed a statute mandating commerce, and Congress would not likely have done that here, except for the unique circumstances that individuals who do not get health insurance impose costs on the rest of society by showing up at emergency rooms and getting treatment which the rest of society will then pay. The government estimated in the *NFIB* litigation that this cost-shifting raises insurance rates for individuals who are insured by $1,000 a year.59 Given this unique set of circumstances, which does not apply to any other industry, concerns about whether the federal government would start requiring people to buy GM cars to aid the auto industry,60 or buy broccoli to aid their health,61 were never plausible concerns, albeit good fodder for cable news and other media outlets. The real future risk along these lines is that some states or cities might impose intrusive commercial regulations on citizens, like the New York City commercial ordinance banning soda drinks larger than 16 ounces at New York City eateries, street carts, and stadiums.62 The Commerce Clause analysis is no barrier


60    BLACKMAN, *supra* note 1, at 42, 94-96.

61    *Id.* at 92-96

62    *See* New York State Coalition of Hispanic Chambers of Commerce v. New York City Dep’t of Health and Mental Hygiene, 110 A.D.3d 1, 970 N.Y.S.2d 200 (N.Y.A.D. 1 Dep’t, 2013) (city ordinance invalid because Board of Health exceeded bounds of its lawfully delegated authority when it promulgated the rule), *affd*, 2014 WL 2883881 (N.Y. Court of Appeals 2014).
to that because, as noted in Part IIIB(2), states and cities have general “police powers” to pass laws on any topic they wish.

Given this political reality, the future impact of NFIB is likely to be similar to the impact of the other recent limitations on the federal government’s power to regulate under the Commerce Clause: minimal. Although the civil rights violation based on gender motivated violence was struck down in 2000 in Morrison, Congress has continued to pass a Violence Against Women Act, using Congress’ Spending Clause power to make grants to, or otherwise aid, states, local communities, and Native American tribes in dealing with violence against women. Given the greater enforcement resources of states and local communities versus the limited number of federal enforcement agents, this approach may be as effective as the original Violence Against Women Act. Following Lopez in 1995, Congress amended the Gun-Free School Zones Act of 1990 to provide that it now regulates only the possession of guns around schools as long as the gun has moved in

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63 United States v. Morrison, 529 U.S. 598, 617-18 (2000) (under the Court’s precedents, “The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”).

64 See Violence Against Women Reauthorization Act of 2013, Pub.-L 113-4, 127 Stat. 54 (March 7, 2013) (Title I: Enhancing Judicial and Law Enforcement Tools to Combat Violence Against Women; Title II: Improving Services for Victims of Domestic Violence, Dating Violence, Sexual Assault, and Stalking; Title III: Services, Protection, and Justices for Young Victims of Violence; Title IV: Violence Reduction Practices; Title V: Strengthening the Healthcare System’s Response to Domestic Violence, Dating Violence, Sexual Assault, and Stalking; Title VI: Safe Homes for Victims of Domestic Violence, Dating Violence, Sexual Assault, and Stalking; Title VII: Economic Security for Victims of Violence; Title VIII: Protection of Battered Immigrants; Title IX: Safety for Indian Women; Title X: Safer Act (Debbie Smith grants for auditing sexual assault evidence backlogs; reports to Congress, reducing the rape kit backlog, oversight and accountability, and sunset); Title XI: Other matters (sexual abuse in custodial settings, anonymous online harassment, stalker database, federal victim assistants reauthorization, child abuse training programs for judicial personnel and practitioners reauthorization); Title XII: trafficking victims protection).
interstate commerce. Since virtually every gun has moved in interstate commerce, that amendment undermines the limitation in *Lopez* on Congress’ ability to regulate mere possession of guns around schools. Nevertheless, the revised statute would likely be found constitutional under Congress’ Commerce Clause power to regulate the instrumentalities of, that is, things moving in, interstate commerce.

Further, *NFIB* did not involve any change in the burden of proof, despite Professor Blackman’s view to the contrary. Professor Blackman states, “From this point forward, and barring a change in the current balance on the Court, it will be the government that must bear the burden of justifying departures from the existing system of constitutional power.” This is likely just not true.

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65 See Bethany Blackstone, *An Analysis of Policy-Based Congressional Responses to U.S. Supreme Court’s Constitutional Decisions*, 47 Law & Soc’y Rev. 199, 217 (2013) (“The [Gun-Free School Zones Act] as amended required that the government prove that a firearm has “moved in or the possession of such firearm otherwise affects interstate or foreign commerce.” Statements in the *Congressional Record* make clear that supporters saw the jurisdictional element as a means to save their policy while satisfying the rule announced in *Lopez*.”).

66 See Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 Case W. Res. L. Rev. 921, 927-54 (1997). See generally Champion v. Ames, 181 U.S. 321 (1903) (constitutional for Congress to ban the carrying of a lottery ticket across state lines as a regulation of items crossing state lines, and thus moving in interstate commerce); Gonzales v. Raich, 545 U.S. 1, 33-42 (2005) (Scalia, J., concurring in the judgment) (Congress may “regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.”), citing, inter alia, *Shreveport Rate Cases*, 234 U.S. 342, 351-52 (1914). As indicated in *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), Congress’ power under the Commerce Clause exists in three kinds of cases, not merely one: (1) regulating “the use of the channels of interstate commerce,” as in the lottery case, *Champion v. Ames*; (2) protecting “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities,” as in *Gonzales* and *Shreveport Rate Cases*; and (3) regulating “those activities that substantially affect interstate commerce,” that part of the Commerce Clause at issue in *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (“The first two categories of authority may be quickly disposed of. . . . Thus, if [the regulation] is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.”).

