

# THE GREAT TACTICIAN: THE CHIEF JUSTICE, OBAMACARE, AND WALKING THE TIGHTROPE OF PARTISAN POLITICS

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It is a long accepted and relied upon fiction that for every legal case and controversy there is but one correct answer.<sup>1</sup> Through this fiction is born a belief that there are clear and objective right and wrong answers to every issue.<sup>2</sup> This dichotomy of correctness creates a divide between two canons of thought, which in turn creates the split down the aisle that keeps the branches of our government enmeshed in partisan politics.<sup>3</sup>

This partisanship not only runs through the political branches but also inevitably resides in the judiciary.<sup>4</sup> The judiciary has long relied on a belief in one correct answer and traditionally, reaching the correct answer was achieved through a formalistic, restrained, and objective application of the law.<sup>5</sup> Yet, this approach denied the inevitable truth expressed by Justice

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1. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and The Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1949) [hereinafter Llewellyn, *Remarks*] (arguing that the Court uses a conventional vocabulary that continues to unfortunately presuppose there is only one correct answer and so then there are two opposing canons on every part).

2. See Llewellyn, *Remarks*, *supra* note 1, at 401.

3. See *id.* at 401 (noting that because the court relies on a conventional and static lexicon, and by presupposing there is one correct answer, it binds itself to the perpetuation of a system with “two opposing canons on almost every point”); see generally Karl N. Llewellyn, *Law and the Social Sciences—Especially Sociology*, 62 HAR. L. REV. 1286, 1296 (1949) [hereinafter Llewellyn, *Law and the Social Sciences*] (explaining that “[i]f you pose this question in the world of correct or incorrect doctrine, you enter on a never ending battle.”).

4. See generally Llewellyn, *Law and the Social Sciences*, *supra* note 3, at 1296 (suggesting that the line between judges finding law and making law is ultimately meaningless because “the judges in fact do both at once”).

5. See L.L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 436–37 (1934) (explaining that traditional judicial philosophy based on formalism and restraint grounds decisions in the mechanical and technical application of the law due to a belief that such

Holmes that “[t]he life of the law has not been logic: it has been experience.”<sup>6</sup> By consistently relying on a dichotomy of correctness, the judiciary ignores the inevitable subjectivity embedded in the role of the judge and promulgates the false misconception that for every legal question there is one correct answer.<sup>7</sup>

The judge is not a beacon of objectivity, sitting on high, removed from the trials and tribulations of the human experience.<sup>8</sup> She is just as enmeshed in the values, desires, disappointments, and the various other ingredients that are the stuff of human life as everyone else.<sup>9</sup> To deny that such experience is removed from the judge the moment she sits on the bench is a mistake.<sup>10</sup> Her decision is filtered through the lens of her experience and that experience creates only the absolute, true, correct answer *for her*.<sup>11</sup> Even adopting a position of judicial restraint, which values deference to the legislature and limited judicial interference,<sup>12</sup> does not allow the judge to escape the subjective influences that are inevitably part of decision-making.<sup>13</sup> By denying these subjective influences and

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techniques created greater predictability, but arguing that such an approach in fact did the opposite because it ignored the subjective factors that inevitably influence every judge and judicial decision).

6. O.W. HOLMES, JR., *THE COMMON LAW*, 1 (1881).

7. See Llewellyn, *Remarks*, *supra* note 1, at 401; see also Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 363 (1973) (arguing that “values, wants, purposes, desires” inform every human action. This is crucial because the experience of values not only defines the state of being human, it also motivates all genuinely human action.”).

8. Robert A. Ferguson, *Holmes and the Judicial Figure*, 55 U. CHI. L. REV. 506, 511 (1988) (discussing the traditional herculean judicial model set forth in American culture and arguing that the ideal of “Judge Hercules,” positioned on high above the human condition, troublingly removes the judge from the community and “undermines his humanity”).

9. See generally Kennedy, *supra* note 7, at 363; Roscoe Pound, *Fifty Years of Jurisprudence*, 51 HARV. L. REV. 777, 788 (1938) (distinguishing judicial review from scientific analysis and arguing that in the judiciary “a prediction as probable as that of the physicist predicting the result of a time-worn experiment would not be possible. For in the experiment every element not present in the prior observations is painstakingly excluded. Such exclusion is not possible in the actual behavior situations of every-day life, including that in which the particular judge is to act.”).

10. See Fuller, *supra* note 5, at 437 (explaining that ignoring the subjective factors that contribute to judicial review “prevents these ‘non-technical’ considerations from being talked and written about. It prevents their possible rationalization and systematization.”).

11. See generally Kennedy, *supra* note 7, at 363; Pound, *supra* note 9, at 788.

12. David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 450 (1994) (explaining that judicial restraint is a “policy regarding judicial review of the constitutionality of legislation, a policy according to which courts, and especially the U.S. Supreme Court, should adopt a cautious or ‘deferential’ attitude toward voiding legislation on constitutional grounds”).

13. See Wendy Brown Scott, *Oliver Wendell Holmes on Equality and Adarand*, 47 HOW. L.J. 59, 64 (2003) (discussing Holmes’s departure from traditional formalism and judicial restraint and accepting that the law is influenced by the “subjective, indeterminate, and pragmatic” experiences of the judge); see also Llewellyn, *Remarks*, *supra* note 1, at 398 (distinguishing between the use of judicial restraint in easy cases and the difficulty of restraint in harder cases, framing his argument around the theory that “[h]ard cases make bad

clinging to a belief that a restrained position creates an objective, predictable result denies the opportunity to confront and discuss the many factors that actually influence judicial decision-making.<sup>14</sup>

However, it is not an overly pessimistic perspective or a harbinger of disaster to accept the impossibility of true objectivity or consistent judicial restraint. Such acceptance does not invalidate the authority of the judiciary; in fact, it might do the exact opposite. The social sciences have long ago given up the utopic idea that humans can apply analysis without the influence of their humanness.<sup>15</sup> Many social scientists would argue that the dismissal of fictional objectivity has validated their science, brought them closer to egalitarianism, and helped dissipate Eurocentric influence.<sup>16</sup> But is the law so similarly situated as to benefit from a frank look at judicial interpretation or do we need this fiction of rightness? Does the whole thing come crumbling down if the façade is dismantled?

This note argues that true judicial restraint is a fictional impossibility. Any practice of judicial restraint is at the very same moment an exercise of judicial activism because a judge cannot approach the law from a truly objective, mechanical position.<sup>17</sup> Every judicial opinion is influenced not only by the political and moral vantage point of the judge, but also the judge's policy and societal concerns.<sup>18</sup> This thesis is illustrated by a case study of *National Federation of Independent Business v. Sebelius*, and, specifically, Chief Justice Roberts's opinion regarding the individual mandate and the Medicaid provision of the Affordable Care Act. Chief Justice Roberts's opinion demonstrates how even with the best intentions of deference, the judiciary is inevitably influenced by partisanship, personal experience, the current temper of the court, the perceived needs and desires of the majority, and any number of other factors that make it impossible to have a truly objective, deferential judiciary.

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law," and explaining that "the proposition that *the greater the felt need, because of felt sense, the wider is the leeway correctly and properly available in reshaping an authority or the authorities*. What is both proper and to be expected in an extreme case would become abuse and judicial usurpation if made daily practice in the mine-run of cases.") (emphasis in the original); Llewellyn, *Law and the Social Sciences*, *supra* note 3, at 1304 ("[w]hat is inherent is that the man must always enter into the result: it is he who must read the words of the rule of law, it is he who must size up the facts as to whether a rule of law applies. No rule of law ever applied itself.").

14. See Fuller, *supra* note 5, at 437.

15. See generally MAX WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* 75 (1949) (arguing that in order to explain laws and factors one must do so through their own individualized configurations).

16. See generally *id.* at 64–66 (discussing the challenge social scientists face when attempting to distinguish between "value-judgments" and "empirical knowledge," with the latter requiring scientists to "discuss the meaning of objectively 'valid' truths" while consecutively requiring them to reconcile varying viewpoints that emerge when describing these so-called truths).

17. See generally Fuller, *supra* note 5, at 437; Kennedy, *supra* note 7, at 363; Pound, *supra* note 9, at 788.

18. See generally Llewellyn, *Law and the Social Sciences*, *supra* note 3, at 1304.

Roberts's opinion has been touted as an exemplary piece of judicial scholarship and a superb act of statesmanship.<sup>19</sup> Legal scholars have celebrated his opinion as a win for bipartisanship and congratulated the Chief Justice on his ability to turn his back on political influences and concentrate instead on a restrained interpretation of the Affordable Care Act.<sup>20</sup> He has been lauded for sticking to the law, for demonstrating impartiality and deference, and for formulating an opinion that shows the Court can be a place of political and partisan refuge.<sup>21</sup> Chief Justice Roberts has long espoused a dedication to judicial restraint. In his Senate Confirmation Hearings, Roberts analogized the role of the judge to the role of an impartial umpire and advocated for restraint, humility, and a limited judiciary role.<sup>22</sup> In *Sebelius*, Roberts again cited a philosophy of judicial restraint by explaining that “[m]embers of the Court are vested with the authority to interpret the law; we possess neither the expertise nor prerogative to make policy judgments.”<sup>23</sup>

However, a careful read of the *Sebelius* decision shows that Roberts did not actually practice judicial restraint but judicial activism coupled with significant policy judgments. Roberts argues the role of the Court is to “give Congress great latitude in exercising its powers.”<sup>24</sup> Yet, it is exactly

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19. See Martha Minow, *Affordable Convergence: “Reasonable Interpretation” and the Affordable Care Act*, 126 HARV. L. REV. 117, 118–19 (2012) (arguing that Roberts’s “opinion transcended the polarized political debates surrounding the legal challenge to President Barack Obama’s signature domestic policy initiative through analytical convergence, not political compromise”); Brian P. Kane, *Everyone Was Right and Everyone Was Wrong: The Subtle Echoes of the Supreme Court’s Healthcare Reform Decision*, ADVOCATE: OFFICIAL PUBLICATION OF THE IDAHO STATE B., Aug. 2012, at 54, 56 (touting Roberts’s opinion for its “commitment not only to adhere strictly to the law, but also to avoid inserting his or the Court’s policy choices” and finding that “his opinion is likely to become a hallmark of judicial minimalism because of the multiple opportunities that the Court had to strike broadly, but instead patiently and surgically upheld with minimal removal”); John K. DiMugno, *Navigating Health Care Reform: The Supreme Court’s Ruling and the Choppy Waters Ahead*, 24 No. 6 CAL. INS. L. & REG. REP. 1, 1 (2012) (applauding Roberts’s *Sebelius* decision for “navigating these [political] currents in a manner that extricated the Court from a political firestorm that would have threatened the Court’s legitimacy and institutional standing following a decade of politically-charged rulings without changing the Court’s conservative trajectory”).

20. See generally Minow, *supra* note 19; Kane, *supra* note 19; DiMugno, *supra* note 19.

21. See generally Minow, *supra* note 19; Kane, *supra* note 19; Dimungo, *supra* note 19.

22. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing before the Committee on the Judiciary*, 109th Cong. 55 (2005) [hereinafter *Confirmation Hearing*] (statement by John G. Roberts, Jr.) (basing his judicial perspective on the “humility [that] should characterize the judicial role.” Arguing that “[j]udges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role.”).

23. Nat’l Fed’n of Indep. Bus. v. *Sebelius*, 132 S. Ct. 2566, 2579 (2012).

24. *Id.* (Roberts goes on to adopt the proposition: “[I]et the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly

this latitude that Roberts denies Congress in *Sebelius*. As will be demonstrated below, Roberts could have upheld both the individual mandate and Medicaid provision under the Commerce Clause and the power to tax and spend, respectively. His decision to limit both the Commerce Clause and the Tax and Spend power was not done from a position of restraint, but from a position of policy, informed by his subjective experience and political perspective. The *Sebelius* decision is not an example of judicial restraint and bipartisanship; instead, it is an example of judicial activism—illustrative of the partisanship inherent in the judiciary.

This note will examine judicial restraint and the *Sebelius* decision in five parts. First, it will be necessary to explore the history of judicial restraint and its past and present applications. Second, the note will distinguish between legal realism and legal formalism and examine the rise of realism in the Critical Legal Studies Movement. Third, Roberts's actual decision and his alleged application of judicial restraint will be investigated. Fourth, the individual mandate and Medicaid provision will be examined through the government's initial arguments to uphold them under the Commerce Clause and Tax and Spend power respectively, thereby demonstrating that Roberts could have easily decided in the converse. Finally, after examining the choices available to Roberts, this note will explain why his espoused philosophy of restraint was used to do just the opposite and was actually an example of activism. Through an assessment of the *Sebelius* decision, this note argues that judicial restraint is an illusion and that any judicial decision is inevitably a form of activism, imbued with the subjective influences and experiences of the judge.

## I. THE PAST AND PRESENT APPLICATIONS OF JUDICIAL RESTRAINT

Judicial restraint is best categorized as a judicial policy that provides “a structural relationship between the judiciary and the other branches of government.”<sup>25</sup> It is a policy of judicial review based on deference and a presumption of constitutionality.<sup>26</sup> Under a traditional restrained perspective, a judge will uphold legislation if there is any way to do so under the constitutional framework and will only overturn a piece of legislation when it is clearly unconstitutional or an abuse of constitutional power.<sup>27</sup>

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adapted to that end, which are not prohibited but consistent with the letter and spirit of the constitution, are constitutional.” (quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)).

25. Luban, *supra* note 12, at 450.

26. *Id.* at 450–51.

27. *Id.*; Timothy P. O'Neill, *Harlan on My Mind: Chief Justice Roberts and the Affordable Care Act*, 3 CAL. L. REV. CIRCUIT 170, 172 (2012).