67 BLACKMAN, *supra* note 1, at 297.
In 2010, a five-Justice majority of Chief Justice Roberts, and the four more liberal-minded Justices on the Court at the time (Justices Stevens, Ginsburg, Breyer, and Sotomayor), adopted a broad approach to federal legislative power in *United States v. Comstock*. In *Comstock*, adopting a minimum rationality review approach, the Court upheld 18 U.S.C. § 4248, which authorizes the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released, as long as the original confinement was within Congress’ power, either authorized by express constitutional text, such as for “counterfeiting” or “treason,” or a criminal law in furtherance of some other power, such as mail fraud statutes as related to the post office power. The Court also indicated that the issue under the Commerce Clause of whether Congress could rationally think some activity has a substantial affect on interstate commerce, or the issue of whether some regulation is Necessary and Proper, is governed by the same minimum rationality review. Concurring in the judgment, Justices Kennedy and Alito indicated their belief that the Necessary and Proper Clause analysis, and the Commerce Clause analysis, may well require more justification than a mere Equal Protection rational relationship test. In dissent, Justice Thomas, joined by Justice Scalia, was even more forceful in rejecting the majority’s deferential analysis. However, the 5-Justice majority of Chief Justice Roberts and the four more liberal members of the Court – Justices Stevens, Ginsburg, Breyer, and Sotomayor – adopted this view.


69 *Id.* at 1957-65.

70 *Id.* at 1956-57.

71 *Id.* at 1966-68 (Kennedy, J., concurring in the judgment); *id.* at 1968-69 (Alito, J., concurring in the judgment).

72 *Id.* at 1975-77 (Thomas, joined by Scalia, J., in all but Part III-A-1-b, dissenting).
There is no indication in Chief Justice Roberts’ opinion in *NFIB* that he has shifted his views. Indeed, his use of the deference-to-government maxim of upholding government action if there is any reasonable ground for doing so underscores his continued posture of deference to government action.\(^{73}\)

In addition, Chief Justice Roberts’ language upholding the mandate as a tax is filled with deference-to-government references about the power of Congress under the Taking Power.\(^{74}\) Even in concluding the individual mandate could not be justified under the Commerce Clause or Necessary and Proper Clause, Chief Justice Roberts indicated that he was applying long-standing doctrine to the issue.\(^{75}\) It was only because even under that deferential approach the mandate was not a “regulation” of commerce, but rather a “mandate” on commerce, that it could not justified under the Commerce Clause.\(^{76}\) Even Justice Kennedy’s question at oral argument about the burden

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\(^{73}\) *See supra* text accompanying notes 56-57.

\(^{74}\) *See, e.g., NFIB*, 132 S. Ct. at 2600 (Roberts, C.J., announced the judgment of the Court, and delivered the opinion of the Court with respect to Part I, II, and III-C) (“The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.”).

\(^{75}\) *Id.* at 2591-92 (“As our jurisprudence under the Necessary and Proper Clause has developed, we have been very deferential to Congress's determination that a regulation is ‘necessary.’”).

\(^{76}\) *Id.* at 2593 (“Just as the individual mandate cannot be sustained as a law regulating the substantial effects of the failure to purchase health insurance, neither can it be upheld as a “necessary and proper” component of the insurance reforms. The commerce power thus does not authorize the mandate.”). *See also supra* text accompanying note 49 (mandate not a “regulation” of commerce).
of proof in this kind of case did not go as far as to recommend shifting the burden. And, of course, Kennedy ended up in the dissent.

(2) The Due Process and Taxing Power Arguments in the Case

As indicated above, the real future risk along the lines of mandating commerce is that some states or cities might impose intrusive commercial regulations on citizens, not the federal government. The federal Commerce Clause analysis is no barrier to that, because states and cities have general “police powers” to pass laws.

The better argument against any such mandate, applicable to federal, state, and local regulation, involves asking if the mandate violates due process of law. The due process argument was not pushed by the litigants in the NFIB litigation. Perhaps there was a concern that if the individual mandate in the ACA were struck down as a violation of due process that would render

77 See Official Transcript of Oral Argument, Department of Health and Human Services v. Florida 11-12 (March 27, 2012) (available at www.supremecourt.gov) (“KENNEDY: Could you help – would help me with this? Assume for the moment – you may disagree. Assume for the moment that this is unprecedented. This is a step beyond what our cases have allowed, the affirmative duty to act to go into commerce. If that is so, do you not have a heavy burden of justification? I understand that we must presume laws are constitutional, but, even so, when you are changing the relation of the individual to the government in this, what we can stipulate is, I think, a unique way, do you not have a heavy burden of justification to show authorization under the Constitution?”).

78 NFIB, 132 S. Ct. at 2642 (2012) (joint opinion of Scalia, Kennedy, Thomas & Alito, JJ., dissenting)

79 See supra text accompanying notes 59-62.

80 See United Haulers Ass'n v. Massachusetts, 550 U.S. 330, 342 (2007), citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985) (“The States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.”) (internal quotation marks omitted); Slaughter-House Cases, 83 U.S. 36, 62 (1873) (States traditionally have had great latitude under their police powers to legislate as “to the protection of the lives, limbs, health, comfort, and quiet of all persons”), quoting Thorpe v. Rutland & Burlington R.R. Co., 27 Vt. 140, 149 (1855).
unconstitutional both the ACA and the similar “Romneycare” individual mandate in Massachusetts. Instead of being able to argue that only President Obama signed unconstitutional legislation, that result would have also implicated former Massachusetts Governor Mitt Romney, the Republican nominee in the 2012 Presidential election.

Perhaps also the argument was not raised because it would have accentuated the difference between Republican talking points and constitutional decisionmaking. For example, requiring every person to “buy and consume broccoli at regular intervals” \(^{81}\) might violate due process, as not being rationally related to any legitimate government interest. So, too, might be a ban on soda drinks larger than 16 ounces at New York City eateries, street carts, and stadiums.\(^{82}\) The due process argument is weaker in the health care context, however, since requiring everyone to buy health insurance to avoid a problem of free-riders is easier to defend as rational.\(^{83}\) While some individuals subject to the mandate might never need emergency care, and thus are not part of the cost-shifting problem, there is no way in advance to tell who those individuals would be, and thus it is rational to regulate the entire class.\(^{84}\) As the NFIB litigation played out, the decision not to push the due


\(^{82}\) The constitutionality of this regulation is currently being litigated. New York State Coalition of Hispanic Chambers of Commerce v. New York City Dep’t of Health and Mental Hygiene, 110 A.D.3d 1, 970 N.Y.S.2d 200 (N.Y.A.D. 1 Dep’t, 2013) (city ordinance invalid because Board of Health exceeded bounds of its lawfully delegated authority when it promulgated the rule), leave to appeal granted, 2013 WL 5658229 (N.Y. Oct. 17, 2013).