Harvard professor James Bradley Thayer promulgated the classical conception of judicial restraint in 1893.<sup>28</sup> Under Thayer's brand of judicial restraint, a judge will refrain from striking down a legislative act even if it was constitutionally incorrect and will only intervene for clear error or abuse of discretion.<sup>29</sup> Thayerism attracted some of the judiciary's greatest minds,<sup>30</sup> and although its most extreme application has been replaced with more moderate views of restraint, it is still influential in framing the discourse about policies of deference and restraint.<sup>31</sup>

The emergence of Thayerism in the late 19<sup>th</sup> Century created a "kind of intellectual *Gemeinschaft*," counting among its members Justices Oliver Wendell Holmes, Louis Brandeis, Felix Frankfurter as well as Learned Hand and Yale law professor, Alexander Bickel.<sup>32</sup> However, even beginning with Holmes, who proclaimed his theories to be succinct with Thayer, Thayerism immediately began to distort and fray around the edges in the hands of Thayerian judges and professors.<sup>33</sup>

Thayer not only believed that the legislature was usually right, but also that the legislative branch creatively and responsibly applied and considered their constitutional limitations in the creation of law.<sup>34</sup> These beliefs, serving as the basis for pure Thayerian restraint, along with the difficulty of applying his stringent model of restraint, marked its demise. With the emergence of competing theories used for deciding difficult constitutional cases, the validity of Thayer's approach waned.<sup>35</sup> Under a pure application of Thayer's model of restraint, a judge would have to uphold a decision, even if she believed it unconstitutional, unless it was clearly erroneous and unreasonable.<sup>36</sup> With difficult constitutional issues, Thayerism offered no real guidance and no viable avenue for finding a statute unconstitutional.<sup>37</sup> Thus, in practice, the key members of "The

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28. Luban, *supra* note 12, at 451.

29. O'Neill, *supra* note 27, at 172.

30. See Luban, *supra* note 12, at 451 (noting classical restraint theorists such as Justices Oliver Wendell Holmes and Felix Frankfurter).

31. See Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 522, 533 (2012) (explaining that Thayerism "died for a variety of reasons: it rested on false premises about judicial deliberation; it lacked coherence," and further noting that although Thayerism faded away, the ideology of judicial restraint remains, even if it is only a "vague, all-purpose compliment").

32. Luban, *supra* note 12, at 450–51.

33. See Posner, *supra* note 31, at 522 (finding that Thayerism died because "it lacked coherence—the Thayerians did not constitute a community of thought; it had no stopping point—once you embraced it, you could not explain why a law would ever be declared unconstitutional; it was vulnerable to the rise of constitutional theories; and it was given its coup de grâce by a combination of decisions by the liberal Warren Court and the refusal of the conservative successors to Justices of the Warren Court to accept a ratchet theory of judicial succession.").

34. *Id.* at 525.

35. *Id.* at 535.

36. *Id.* at 522–23.

37. *Id.* at 522.

School of Thayer” interpreted judicial restraint through the lenses of their personal philosophies and the pure application of Thayer’s model of judicial restraint faded away.<sup>38</sup>

Perhaps the last quasi-Thayerian was Justice John Marshall Harlan, a man Richard Posner identified as the “the last restrained justice.”<sup>39</sup> Harlan adopted judicial restraint as a form of humility and a path to upholding federalism and the separation of powers.<sup>40</sup> He believed that judicial restraint was the best way for a judge to keep his personal beliefs, politics, and influences in check, and that deference to legislative action was the key to upholding states’ rights, the political process, and constitutional clarity.<sup>41</sup> Harlan’s philosophy of restraint demonstrates the influence of Thayer’s model but removes Thayer’s extreme practice of deference when faced with a complex issue of constitutional law. Although Harlan believed that judicial restraint was key to an effective and responsible judiciary, his philosophy did not rely on Thayer’s belief that the legislature was presumably smarter and wiser nor did he advocate for Holmes’s soldier-like obedience and deference.<sup>42</sup> In practice, Harlan’s brand of judicial restraint was accomplished through a constant respect for federalism, separation of powers, and consistent acknowledgment of the needs, values, and desires of the majority.<sup>43</sup>

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39. See Posner, *supra* note 31, at 522. Justice Holmes took perhaps the most influential Thayerist approach, evolving his initial perspective of judicial restraint into an entirely new legal philosophy and giving birth to Legal Realism and Critical Legal Studies movement, as will be discussed below. See Fuller, *supra* note 5. Justice Holmes equated a judge’s position to that of a soldier, one who follows orders regardless of their wisdom and attempts to constantly keep subjective influences at bay. See Luban, *supra* note 12, at 489–90 (citing Holmes’s famous judicial perspective; “I always say, as you know, that if my fellow citizens want to go to Hell I will help them. It’s my job.”) (quoting Letter from Oliver W. Holmes to Harold J. Laski (Mar. 4, 1920), in 1 HOLMES-LASKI LETTERS, at 248–49 (Mark DeWolfe Howe ed., 1953)). However, as discussed below, his divergence from Thayerism was rooted in a growing skepticism of the judiciary’s ability to objectively apply the law. See Scott, *supra* note 13, at 64.

Bickel and Brandeis also applied their own touches to Thayer’s model of judicial restraint. See Luban, *supra* note 12, at 453 (noting how “Bickel, following up on the famous opinion of Brandeis, advocated the ‘passive virtues’: a strategy of dodging of constitutional issues by means of jurisdictional devices.”); Posner, *supra* note 31, at 532 (noting Bickel’s basis for judicial restraint was grounded in prudence and a belief that restraint was a moral path to making sure the judiciary did not overly influence the majority).

40. Posner, *supra* note 31, at 533.

41. See O’Neill, *supra* note 27, at 179.

42. See generally *id.*

43. *Id.* at 180–82 (noting that Harlan’s “‘idea of federalism is, itself, a kind of balance—a way of dividing governmental authority to prevent a too-easy dominance of public life by a single institution or faction” (citing Norman Dorsen, *John Marshall Harlan, Civil Liberties, and the Warren Court*, 36 N.Y.L. SCH. L. REV. 81, 101 (1991)) and further noting that when Harlan thought a case called for substantial action, he would go far to uphold a statute, even adding language if need be (referring to Justice Harlan’s concurrence in *Welsh v. United States*, 398 U.S. 333 (1970) (Harlan, J., concurring)).

44. See *Griswold v. Conn.*, 381 U.S. 479, 501–02 (1965) (Harlan, J., concurring) (disagreeing with Justices Black and Stewart that judicial restraint will be accomplished by a

Although Posner might believe Harlan was the last restrained justice, Chief Justice Roberts attempts to follow in his footsteps. During his Senate Confirmation Hearings, Justice Roberts adopted Justice Harlan's technique of constitutional interpretation, noting specifically Justice Harlan's "sensitivity to the limitations on the judicial role."<sup>44</sup> It is Harlan's brand of judicial restraint that Roberts identified as most influential to his own judicial philosophy during his confirmation hearings and what he attempted to practice in *Sebelius*.<sup>45</sup> Throughout his opinion, Roberts notes the limited role of the judiciary and the deference that must be given to legislative action.<sup>46</sup> However, as will be illustrated below, this attempt at judicial restraint was actually a form of judicial activism and evidences the impossibility of true restraint.