\(^{83}\) See Florida ex rel. Atty. Gen. v. United States Dept. of Health and Human Serv., 648 F.3d 1235, 1363 (11th Cir. 2011) (Marcus, J., concurring in part and dissenting in part) (“Congress rationally found that the individual mandate would address the powerful economic problems associated with cost shifting from the uninsured to the insured and to health care providers . . . .”).

\(^{84}\) See, e.g., New York City Transit Authority v. Beazer, 440 U.S. 568, 590-94 (1979) (since no way to determine who would be heroin drug recidivists, and who would not, rational to ban all
process argument during litigation created an increasing anomaly between the social concern of many mainstream Republicans that the individual mandate was depriving individuals of their liberty by requiring them to purchase insurance, and the legal strategy which did not push much the constitutional due process argument that “no person shall be deprived of life, liberty, or property, without due process of law.”

Another consequence of focusing on the Commerce Clause argument in the NFIB litigation was that the argument regarding justifying the ACA under the taxing power was undeveloped. The four-Justice dissent rejected viewing the mandate as a tax, because it was imposed as a penalty for not procuring insurance, and was called that by Congress in passing the Act. That argument, however, depended on what Congress called the legislation, not its actual impact. Chief Justice Roberts correctly noted in his opinion that the Court is not bound by what Congress calls a piece of legislation in determining whether there is constitutional power to regulate, but rather by its actual effect.

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persons in methadone treatment program from Transit Authority jobs).

85 U.S. Const. Amend. V (No person . . . shall be deprived of life, liberty, or property, without due process of law); Amend. XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”).

86 NFIB, 132 S. Ct. at 2653 (joint opinion of Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (“We never has classified as a tax an exaction imposed for violation of the law, and so too, we never have classified as a tax an exaction described in the legislation itself as a penalty. . . . [W]e have never – never – treated as a tax an exaction which faces up to the critical difference between a tax and a penalty, and explicitly denominates the exaction a ‘penalty.’ Eighteen times in [the ACA] Congress called the exaction [in the Act] a ‘penalty.’”).

87 Id. at 2594-95, 2598 (Roberts, C.J. opinion for the Court). As Chief Justice Roberts stated, “The ‘question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.’ Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948).” Id. at 2598. For statutory interpretation purposes, of course, the Court is bound by congressional intent, which is why the individual mandate was not viewed as a tax for purposes of interpreting the Anti-Injunction Act. Id. at 2594 (“It is of course true that the Act describes the
payment as a ‘penalty,’ not a ‘tax.’ But while that label is fatal to the application of the Anti-Injunction Act, it does not determine whether the payment may be viewed as an exercise of Congress’s taxing power. It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress’s choice of label on that question. That choice does not, however, control whether the exaction is within Congress’s constitutional power to tax.”  

Chief Justice Roberts’ argument in NFIB is substantially the same. As Roberts noted, while Congress did not call it a tax, but instead called it a penalty (perhaps for political reasons of having pledged not to raise taxes on the middle class, although Justice Roberts did not speculate on that), the mandate actually operates as a tax on individuals without health insurance, and the Supreme Court should not be misled (“faked out”) by the fact the word “penalty,” instead of the word “tax,” was used in the Act.  

Justice Scalia himself had acknowledged that actual effects are the test of constitutionality in an earlier case. In *Clinton v. City of New York*, Justice Scalia concluded that the Line-Item Veto Act was not actually an unconstitutional Line-Item Veto, but rather an impoundment provision, because it operated as an impoundment, despite the terminology Congress used in passing the Act. Justice Scalia stated, “The title of the Line Item Veto Act, which was perhaps designed to simplify for public comprehension, or perhaps merely to comply with the terms of a campaign pledge, has succeeded in faking out the Supreme Court. The President’s action it authorizes in fact is not a line-item veto.”  

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89 *Id.* at 469.  

90 *Id.* at 2593-600 (Roberts, C.J., opinion for the Court) (individual mandate is constitutional under the taxing power, as the mandate functionally operates like a tax, see *supra* text accompanying notes 56-58). Regarding speculating into congressional motives as to why perhaps the word
If the mandate is viewed as a tax, then a number of other issues exist. Is it a direct tax, which must be apportioned equally, or an indirect tax?91 Even if an indirect tax, is the individual mandate penalty an impermissible coercive tax to regulate indirectly what you cannot regulate under the other provisions in the Constitution, including the Commerce Clause?92 Chief Justice Roberts touched on these arguments briefly in his opinion.93 The four-Justice dissent noted in passing that there might be arguments on these issues.94 However, because the litigation was never focused on the taxing power, but on the Commerce Clause power, this discussion was not developed fully by either

“penalty” was used rather than “tax,” Chief Justice Roberts noted, “More often and more recently we have declined to closely examine the regulatory motive or effect of revenue-raising measures. See Kahringer, 345 U.S. [22], 27-31 [1953] (collecting cases).” NFIB, 132 S. Ct. at 2599.

91 Under U.S. Const. Art. I, § 9, cl. 4, “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.” As Chief Justice Roberts stated in his opinion, “This requirement means that any ‘direct Tax’ must be apportioned so that each State pays in proportion to its population. . . . Even when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a ‘head tax’ or a ‘poll tax’), might be a direct tax.” NFIB, 132 S. Ct. at 2598. Since that time, as Roberts noted, the Court has taken the position that taxes on real estate and personal property are direct taxes. Id.

92 See Bailey v. Drexel Furniture Co. (U.S. Reports Title: Child Labor Tax Case), 259 U.S. 20 (1922) (10% tax on all goods manufactured, as long as one good was produced using child labor, unconstitutional as a coercive attempt to use the Taxing Power to regulate child labor). At the time, Congress could not regulate child labor under the Commerce Clause, as regulations of manufacturing (making products) were held not to be regulations of commerce (buying and selling products). See Hammer v. Dagenhart, 247 U.S. 251 (1918). Today, of course, Congress can regulate child labor as an economic activity which has a substantial effect on interstate commerce. See United States v. Darby, 312 U.S. 100, 116-17 (1941), overruling Hammer v. Dagenhart, 247 U.S. 251 (1918).

93 NFIB, 132 S. Ct. at 2595-96 (Roberts, C.J., opinion for the Court) (tax not coercive since “for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more”); id. at 2599 (“A tax on going without health insurance does not fall within any recognized category of a direct tax.”).

94 Id. at 2655 (joint opinion of Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (“[T]he meaning of the Direct Tax Clause is famously unclear, and its application here is a question of first impression that deserves more thoughtful consideration than the lick-and-a-promise accorded by the Government and its supporters. . . .")
the majority or dissenting opinions. It is likely too late to bring up due process or tax arguments now. The constitutionality of the ACA has been decided, and a majority of the Court is not likely to revisit either due process or tax arguments as applied to the ACA in any future case.

(3) Limited Impact of the Spending Clause Decision

An additional aspect of *NFIB* involved whether the ability of the federal government to deny a state all Medicaid funding if a state chose not to join in Medicaid expansion constituted an unconstitutional coercive condition on spending. Although no spending condition had been held coercive in the post-1937, New Deal era, seven Justices held that threatening to remove all Medicaid funding, which might involve anywhere from 10% to 40% of a state’s budget, was a coercive threat. Only Justices Ginsburg and Sotomayor disagreed with this conclusion.

A 5-Justice majority of Chief Justice Roberts, and Justices Ginsburg, Breyer, Sotomayor, and Kagan, concluded that the threat to remove all funding could be severed from the Act, and the rest of the Act remain. The 4-Justice joint dissent concluded that this threat rendered the entire

95 *Id.* (“One would expect this Court to demand more than fly-by-night briefing and argument before deciding a difficult constitutional question of first impression.”).

96 It is perhaps useful to note that, under the ACA, the Internal Revenue Service is prevented from using their normal enforcement powers to collect the tax for failure of individuals to obtain insurance: criminal indictments for nonpayment, including the possibility of jail time, penalties with respect to untimely payment, or liens on property to collect taxes dues. *See id.* at 2596 (Roberts, C.J., for the Court), *citing* 26 U.S.C.A. § 5000A(g)(2). Thus, the only practical remedy is for the government to deduct the penalty amount from any refund check to which the person would normally be entitled. If the penalty is greater than the refund amount, the government can take the penalty out of the next year’s withholding payments.


98 *Id.* at 2641-42 (Ginsburg, J., joined by Sotomayor, J., as to Part V).

99 *Id.* at 2607-08 (Roberts, C.J., joined by Breyer & Kagan, J., as to Part IV); *id.* at 2642 (Ginsburg, J., joined by Sotomayor, J., as to Part V).
Medicaid expansion unconstitutional. That conclusion was easier for the dissent because of their view that the individual mandate was also unconstitutional, and thus severing out both the mandate and the Medicaid expansion threat left the statute more of a mere shell. Thus, they ruled the entire Act unconstitutional. Once the mandate provision is constitutional under the Taxing power, the majority’s analysis is consistent with the Court’s usual practice to sever out provisions, if possible.

Under the Act, the federal government will pick up 100% of the costs of Medicaid expansion in the first three years, declining to 90% of the costs after that. States will now be able to make the decision whether to participate in Medicaid expansion without having to worry that their existing Medicaid funds might be terminated if they do not participate. The decision will also likely increase the number of cases where states will challenge other federal government conditions as being

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100 Id. at 2667-69 (joint opinion of Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

101 Id. at 2671-77.

102 Id. at 2607-08 (Roberts, C.J., joined by Breyer & Kagan, JJ., as to Part IV) (noting that the “chapter of the United States Code that contains [the Medicaid threat] includes a severability clause confirming that we need go no further. That clause specifies that ‘[i]f any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other person or circumstances shall not be affected thereby.’ . . . [W]e do not believe Congress would have wanted the whole Act to fall, simply because some [states] may choose not to participate [because the Medicaid threat of withdrawing all funds is now unenforceable as being coercive]’); id. at 2642 (Ginsburg, J., joined by Sotomayor, J., as to Part V) (even absent the statutory command, the Medicaid threat should be severed out, and the rest of the Act enforced as written, because “when a court confronts an unconstitutional [provision], its endeavor must be to conserve, not destroy, the legislature’s dominant objective. See, e.g, Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320, 328-30 (2006).”). See generally Chadha v. Immigration and Naturalization Service, 462 U.S. 919, 931-34 (1983) (unconstitutional legislative veto provision in Chadha, and by analogy 200-plus other statutes with legislative veto provisions, severable, while rest of delegated power constitutional).