## II. LEGAL FORMALISM VERSUS LEGAL REALISM AND THE CRITICAL LEGAL STUDIES MOVEMENT

Regardless of the incongruous adaptations of Thayerism, it influenced, and perhaps even gave birth to, the dueling philosophies of legal formalism and legal realism. In Justice Holmes's divergence from Thayer's faith in the legislative branch, he was also skeptical about the ability of the judiciary to objectively apply the law.<sup>47</sup> Although he valued the practice and philosophy of judicial restraint, Justice Holmes's perspective evolved into a belief that the application of law is inescapably influenced by the subjective elements of human experience.<sup>48</sup> In *The Common Law*, Holmes stated that "the life of the law has not been logic: it has been experience," and in that succinct phrase he gave birth to the idea of legal realism.<sup>49</sup> The acknowledgment of the subjective experience in judicial action created a schism from legal formalism, which was the dominant view in Holmes's time, and it is a dichotomy that grounded the

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narrow application of due process, limited to the right enumerated in the constitution and explaining that judicial self-restraint "will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms . . . . Adherence to these principles will not, of course, obviate all constitutional differences of opinion among judges, nor should it. Their continued recognition will, however, go farther toward keeping most judges from roaming at large in the constitutional field than will the interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause.")

45. *Confirmation Hearing*, *supra* note 22, at 259.

46. *See id.*; O'Neill, *supra* note 27, at 171-72.

47. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012).

48. *See Scott*, *supra* note 13, at 64.

49. *Id.*

50. *Id.*; Fuller, *supra* note 5, at 429.



legal realism movement and remains a sticking point in today's debates on judicial philosophy.<sup>50</sup>

#### a) Legal Formalism

Formalism permeated legal scholarship among 19<sup>th</sup> and early 20<sup>th</sup> Century jurists, in which there was a search for and a belief in the “built-in legal structure of the democracy and the market.”<sup>51</sup> This legal structure provided the policies, rules, and materials that grounded judicial decision-making and was rooted in the belief of a “universal legal language.”<sup>52</sup> This philosophy, like judicial restraint, centered on the clear delineation of responsibility among the branches of government, and mechanically relied on the idea of the legislature's role to make laws and the judiciary's role to apply them without question or acknowledgment of subjective influence on the judiciary.<sup>53</sup>

Formalism is directly linked to judicial restraint. Richard Posner posits that there are three categories of judicial restraint and the first and foremost is born from an adoption of legal formalism.<sup>54</sup> As Posner explains, judicial restraint is manifested from the belief that judges merely apply the law, they do not make it.<sup>55</sup> This formalist philosophy was also illustrated by Roberts himself when he referred to the judge as merely an

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51. Scott, *supra* note 13, at 64 (“[a]ccording to Holmes, the law is informed by experience. Because experience is subjective, indeterminate, and pragmatic, Holmes’s position represented a significant departure from the formalist legal philosophy of his time.”); see also Edgar Bodenheimer, *Book Review: Jurisprudence: Realism in Theory and Practice by Karl N. Llewellyn*, 41 TEX. L. REV. 609, 609–10 (1963) (explaining that legal realists focus on “factors outside the positive sources of law which in their opinion are apt to influence judicial action significantly, such as the personality of the judge, his conscious or subconscious value preferences, his social philosophy, and his intuitive response to the totality of the facts in a litigated case.”).

52. Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 567 (1983).

53. *Id.* at 568.

54. See Kennedy, *supra* note 7, at 352–59 (explaining the formalist “idea that the legitimate legal sovereign, representing the citizenry, should make *rules* applying to the various situations in which state coercion might be used. Judges should then apply those rules, acting as agents of the sovereign.”) (emphasis in the original) (Kennedy goes on to explain that the nature of rule application was thought to be mechanical. “[The judge] must *never* ask whether giving this particular response, in light of the total situation including *but not limited to the per se* elements, is best”) (emphasis in the original).

55. See Posner, *supra* note 31, at 520–21 (explaining the three categories of restraint as “(1) judges apply law, they don’t make it (call this ‘legalism’—though ‘formalism’ is the commoner name—or, better, ‘the law made me do it’); (2) judges defer to a very great extent to decisions by other officials—appellate judges defer to trial judges and administrative agencies, and all judges to legislative and executive decisions (call this ‘modesty,’ or ‘institutional competence,’ or ‘process jurisprudence’); (3) judges are highly reluctant to declare legislative or executive action unconstitutional—deference is at its zenith when action is challenged as unconstitutional (call this ‘constitutional restraint’)”).

56. *Id.*

umpire; a figure limited to interpreting the law and never imposing on the game itself.<sup>56</sup> As Duncan Kennedy explains, the formalists believe that “[r]ule application, in sharp contrast, involves the objective or ‘cognitive’ operation of identifying particular factual aspects of situations followed by the execution of unambiguous prescriptions for official action. In short, according to the theory of formality, *it is inherently certain and predictable*.”<sup>57</sup> This belief in certainty and predictability is the basis for judicial restraint due to the belief that the more limited and deferential the judiciary, the more objective and foreseeable their actions.<sup>58</sup> Formalism suggests that the law can be determined on objective facts and, thus, the judiciary need not ever question the wisdom of the law, only whether it fits within the constraints of the Constitution.<sup>59</sup>

This formalistic judicial philosophy gave birth to the idea of the judge as a herculean figure, one composed of staunch judicial restraint and deference, demonstrating steadfast commitment to “intellectual disinterestedness.”<sup>60</sup> As Robert Ferguson explained, such a philosophy promulgated the idea that “[j]udges are in but not of the world.”<sup>61</sup>

Perhaps the most readily identifiable formalist is Justice Antonin Scalia. Justice Scalia is an originalist in his constitutional interpretation and a textualist in his statutory interpretation,<sup>62</sup> perspectives he believes lend themselves to proper formalistic strategy.<sup>63</sup> Scalia expressed the idea that adherence to form and clear, readily applicable rules is the only way for the judiciary to make “as little law as possible.”<sup>64</sup> For Scalia, formalism is the identification and application of a general rule above all else. These rules are pulled strictly from the Congress or the Constitution, and where there is ambiguity, it is the job of the judiciary to use the proper legal materials to identify “some precise, principled content.”<sup>65</sup> Through the identification and application of general legal rules, Scalia believes the judiciary gets closer to the ultimate goal of predictability.<sup>66</sup> In order to avoid “protracted uncertainty” and achieve predictability, “there are times when even a bad rule is better than no rule at all.”<sup>67</sup>

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57. *Confirmation Hearing*, *supra* note 22, at 55.

58. Kennedy, *supra* note 7, at 364 (emphasis in the original).

59. See Fuller, *supra* note 5, at 435–37 (noting that traditionalist judicial philosophy values a restrained judiciary that bases its decisions on the technical aspects of the law because such an approach leads to greater predictability).

60. See Kennedy, *supra* note 7, at 359.

61. Ferguson, *supra* note 8, at 511–13.

62. *Id.* at 515.

62. Craig Green, *An Intellectual History of Judicial Activism*, 58 Emory L.J. 1195, 1250 (2009).

63. See generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

64. *Id.* at 1179.

65. *Id.* at 1182–83.

66. Scalia, *supra* note 63, at 1179.

67. *Id.* at 1179.

More than even judicial restraint, Scalia urges judicial constraint. He argues that by adopting general rules the Court not only constrains its decisions to those rules but implements constraints on the lower courts.<sup>68</sup> He further argues that although other interpretative philosophies do not preclude an adherence to formalism, his originalist and textualist perspectives are especially well-suited to the judiciary's formulaic task.<sup>69</sup> By adhering to the "plain meaning of the text" and the original meaning of the Constitution, Scalia finds a basis for constraint and a better-suited perspective for identifying and limiting a case to the general rule of law.<sup>70</sup> Scalia's promotion of judicial constraint, adherence to generally acceptable and recognizable rules of law, and the pursuit of predictability through such constraints are the cornerstones of formalism and the converse of these ideals provide the basis for understanding realism.