103 The precise figures are the federal government will pay all of the costs of expanding Medicaid under the reform until 2016, 95% in 2017, 94% in 2018, 93% in 2019, and 90% thereafter. See Health Care and Education Reconciliation Act of 2010, Section 1201 (Federal funding for States), Pub.-L 111-152, 124 Stat. 1029 (March 30, 2010).
coercive.\textsuperscript{104} It remains to be seen whether any such challenges will be successful, or will the Court view the massive spending threat regarding Medicaid funding as \textit{sui generis}.\textsuperscript{105} We do know that no court has ever held that the threat in the No Child Left Behind Act to remove federal support for education unless a state adopted national performance testing standards was unconstitutionally coercive.\textsuperscript{106}

\textbf{(4) Possible Impact of a Sanguine View of the Result in \textit{NFIB} on Chief Justice Roberts’ Vote}

As discussed in Part II(B), Professor Blackman and Professor Barnett share the view that the limitations on the Commerce Clause and Spending Clause achieved in \textit{NFIB} represent significant victories for the conservative legal movement. That view, if shared by Chief Justice Roberts while he was deciding the case, may have made it easier for Chief Justice Roberts to vote the way he did and not view himself as a “traitor” to the conservative cause. It is naturally mere speculation, but had those in the conservative movement strongly shared my view that the kinds of limitations achieved in \textit{NFIB} are ephemeral, illusory, or pyrrhic, that might have changed the dynamics somewhat in terms of how Chief Justice Roberts ultimately decided the case.

\begin{footnotesize}
\textsuperscript{104} See, e.g., Houston Chronicle, \textit{Health care ruling cited in air appeal}, B1 (August 2, 2012) (attorneys for Texas claim it is coercive for the Environmental Protection Agency to threaten Texas with construction bans on power plants, refineries, and other large industrial facilities unless Texas passes a plan to control emissions of gases linked to global warning).


\textsuperscript{106} See generally \textit{id}. at 612-29. As the author notes, “Examination of the financial terms on No Child Left Behind should lead to the conclusion that the law does not constitute dragooning under either the plurality’s analysis or the joint dissent’s.” \textit{Id}. at 621. Further, the federal government routinely waived requirements of the No Child Left Behind Act to ensure that states would not be denied funding, thus making the program even less coercive in practice. \textit{Id}. at 616.
\end{footnotesize}
In addition, following *NFIB*, some conservative commentators have argued that the result in the case is not that great of a loss, since once it begins to be implemented, the flaws in the ACA will redound to the benefit of Republican candidates, and eventually Obamacare can be defunded, repealed, or substantially replaced by regular democratic means.107 The future will tell whether this prediction is true or not. Once an entitlement, with government subsidies, takes effect, it may prove very difficult to cancel the program. Senator Ted Cruz of Texas may have been right in his stated view that unless you defund or delay Obamacare before October 1, 2013, the date when the federal and state exchanges opened for business, you will never get rid of it.108 That attempt to defund or delay, of course, failed.

C. Any Change in Voting Not Likely the Product of Media, But Internal Court Opinion Writing

As Professor Blackman accurately notes, there is substantial circumstantial evidence that Chief Justice Roberts changed his position between his initial vote in conference and the final opinion.109 Blackman also notes Jan Crawford’s report that Chief Justice Roberts’ initial position likely was to strike down the individual mandate, but that the United States government’s severability analysis, which would strike down the mandate, the required coverage of preexisting conditions, and the community pricing rules, but save the rest of the ACA, was still “in play.”110 Given that there were eventually 7 votes on the Court to hold unconstitutional the threat in the ACA


110 *Id.* at 220 (quoting a report by Jan Crawford).
to remove all of a state’s Medicaid funding if the state did not participate in Medicaid expansion,\textsuperscript{111} it probably was clear early on after oral argument that the Medicaid threat was going to be declared unconstitutional.

If this analysis is right, then based on the other Justices’ eventual votes in the case, this would have meant that Chief Justice Roberts carried the controlling vote following oral argument: his view on the unconstitutionality of the individual mandate would have 5 votes (Roberts, Scalia, Kennedy, Thomas, and Alito); and his view on the unconstitutionality of the Medicaid threat had 7 votes (Roberts, Scalia, Kennedy, Thomas, Breyer, Alito, and Kagan). Being in the majority on each, Chief Justice Roberts would have the authority to assign writing the opinion to whomever he wished, and as Professor Blackman suggests, based on Jan Crawford’s reporting, he likely reserved it “for himself.”\textsuperscript{112}

The issue of severability would have been more up-in-the-air, however. What became the joint dissent had four votes (Justices Scalia, Kennedy, Thomas, and Alito) to conclude that if the Mandate and Medicaid threat were unconstitutional, that meant the entire Act should be struck down as unconstitutional.\textsuperscript{113} Two Justices (Ginsburg and Sotomayor) believed both the Mandate and the Medicaid threat were constitutional, and thus no severability analysis need be done.\textsuperscript{114} Two other Justices would have shared that view about the Mandate (Breyer and Kagan), but, as they did in the

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\item \textsuperscript{111} 132 S. Ct. 2566, 2575, 2607 (2012) (Roberts, C.J., joined by Breyer & Kagan, JJ., as to Part IV); id. at 2662-66 (joint opinion of Scalia, Kennedy, Thomas & Alito, JJ., dissenting).
\item \textsuperscript{112} BLACKMAN, supra note 1, at 220 (quoting a report by Jan Crawford).
\item \textsuperscript{113} NFIB, 132 S. Ct. at, 2668-77 (2012) (joint opinion of Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (if the individual mandate and the threat on Medicaid expansion are unconstitutional, the entire Act must be struck down as unconstitutional).
\item \textsuperscript{114} Id. at 2641-42 (Ginsburg, J., joined by Sotomayor, J., as to Part V).
\end{itemize}
final opinion, concluded that if the only provision that was unconstitutional was the Medicaid threat, that could easily be severed from the Act, and the rest of the Act enforced as written. 115

If this is true, that would have left Chief Justice Roberts alone with his position that the Mandate and Medicaid expansion were unconstitutional, but that severability analysis suggested, as the United States government had argued, that if the Mandate was unconstitutional, only the Pre-Existing Condition and Community Pricing provisions had to fall with it. So you could sever out those three inextricably related provisions, sever out the Medicaid threat, and then enforce the rest of the ACA as written. 116

As suggested by the final vote in the case, 117 the four Democrat-appointed Justices apparently agreed early on to acquiesce in Chief Justice Roberts’ severability analysis. As Justice Kagan had remarked during oral argument, “half is loaf is better than no loaf.” 118 If the four Justices who formed the joint dissent had also acquiesced in Roberts’ severability analysis, that would likely have been the final result in the case. There would have been the 5 votes to strike down the Mandate

115 Id. at 2575, 2607 (2012) (Roberts, C.J., joined by Breyer & Kagan, JJ., as to Part IV), discussed supra note 102.

116 See Official Transcript of Oral Argument, National Federation of Independent Business v. Sebelius 40-43 (March 28, 2012) (available at www.supremecourt.gov) (stating the United States government’s position on severability). The theory behind the government’s position was that the individual mandate, pre-existing condition, and community pricing provisions were inextricably related, since the requirement that insurance companies accept persons with pre-existing conditions, and not charge them more than the average community price for insurance, would impose extra costs on the insurance companies, which the addition of new enrollees under the individual mandate would help compensate. Id. at 40-42. The Medicaid threat provision was viewed by the government as separate from the rest of the private insurance market regulation in the ACA, and thus severing out the threat would not affect the rest of the ACA. Id. at 42-43.

117 NFIB, 132 S. Ct. at 2607-08 (Roberts, C.J., joined by Breyer & Kagan, JJ., as to Part IV); id. at 2642 (Ginsburg, J., joined by Sotomayor, J., as to Part V), discussed supra note 102.

(Roberts, Scalia, Kennedy, Thomas, and Alito); 7 votes to strike down the Medicaid threat (Roberts, Scalia, Kennedy, Thomas, Breyer, Alito, and Kagan); and 9 votes to strike out the provisions on the Mandate, Pre-Existing Condition, Community Pricing, and the Medicaid threat, but then enforce the remaining provisions that rendered no independent constitutional problems on their own.

Instead of this result, the four Justices in the joint dissent were apparently unwilling to compromise on their view that the entire Act should be struck down. If this is true, then their draft of their severability analysis, which, with few modifications, likely was their published opinion, would have argued that if the Mandate, Pre-Existing Condition, Community Pricing, and Medicaid threat all had to be struck down, that left the statute a mere shell, and thus under severability analysis the entire Act had to be rendered unconstitutional.119

The joint dissent’s argument on severability is plausible. They pointed out:

The Affordable Care Act seeks to achieve “near-universal” health insurance coverage. § 18091(2)(D) (2006 ed., Supp. IV). The two pillars of the Act are the Individual Mandate and the expansion of coverage under Medicaid. In our view, both these central provisions of the Act—the Individual Mandate and Medicaid Expansion—are invalid. It follows, as some of the parties urge, that all other provisions of the Act must fall as well.

. . .

The opinion now explains in Part V–C–1, infra, why the Act's major provisions are not severable from the Mandate and Medicaid Expansion. It proceeds from the insurance regulations and taxes (C–1–a) [including the Pre-Existing Condition and Community Pricing rules], to the reductions in reimbursements to hospitals and other Medicare reductions (C–1–b), the exchanges and their federal subsidies (C–1–c), and the employer responsibility assessment (C–1–d). Part V–C–2, infra, explains why the Act's minor provisions also are not severable.120

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119 See NFIB, 132 S. Ct. at 2668-77 (joint opinion of Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (this is the argument made in the published joint dissent).

120 Id. at 2668, 2671.
Regarding the Act’s major provisions, the joint dissent noted:

Without the Individual Mandate and Medicaid Expansion, the Affordable Care Act’s insurance regulations and insurance taxes impose risks on insurance companies and their customers that the Court cannot measure. Those risks would undermine Congress’ scheme of “shared responsibility.” . . .

Invalidating the key mechanisms for expanding insurance coverage, such as community rating and the Medicaid Expansion, without invalidating the reductions in Medicare and Medicaid, distorts the ACA’s design of “shared responsibility.” Some hospitals may be forced to raise the cost of care in order to offset the reductions in reimbursements, which would raise the cost of insurance premiums. . . .

. . . The exchanges cannot operate in the manner Congress intended if the Individual Mandate, Medicaid Expansion, and insurance regulations cannot remain in force.121

Regarding the minor provisions of the Act, the joint dissent noted:

. . . When we are confronted with such a so-called “Christmas tree,” a law to which many nongermane ornaments have been attached, we think the proper rule must be that when the tree no longer exists the ornaments are superfluous. We have no reliable basis for knowing which pieces of the Act would have passed on their own. It is certain that many of them would not have, and it is not a proper function of this Court to guess which. To sever the statute in that manner “would be to make a new law, not to enforce an old one. This is not part of our duty.”122

The joint dissent then continued in language that makes perfect sense if it is in response to what is alleged above was Chief Justice Roberts’ initial position in the case. They stated:

The Court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching. It creates a debilitated, inoperable version of health-care regulation that Congress did not enact and the public does not expect. It makes enactment of sensible health-care regulation more difficult, since Congress cannot start afresh but must take as its point of departure a jumble of now senseless provisions, provisions that certain interests favored under the Court’s new design will struggle to retain. And it leaves the public and the States to expend vast sums of money on requirements that may or may not survive the necessary congressional revision.123

121 Id. at 2671-73.

122 Id. at 2675-76 (citation omitted).

123 Id. at 2676.
Faced with this trenchant critique, it may have appeared to Chief Justice Roberts that he had two choices: join the four other Republican-appointed Justices (Scalia, Kennedy, Thomas, and Alito) and strike down the Act in its entirety, or find a way to join the four Democrat-appointed Justices (Ginsburg, Breyer, Sotomayor, and Kagan) and uphold the mandate, and thereby avoid the severability problem. If this analysis is right, then sometime in May Chief Justice Roberts switched his final position in the case to join the four Democrat-appointed Justices by upholding the mandate as a tax, and thus avoid the severability problem criticized in the joint dissent.124

Given that resolution, the joint dissent’s severability critique of the Court’s opinion makes little sense. The only provision in the Court’s opinion which is unconstitutional is the Medicaid threat. That can easily be severed out, allowing states to decide absent the threat whether or not to participate in Medicaid expansion.125 This result does not create “a debilitated, inoperable version of health-care regulation that Congress did not enact and the public does not expect” or make “enactment of sensible health-care regulation more difficult, since Congress cannot start afresh but must take as its point of departure a jumble of now senseless provisions.”126 There is no jumble of senseless provisions if the only change is removal of the Medicaid threat.