Legal formalism is directly opposed to legal realism. Formalism originates in a basic, simplified, division of labor between law-maker (the legislature) and law application (the judiciary).<sup>71</sup> Formalists recognize a set of principles, methodology, policies, and other tools given to the rule applicers by the rule makers, and any decision either encapsulates those principles and policies or has nothing to do with them.<sup>72</sup> Through this labor division, formalism creates a judicial philosophy that is divorced from the sociological, ideological, philosophical, or psychological.<sup>73</sup> It creates a limited and narrow jurisprudence that applies impersonal, objective principles and policies, and does not allow for any outside subjective influence.<sup>74</sup> Any ideological manifestation is left to the law-maker and the law-applier is limited to the rules, procedure, and policy explicitly guaranteed in the constitution or by statute.<sup>75</sup>

## b) Legal Realism

Legal realism attempts to buck the yoke of traditional, formulaic jurisprudence, by demonstrating that judicial predictability is virtually impossible. Realists posit that predictability is only possible by embracing the subjectivity of judicial action. First, it is impossible to achieve any

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68. *Id.* at 1179–80.

69. *Id.* at 1184.

70. *Id.* (advocating for an "adherence to a more or less originalist theory of construction. The raw material for the general rule is readily apparent. If a barn was not considered the curtilage of a house in 1791 or 1868 and the Fourth Amendment did not cover it, then unlawful entry into a barn today may be a trespass, but not an unconstitutional search and seizure.").

71. See Posner, *supra* note 31, at 520 (basing formalism on the theory of a division of labor in which the legislature makes the law and the judiciary only interprets it).

72. See, Kennedy, *supra* note 7, at 364 (explaining that formalistic rule application is based solely on objective and cognitive facts and laws).

73. See generally, Kennedy, *supra* note 7, at 364; Fuller, *supra* note 5, at 434–35.

74. *Id.*

75. *Id.*

predictability when one ignores relevant factors that influence judicial action.<sup>76</sup> Hemming judges into traditional methods of analysis not only makes it impossible to guess when they will circumvent such rigidity, but it also makes it difficult to create a valid forum of discourse when scholars voluntarily accept the blindfold of formalism and ignore all glimpses of non-traditional analysis.<sup>77</sup> As Roberto Unger explains, there is perpetual “indeterminacy through generalization.”<sup>78</sup>

Legal realism strives to change the traditional philosophy of formalism by creating a more authentic view of the judiciary and the personal abilities of judges themselves. Realists acknowledge that judges do indeed make law, and they do so not only with the materials of procedure, structure, and rules provided by statute and constitutional provisions, but also through the “situation around and before them.”<sup>79</sup> Karl Llewellyn, one of the key founders of legal realism, has often noted that realism is not a school or movement; it does not embody one concise theory.<sup>80</sup> It is instead a philosophical approach with diverging branches; some more extreme than others. Yet, all branches of realism base their philosophy on a few common, key principles, as identified by Llewellyn.<sup>81</sup>

Two such principles are the acceptance that elements outside of procedure and rules influence judicial action<sup>82</sup> and the acknowledgment of the aggregation of judicial theory and the social sciences.<sup>83</sup> Legal realists reject a functional, universal legal perspective that judges could and should decide cases strictly on the rules and traditional materials available to them and adopt the more inclusive view of the social sciences. Justice Holmes originally formulated this idea by distinguishing logic from experience.<sup>84</sup> Justice Holmes believed the law does not develop based strictly on objective factors such as procedure, facts, and precedent, but is also shaped and manifested by the individual experience of the judge.<sup>85</sup> His position, distinguishing objective logic from subjective experience, began the entire

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76. Fuller, *supra* note 5, at 437.

77. *Id.*

78. Unger, *supra* note 51, at 569.

80. Llewellyn, *Law and the Social Sciences*, *supra* note 3, at 1296.

81. See Bodenheimer, *supra* note 50, at 609; Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1233 (1931) [hereinafter Llewellyn, *Some Realism*].

82. See Llewellyn, *Some Realism*, *supra* note 80, at 1235–38 (explaining the various categories of legal realism philosophy that tie the theory together).

83. See Bodenheimer, *supra* note 50, at 609; Llewellyn, *Some Realism*, *supra* note 80, at 1237.

84. See Pound, *supra* note 9, at 785–86 (touting the importance of social science and social psychology on legal scholarship, stating that “[s]ociological jurists, as part of their insistence on unification of the social sciences, have for a generation emphasized the place of social psychology in their program.”).

85. See Holmes, *supra* note 6, at 1.

86. See Scott, *supra* note 13, at 64.

realist movement, which acknowledged the impossibility of true objectivity and embraced the implicit subjectivity within analysis.<sup>86</sup>

From these two key concepts of realism emerged both extreme and moderate viewpoints, with Llewellyn leading the side of the moderates. One of the crucial debates between moderates and extremists is the approach to legal uncertainty. Legal formalism's main goals were to create judicial certainty, predictability, and the basic rules that provide for both.<sup>87</sup> Legal realism, in both its extreme and moderate branches, works to subvert this strategy. Roscoe Pound, who founded the most extreme form of legal realism, "conceives of each item of the judicial process as shaped wholly and inexorably by the psychological determinations of the behavior of the individual judge."<sup>88</sup> For moderate realists, legal certainty is not an impossibility, but can only be achieved by acknowledging the effects of psychology and culture on judicial action.<sup>89</sup>

### c) The Critical Legal Studies Movement

The Critical Legal Studies ("CLS") movement developed from the many branches of realistic, leftist modern thought with scholars Roberto Unger and Duncan Kennedy in the vanguard.<sup>90</sup> Critical Legal Studies is often seen as an answer to those judges who espouse judicial restraint and deference "as code words for the personal intellectual rigor of the judge who, it is presumed, remains aloof while deciding a case."<sup>91</sup> The CLS movement disavows such judicial assertions by finding that the "law is simply politics by other means" and that legal reasoning is a myth.<sup>92</sup> Roberto Unger has identified two facets of the CLS movement. The first focuses on the view that legal doctrine is an illustration of one's vision of society, which embodies and demonstrates the suppressive and manipulative character of such a doctrine.<sup>93</sup> The second idea, which Unger notes has decreased in popularity, is the view that legal doctrines reinforce and sustain social hierarchy and divisions.<sup>94</sup>

The CLS movement is a voice speaking loudly against formalism, and it purports to cast judicial action completely outside the realm of predictability and adherence to legal norms and methods.<sup>95</sup> It admonishes traditional formalism for ignoring the influence of the market, social

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87. See *id.*; see also Wilfrid E. Rumble, Jr., *Legal Realism, Sociological Jurisprudence and Mr. Justice Holmes*, 26 J. HIST. OF IDEAS 547, 548–49 (1965).

88. See Scalia, *supra* note 63, at 1179.

89. Pound, *supra* note 9, at 787.

90. See Fuller, *supra* note 5, at 437.

91. Unger, *supra* note 51, at 564.

92. Ferguson, *supra* note 8, at 513.

93. *Id.* (citing David Kairys, ed., *THE POLITICS OF LAW*, n.14 (1982)).