124 I say “sometime in May” because all the indications from the supposed leaks, and the explosion of conservative commentator concern at the end of May that Professor Blackman chronicles, suggests that by June 1 Chief Justice Roberts had moved to his final position in the case. See Blackman, supra note 1, at 220-31.

125 NFIB, 132 S. Ct. at 2607-08 (Roberts, C.J., joined by Breyer & Kagan, JJ., as to Part IV); id. at 2642 (Ginsburg, J., joined by Sotomayor, J., as to Part V), discussed supra note 102.

126 Id. at 2676 (joint opinion of Scalia, Kennedy, Thomas & Alito, JJ., dissenting).
The joint dissent did add, apparently, a couple of paragraphs on severability that do respond to what Chief Justice Roberts’ position, and thus the Court’s majority position, eventually became. They stated:

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

. . .

The Court's disposition, invented and atextual as it is, does not even have the merit of avoiding constitutional difficulties. It creates them. The holding that the Individual Mandate is a tax raises a difficult constitutional question (what is a direct tax?) that the Court resolves with inadequate deliberation. And the judgment on the Medicaid Expansion issue ushers in new federalism concerns and places an unaccustomed strain upon the Union. Those States that decline the Medicaid Expansion must subsidize, by the federal tax dollars taken from their citizens, vast grants to the States that accept the Medicaid Expansion. If that destabilizing political dynamic, so antagonistic to a harmonious Union, is to be introduced at all, it should be by Congress, not by the Judiciary.127

These passages, however, are inconsistent with the basic premise of the joint dissent that the Court’s action created “a debilitated, inoperable version of health-care regulation” because the ACA is now “a jumble of now senseless provisions.”128 This inconsistency suggests that most of the joint dissent on severability was written not with the Court’s eventual position in mind, but at a time when the controlling vote in the case, Chief Justice Roberts, was intending to strike down the Mandate, Pre-Existing Condition, Community Pricing, and Medicaid threat, but then enforce the rest of the Act.

127    Id.
128    Id.
If all of this is true, the basic lesson to be drawn may be that sometimes compromise is better than rigid ideology. Had the four Justices in the joint dissent (or perhaps one or two of them) been willing to join Chief Justice Roberts in his initial severability analysis, Chief Justice Roberts may not have changed his mind, and the result in the case would have been striking down the core of the ACA (the Mandate, Pre-Existing Condition, Community Pricing, and Medicaid threat). By trying to get Roberts to join them in striking down the entire Act, the joint dissent ended up losing 98% of the case, winning only the Medicaid threat issue.

On the Medicaid threat issue, the joint dissent noted, “States that decline the Medicaid Expansion must subsidize, by the federal tax dollars taken from their citizens, vast grants to the States that accept the Medicaid Expansion.”\(^\text{129}\) For this reason, there will be tremendous pressure for States to accept Medicaid expansion anyway, even absent the threat in the original ACA. Many large states, even those with Republican Governors, like Michigan and Ohio, have agreed to expand their Medicaid program, and Republican Governors in other large states, like Pennsylvania and Florida, are supportive.\(^\text{130}\) Whoever wins the Governors’ races in 2014 in Florida, Pennsylvania, Texas, and Wisconsin, among others, whether Republican or Democrat, will likely find great pressure to join. Only very small states, with little financial loss or gain, can afford to be ideologically pure from the conservative perspective, and opt out. So even on that, conservatives who would wish to limit Medicaid expansion will probably be faced in the long run with a substantial defeat.

\(^{129}\) *Id.*

Subsequent to *NFIB*, the conservative cause did obtain one minor Supreme Court victory, but again its impact is likely to be minimal. One aspect of the Affordable Care Act is a mandate that employers’ health insurance plans provide contraceptive coverage free of cost. Catholic-based institutions, such as universities and hospitals, and secular corporations, whose CEOs have religious objections to contraception, particularly contraceptives that work after fertilization, such as morning-after pills, which they view as abortifacients, sued claiming the mandate is unlawful as a substantial burden on their rights to religious freedom under either the Free Exercise Clause of the United States Constitution or the 1993 Religious Freedom Restoration Act (RFRA).

In *Burwell v. Hobby Lobby Stores, Inc.*, a 5-4 Court ruled that closely-held for-profit corporations do have religious rights under the 1993 Religious Freedom Restoration Act; that the requirement to include contraception in their company-provided insurance plan was a substantial burden on their religious beliefs; and under RFRA’s strict scrutiny standard there were less restrictive effective alternatives to advance the government’s compelling interest in making contraceptive coverage available to women.

Among other alternatives, the Court noted that government could “assume the cost” of providing

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133 *Id*. at 2767-75.

134 *Id*. at 2775-79.

135 *Id*. at 2779-80.
the contraceptive coverage, or extend the current exemption for “non-profit organizations with religious objections” where the non-profit can certify that it opposes providing the coverage, and then the insurance company must arrange independently with the plan participants to provide the contraceptive coverage to those participants without imposing “any cost-sharing requirements” on them. Whether certification can be required to be made by the company directly to the insurance company, or whether to avoid any implication of complicity in contraceptive use the certification should go directly to the federal government who would then notify the insurance company, was never decided in court, as the government changed the regulation during the course of litigation to permit certification directly to the government. 137

Four Justices dissented in *Burwell v. Hobby Lobby*. Two dissenting Justices concluded that there was no case law supporting the notion for-profit corporations had free exercise clause rights. 138 All four Justices in dissent agreed that even if for-profit corporations had religious rights, being required to include in an insurance plan provided to employees coverage to which there were religious objections was not a “substantial burden” on their religious rights, since the contraceptives would be used by the “autonomous choice” of the plan participants, not the corporation. 139 The dissent then concluded that the majority’s “let the government pay” option was not as effective an

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136 Id. at 2780-82. In a concurrence, Justice Kennedy noted the narrow holding of the Court’s opinion. *Id.* at 2785 (Kennedy, J., concurring).

137 See generally *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014) (religious college not required to follow notice certification procedure to insurance company in order to obtain injunction against the policy pending appeal); *id.* at 2806 (Sotomayor, J., joined by Ginsburg & Kagan, JJ., dissenting).


139 *Id.* at 2797-99 (Ginsburg, J., joined by Sotomayor, J., and joined by Breyer & Kagan, JJ., dissenting).
alternative as direct coverage from the employer,\textsuperscript{140} and it was not clear from the record that the alternative of certifying objections, thus triggering an obligation of the insurance company to provide the coverage independently, with unquestioned added paperwork costs, would be as effective either.\textsuperscript{141} It is unlikely that this added burden will deprive many individuals of coverage they would otherwise obtain, but time will tell whether the added paperwork, and perhaps informal pressure on employees of companies like Hobby Lobby not to apply for the contraceptive coverage given corporate disapproval of the coverage, will make a difference in coverage options.

Not litigated before the Court was the preliminary question of whether RFRA applied at all to the contraceptive coverage under the Affordable Care Act (ACA). RFRA provided that its terms apply not only existing legislation in 1993, but to all future legislation unless the later Congress “explicitly excludes such application by reference to this Act.”\textsuperscript{142} Such an attempt by a past Congress to limit what a later Congress can do violates basic norms of constitutional democracy, the Article I, § 7 bicameralism and presentment clauses of the United States Constitution, which provide the constitutional means by which legislation is enacted, free from any additional requirements imposed by earlier Congresses, and is thus, by its literal terms, unconstitutional.\textsuperscript{143} Thus, the real question in \textit{Burwell v. Hobby Lobby} is whether the Congress that passed the ACA in 2010 intended to incorporate by reference RFRA protections for religious exercise enacted in 1993. The 2010 Congress did not say they were incorporating those terms, and the 2010 Congress

\textsuperscript{140} \textit{Id.} at 2802-03.

\textsuperscript{141} \textit{Id.} at 2803.

\textsuperscript{142} 42 U.S.C. § 2000bb-3.

provided in the ACA their own set of religious opt-out provisions, limiting them to non-profit institutions. Typically, when a legislature addresses something specifically in a statute, like in this case providing for specific statutory exceptions, the normal rule of statutory interpretation would be that Congress did not intend other, unstated, broader exceptions to be implicitly incorporated by reference.144

One response to this critique would be to cite to the Dictionary Act, which provides a number of definitions of words typically used in congressional statutes.145 The Dictionary Act is different, however, since it can reasonably be assumed that an existing Congress in passing legislation enacted

144 See, e.g., Silvers v. Sony Pictures Entertainment, Inc., 402 F.3d 881, 885 (9th Cir. 2004) (en banc) (“The doctrine of expresio unius est exclusio alterius ‘as applied to statutory interpretation creates a presumption that when a statute designates certain person, things, or manners of operation, all omissions should be understood as exclusions.’ Boudette v Barnette, 823 F.3d 754, 756-57 (9th Cir. 1991).”).

145 The Dictionary Act, 1 U.S.C. § 1. provides:

In determining the meaning of any Act of Congress, unless the context indicates otherwise—

words importing the singular include and apply to several persons, parties, or things;

words importing the plural include the singular;

words importing the masculine gender include the feminine as well;

words used in the present tense include the future as well as the present;

the words “insane” and “insane person” shall include every idiot, insane person, and person non compos mentis;

the words “person” and “whoever” include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

“officer” includes any person authorized by law to perform the duties of the office;

“signature” or “subscription” includes a mark when the person making the same intended it as such;

“oath” includes affirmation, and “sworn” includes affirmed;

“writing” includes printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise.
provisions consistent with standard definitions listed in the Dictionary Act. However, in this case, where the Affordable Care Act was passed with no Republican votes, for the majority in *Burwell v. Hobby Lobby* to conclude that the Nancy Pelosi-led House of Representatives, and Harry Reed-led Senate, intended in passing the Act to give for-profit corporations a means to make it harder for women to get the contraceptive coverage mandated by the ACA strains credulity as a matter of unbiased statutory interpretation. Further, the Dictionary Act does not have language stating that its terms must apply to future legislation. It applies as a matter of normal statutory construction, not an imposed mandate as in the RFRA.

**IV. Conclusion**

In his book, *Unprecedented: The Constitutional Challenge to Obamacare*, Professor Josh Blackman presents a detailed account of the battle to defeat the Patient Protection and Affordable Care Act of 2010, giving us an inside-look at the strategy choices, and the highs and lows, of events surrounding the multiple cases involved in the ACA litigation. The book is very well-written, with lively, engaging prose, while taking the reader through the tumultuous events surrounding the ACA’s initial drafting, legislative maneuvering, and eventual passage on March 23, 2010, through the Supreme Court’s decision on its constitutionality on June 28, 2012.

Professor Blackman’s account includes three major conclusions: (1) the ACA was unprecedented in a number of ways; (2) despite the Supreme Court eventually voting to uphold almost all of the ACA, the litigation was, in many respects, a substantial victory for the conservative legal movement; and (3) to the extent Chief Justice Roberts may have changed his position in the case sometime between his initial vote following oral argument and his final decision, it was likely the product of a desire to preserve long-term court legitimacy against a background of liberal
political and media pressure. This review has challenged each of these three conclusions, presenting the argument that: (1) the ACA, while a major piece of legislation, was not that unprecedented; (2) the litigation outcome was a substantial defeat for the conservative movement, while coming remarkably close to victory; and (3) the likely change in Chief Justice Roberts’ position was due more to the dynamics of internal Court draft-opinion writing, not outside political and media pressure.

Despite these disagreements, Professor Josh Blackman’s book is very good read. It certainly deserves to be read by anyone with an interest in the political and legal aspects of health care policy in the United States, or interest in the conservative political and legal movement generally.