94. Unger, *supra* note 51, at n.1.

95. *Id.*

96. See generally *id.* at 673–76.

science, philosophy, and psychology, and advocates for a judicial perspective that takes into account the influence of cultural and societal factors on judicial action.<sup>96</sup> Many CLS scholars believe that recognizing the inevitable subjective influences on judicial decision-making not only brings predictability one step closer, but also serves to subvert social hierarchy and division.<sup>97</sup>

Although critics of CLS, and legal realism in general, argue that they fail to assist the judiciary in making any distinctions between proper and improper basis for judgment,<sup>98</sup> advocates praise these theories for their candor in recognizing the shortcomings of traditional judicial legal theory. All branches of realism not only show the stifling limitations of strict formalism, they offer the possibility of other options in thought, process, and action.<sup>99</sup> Realism's purpose, and one it shares with Critical Legal Studies, is to "discredit, once and for all, the conception of a system of social types with a built-in institutional structure."<sup>100</sup>

The remainder of this paper seeks to demonstrate the fallibility of a system that relies on one institutional structure. Such fallibility is demonstrated by the belief there is a difference between judicial activism and judicial restraint, and the unfortunate, antiquated assumption that the judiciary's saving grace is in the latter.<sup>101</sup> Formalistic judicial theories are used to reconcile a dichotomy of correctness that does not exist and that willfully turns a blind eye to substantive theories of politics and rights.<sup>102</sup> In the search for one right answer, be it a case or judicial philosophy, traditional formalism shines a light on its own weakness.<sup>103</sup> Consequently, it is through adherence to this weakness that the system remains mired in partisanship.<sup>104</sup>

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97. *Id.*

98. *Id.* at 674–75 (“When we came, they were like a priesthood that had lost their faith and kept their jobs. They stood in tedious embarrassment before cold altars. But we turned away from those altars, and found the mind’s opportunity in the heart’s revenge.”).

99. Bodenheimer, *supra* note 50, at 612.

100. *See* Unger, *supra* note 51, at 577 (“The disintegration of such theories, which has been the dominant feature of recent social thought, creates an opportunity for normative and programmatic ideas . . .”).

101. *Id.* at 570.

102. *Id.* at 572.

103. *Id.* at 573 (explaining that attempting to rescue doctrines from valid critiques are “makeshift apologies”); *see also* Fuller, *supra* note 5, at 435 (referring to the tortured practice of reconciling particular theoretical legal doctrines with the practical law judges must apply which ultimately ignores essential humanitarian considerations).

104. *See* Unger, *supra* note 51, at 573; Fuller, *supra* note 5, at 435.

105. *See generally* Llewellyn, *Remarks*, *supra* note 1, at 401 (demonstrating the seemingly polar results one gets when applying varying theories on the canons of construction).

### III. THE *SEBELIUS* DECISION AND CHIEF JUSTICE ROBERTS'S RELIANCE ON JUDICIAL RESTRAINT

Chief Justice John Roberts's judicial philosophy is rooted in judicial restraint. During his 2005 Senate Confirmation Hearings, Roberts responded to Vice President (then-Senator) Biden that an appropriate judicial perspective revolved around a practice of "judicial humility" which gives due deference to precedent and the separation of powers.<sup>105</sup> Roberts further grounded his judicial perspective in the belief that judges are "not individuals promoting their own particular views, but they are supposed to be doing their best to interpret the law, to interpret the Constitution, according to the rule of law, not their own preferences, not their own personal beliefs. That's the ideal."<sup>106</sup>

Roberts further embraced judicial restraint as the basis for his decision in *Sebelius*. Roberts explained that the Court's approach should demonstrate a "general reticence to invalidate the acts of the Nation's elected leaders," and the actions of the legislature should only be struck down when an act clearly oversteps the legislature's constitutional power.<sup>107</sup> Roberts explained that judicial restraint is rooted in the very nature of the relationship between the judiciary and the legislature by emphasizing that "members of this Court are vested with the authority to interpret law," not the power to make law or policy judgments.<sup>108</sup> Judicial restraint, according to the Roberts, is crucial to the separation of powers because it is the legislature and not the judiciary that bears the burden of making law and policy.<sup>109</sup> Additionally, Roberts acknowledged that only the legislature is voted for by the people and, thus, speaks with the voice of the people.<sup>110</sup> Due to that relationship and the power that must be retained by the people, Roberts clarified that it is not the Court's job to "protect people from the consequences of their political choices."<sup>111</sup> Roberts emphasized that the role of the Court is to uphold the will of the people whenever possible, regardless of the wisdom of their choices, as long as such laws and policies can be found constitutional.<sup>112</sup>

It is with this philosophy of judicial restraint that Roberts ostensibly interpreted the Affordable Care Act. Throughout the *Sebelius* decision, Roberts grounded his analysis in judicial deference to Congress.<sup>113</sup> He argued a legislative act should be upheld as long as the act is within the

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106. *Confirmation Hearing*, *supra* note 22, at 55.

107. *Id.* at 205.

108. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012).

109. *Id.*

110. *See id.*

111. *Id.*

112. *Id.*

113. *See Sebelius*, 132 S. Ct. at 2579.

114. *See id.*

bounds of the Constitution, and<sup>114</sup> that “every reasonable construction [of an act] must be resorted to, in order to save a statute from unconstitutionality.”<sup>115</sup> Through this philosophy and deference, Roberts analyzed the constitutionality of both the individual mandate and the Medicaid provision.

**a) Chief Justice Roberts declined to find the individual mandate a valid exercise of Congress’s commerce power.**

Under the Affordable Care Act (“ACA”), the individual mandate states all “applicable individuals” shall maintain minimum health insurance.<sup>116</sup> A penalty fee will be assessed to any such individual who fails to maintain minimum health insurance coverage, which is to be paid with their tax return.<sup>117</sup> In *Sebelius*, the government argued that the individual mandate should be upheld under the Commerce Clause and if not, then alternatively under Congress’s power to tax and spend.<sup>118</sup> Roberts, along with four other conservative justices,<sup>119</sup> disagreed that the individual mandate was a valid exercise of the congressional commerce power.<sup>120</sup> However, basing his analysis on the principles of judicial restraint, Roberts found the penalty is a tax and upheld the individual mandate as constitutional per the Tax and Spend Clause.<sup>121</sup>

Chief Justice Roberts found the individual mandate exceeded Congress’s power to regulate interstate commerce.<sup>122</sup> Roberts identified the difference between regulating commerce and compelling commerce and found Congress had no power to force individuals into the market.<sup>123</sup> Roberts likened the insurance mandate to a congressional directive to

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115. *Id.* at 2594 (“[t]he question is not whether that is the most natural interpretation of the mandate, but only whether it is a ‘fairly possible’ one.”) (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

116. *Id.* (citing *Hooper v. California*, 155 U.S. 648, 657 (1895)).

117. 26 U.S.C. § 5000A(a) (2014); *see* § 5000A(d) (defining “applicable individuals” as all individuals except those meeting an exemption per § 5000A(d)(2)–(4) and (e) including but not limited to those individuals meeting the religious conscience and health care sharing ministry exemptions, incarcerated individuals, those who are not legally present in the country, and those not meeting the minimum income to bear the penalty).

118. 26 U.S.C. § 5000A(b)(1)–(2).

119. *Sebelius*, 132 S. Ct. at 2584.

120. *See id.* at 2642–47 (Scalia, J., dissenting) (Justice Scalia’s dissenting opinion was joined by Justices Kennedy, Thomas, and Alito).

121. *Id.* at 2591, 2644; *see also* U.S. CONST. art. I, § 8, cl. 3 (The Commerce Clause reads as follows: “Congress shall have the power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

122. *Sebelius*, 132 S. Ct. at 2594; *see also* U.S. CONST. art. I, § 8, cl. 1 (The Tax and Spend Clause reads as follows: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”).

123. *Sebelius*, 132 S. Ct. at 2591.

124. *Id.* at 2589.



Americans to buy more vegetables and noted that allowing the government to affect the market in such a way would authorize Congress to compel behavior under the Commerce Clause in a manner the framers never intended.<sup>124</sup>

Chief Justice Roberts distinguished the individual mandate from the Agriculture Adjustment Act's wheat quotas in *Wickard v. Filburn*, whereby the Court upheld a federal penalty against a wheat farmer for growing beyond his quota for personal consumption.<sup>125</sup> Even though the Act compelled the farmer to participate in the market by purchasing wheat for personal use as opposed to growing it, Roberts found such compulsion was distinguishable from the individual mandate because the farmer was already part of the wheat market.<sup>126</sup> Roberts reasoned that unlike the farmer in *Wickard*, individuals are not continuously "active in the market for health care."<sup>127</sup> Although the government argued all individuals are active in the healthcare market because they will require healthcare services at some point in their lives, Roberts equated this reasoning to the purchase of an automobile.<sup>128</sup> He argued that even though an individual bought a car two years ago and is likely to buy a car again in the future, such a presumption does not make that individual active in the automobile market in the interim.<sup>129</sup>

With this analysis, Roberts found the individual mandate exceeded Congress's grant of power under the Commerce Clause and, thus, placed a firm limitation on the scope of that power.<sup>130</sup> Roberts feared that allowing Congress to compel activity through the Commerce Clause would create a

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125. *Id.* at 2588–89.

126. *Id.* at 2587–88; *see also* *Wickard v. Filburn*, 317 U.S. 111, 113–115, 124–25, 130 (1942) (In this case, the appellee farmer argued that the marketing penalty assessed under the Agricultural Adjustment Act of 1938 ("AAA") was unconstitutional under the Commerce Clause. The farmer harvested 11.9 acres of wheat, much of which was to be used for personal consumption and the feeding of livestock, but the wheat quota instituted by the AAA was set at 11.1 acres. Even though the farmer's excess harvest was minimal and for personal use, the Court found that Congress had the right under the Commerce Clause to regulate such consumption. The Court explained the breadth of the Commerce Clause, holding that Congress' commerce power "may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." The Court further distinguished between direct and indirect commercial activity and found that "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'").

127. *Sebelius*, 132 S. Ct. at 2588.

128. *Id.* at 2589–90.

129. *Id.* at 2590.

130. *Id.*

131. *Id.* at 2591; *see also* Minow, *supra* note 19, at 140 (discussing the Commerce Clause limitations created by the *Sebelius* decision and noting that Roberts addressed the "parade of horrors" that could come to pass by allowing Congress such a broad scope of power under the Commerce Clause, including the power to compel purchases of an unlimited number of products from broccoli to automobiles).

slippery slope allowing congressional mandates to purchase almost any product from broccoli to automobiles.<sup>131</sup> Roberts further found that because the individual mandate was not a valid exercise of commerce power, it was also beyond the scope of the Necessary and Proper Clause.<sup>132</sup>

However, Roberts did not end his analysis with the Commerce or Necessary and Proper Clauses, but looked to whether the individual mandate could be upheld under the power to tax and spend. Chief Justice Roberts, siding with the four liberal justices, found that the mandated penalty was a tax.<sup>133</sup> Roberts found the penalty could be interpreted as a tax, regardless of the fact that it was explicitly termed a penalty under the ACA.<sup>134</sup> Roberts explained that the “question is not whether that is the most natural interpretation of the mandate, but only whether it is a ‘fairly possible’ one.”<sup>135</sup>

Roberts sided with the government’s alternative argument and found the penalty to be a tax for several reasons. First, the amount assessed is less than the cost of insurance and, thus, individuals may decide to pay the penalty as opposed to securing minimal coverage.<sup>136</sup> Second, the penalty does not contain a *scienter* element. In other words, the ACA is not attempting to punish bad behavior through the assessment of the penalty.<sup>137</sup> Finally, the penalty is paid to the IRS when payors submit their taxes, and the penalty is assessed in the same manner as taxes, namely through calculations based on taxable income, number of dependents per household, and joint filing status.<sup>138</sup>

Roberts found that the individual mandate is a constitutional exercise of the taxing power because it does not create “any new federal power,” unlike allowing Congress to regulate inactivity under the Commerce Clause.<sup>139</sup> In doing so, Roberts relied on Justice Holmes, citing the proposition that “as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act,”<sup>140</sup> Roberts noted “taxes that

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132. *Sebelius*, 132 S. Ct. at 2591.

133. *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.”).

134. *Id.* at 2598; *see also id.* at 2575 (noting that Justices Ginsburg, Breyer, Sotomayor, and Kagan joined the opinion as to Parts I, II, and III-C and that Justice Ginsburg filed an opinion in respect to Parts III-A, III-B, and III-D concurring and dissenting in part, joined by Justice Sotomayor and Justices Breyer and Kagan in Parts I, II, III, and IV).

135. *Id.* at 2594–95.

136. *Id.* at 2594.

137. *Sebelius*, 132 S. Ct. at 2594

138. *Id.* at 2595–96.

139. *Id.*

140. *Id.* at 2599.

141. *Id.* at 2593 (citing *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J. concurring opinion)).

seek to influence conduct are nothing new” and upheld the individual mandate as a valid exercise of the congressional power to tax and spend.<sup>141</sup>

**b) Chief Justice Roberts declined to find the Medicaid provision a constitutional exercise of Congress’s power to tax and spend.**

Although the individual mandate was upheld under the power to tax and spend, the ACA’s Medicaid provision was not so fortunate. The ACA expanded the Medicaid program by compelling states to increase the number of covered individuals.<sup>142</sup> By 2014, the ACA required states to expand Medicaid to cover adults with incomes up to 133 percent of the federal poverty level.<sup>143</sup> The ACA would increase a state’s federal funding to assist in covering the Medicaid expansion, but it also allowed the government to remove all of the state’s Medicaid funding should the state fail to adhere to the Medicaid provision.<sup>144</sup>

Chief Justice Roberts examined the Medicaid provision under Congress’s power to tax and spend. Although Congress has the power to influence state action through the Tax and Spend Clause, Roberts noted that states must not be coerced or forced into such behavior.<sup>145</sup> He explained that states must have “a legitimate choice whether to accept the federal conditions in exchange for federal funds.”<sup>146</sup> Roberts proposed a test for determining the constitutional scope of the tax and spend power which asked whether the financial inducement was “so coercive as to pass the point at which pressure turns into compulsion.”<sup>147</sup>

Roberts applied this test and found the Medicaid provision was not a simple financial inducement but was more akin to a “gun to the head.”<sup>148</sup> Roberts distinguished the Medicaid provision from the threatened budget cuts in *South Dakota v. Dole*.<sup>149</sup> In *Dole*, the Court found a threat to withhold 5 percent of a state’s federal highway funds if it did not raise the drinking age to twenty-one was not coercive, because it would potentially affect less than half of 1 percent of the state’s overall budget.<sup>150</sup> Roberts noted that the small percentage of affected funds gave South Dakota a real option in deciding whether or not to comply.<sup>151</sup> In contrast, the Medicaid provision could potentially affect over twenty percent of a state’s overall

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142. *Id.* at 2596–98, 2601.

143. 42 U.S.C. § 1396d(a) (2006).

144. 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

145. 42 U.S.C. § 1396c.

146. *Sebelius*, 132 S. Ct. at 2601.

147. *Id.* at 2602–03.

148. *Id.* at 2604 (citing *South Dakota v. Dole*, 483 U.S. 203, 211 (1987)).

149. *Id.*

150. *Id.* at 2604–05.

151. *Dole*, 483 U.S. at 211–12.

152. *Sebelius*, 132 S. Ct. at 2605.

budget, and Roberts found the threat of losing such a large amount of funding removed any real choice from the states.<sup>152</sup>

Roberts raised further issue with the Medicaid provision, finding that in practice it turned the existing Medicaid program into “a comprehensive national plan to provide universal health insurance coverage.”<sup>153</sup> He took issue with this concept because Congress cannot surprise the states with imposed conditions on preexisting programs or condition the grant of federal funds ambiguously.<sup>154</sup> Even though the Medicaid program clearly allows the federal government to alter the program and the requirements for the disbursements of funds at any time, Roberts reasoned that such a drastic change as embodied in the ACA was beyond the scope of reasonable anticipation.<sup>155</sup> Because the Medicaid expansion “accomplishes a shift in kind, not merely in degree,” Roberts agreed with the four conservative justices and struck down the provision as unconstitutional.<sup>156</sup> However, Chief Justice Roberts disagreed with Justice Scalia that the Medicaid provision could not be severed and, thus, upheld the rest of the ACA.<sup>157</sup>

Even though Roberts upheld the rest of the ACA, his determination that the Medicaid provision exceeded Congress’s powers to tax and spend instituted a limitation on congressional powers which had never before been imposed.<sup>158</sup> He again tipped his hat to judicial restraint in upholding the

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153. *Id.*

154. *Id.* at 2606.

155. *Id.* at 2605.

156. *Id.* at 2605–06.

157. *Sebelius*, 132 S. Ct. at 2607, 2666.

158. *Id.* at 2607 (noting that 42 U.S.C. § 1396(c) includes a severability clause and thus interprets congressional intent to uphold the rest of the Act even though a portion of the Act might be struck down).

159. *Id.* at 2630 (Ginsburg, J., concurring) (noting “for the first time ever—[the Court] finds an exercise of Congress’ spending power unconstitutionally coercive”) (emphasis in the original).

The scope of the power to tax and spend is set forth in *Dole*, in which the Court explained that any exercise of such power must be (1) for the general welfare of the people; (2) done so unambiguously so as to give the States notice of what they are agreeing to and allow them to make an intelligent and informed decision; (3) connected to the federal interest inherent to the federal program in question; and (4) must only induce state action that is itself constitutional. *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987). In *Pennhurst State Sch. and Hosp. v. Halderman*, the Court further examined the requirement that conditions be unambiguous and set limitations on the power to tax and spend. 451 U.S. 1 (1981). In that case, residents of an institution for the mentally disabled complained that the state-run and federally-funded hospital did not adhere to the requirements of the Developmentally Disabled Assistance and Bill of Rights Act, specifically the provisions of 42 U.S.C. § 6010 which stated that treatment “should be provided in the setting that is least restrictive of the person’s personal liberty.” *Id.* at 13. The Court disagreed because it found that the provisions of § 6010 were not clearly mandatory upon the states and were not expressly set forth as requirements prior to the states’ acceptance of federal funds. *Id.* at 25. The Court held that the Act could not compel state action because it did not expressly include the provisions of § 6010 as conditional upon state compliance. *Id.* The section in

remaining ACA by noting the “touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of legislature.”<sup>159</sup> Yet, under the umbrella of judicial restraint, Chief Justice Roberts imposed novel limitations on congressional powers at every opportunity, placing brakes on both the Commerce Clause and Tax and Spend Clause for future applications.

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question was easily differentiated from the other provisions of the Act, which set forth how funds should be allotted to the states and what the states must do in order to receive such funds. *Id.* at 13. The Court explained that “Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds . . . . The crucial inquiry, however, is not whether a State would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice.” *Id.* at 24–25.

In *Dole*, the Court hinted at a fifth requirement, and one on which Justice Roberts relies heavily, namely that federal action must not be so coercive as to deprive a state of any real choice. *Dole*, 483 U.S. at 2798. However, as Justice Ginsburg explains in *Sebelius*, that requirement has not been the basis for subsequent limitations on the tax and spend clause. 132 S. Ct. at 2634 (Ginsburg, J., concurring) (noting that prior to the *Sebelius* decision “the Court has never ruled that the terms of any grant crossed the indistinct line between temptation and coercion.”); see *Nevada v. Skinner*, 884 F.2d 445, 448 (1989) (finding that “[t]he coercion theory has been much discussed but infrequently applied in federal case law, and never in favor of the challenging party” due to the rules elusiveness); *Oklahoma v. Schweiker*, 655 F.2d 401, 406 (D.C. Cir. 1981) (finding that “although there may be some limit to the terms Congress may impose, we have been unable to uncover any instance in which a court has invalidated a funding condition.”).

Therefore, it is curious why Justice Roberts, under the guise of judicial restraint, chose to place such a limitation when both *Dole* and *Pennhurst*, when read together, seem to provide a thorough explanation of the limitations on Congress’s power to tax and spend. That limitation is rooted in a lack of express, conditional terms made clear prior to the acceptance of federal funds. *Pennhurst*, 451 U.S. at 25. Without the presence of such ambiguity, the Court is reticent to knock down an act of Congress. See *Helvering v. Davis*, 301 U.S. 619, 640 (1937) (finding that a congressional decision will not be overturned “unless the choice is clearly wrong, a display of arbitrary power, [and] not an exercise of judgment.”); *United States v. Butler*, 297 U.S. 1, 67 (1936) (holding that the Court will only invalidate an act of Congress when there is a “showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress. How great is the extent of that range, when the subject is the promotion of the general welfare of the United States, we need hardly remark.”).

In practice, the limitations on Congress’s power to tax and spend will only be found where, as in *Pennhurst*, a condition is not set out clearly and unambiguously as a requirement for federal funds “at the time the State receives and uses the money.” *Sebelius*, 132 S. Ct. at 2638 (Ginsburg, J., concurring). As will be explained below, the Medicaid provision could easily pass under this bar because not only is the acceptance of Medicaid funds expressly conditioned on the acceptance that Congress can amend Medicaid at any time and in any way necessary to achieve its purpose, but the ACA itself clearly sets forth its requirements and conditions in a manner as to give the states several years to decide whether they will comply or decline to participate. See *id.* at 2637–38 (Ginsburg, J. concurring).

160. *Sebelius*, 132 S. Ct. at 2607 (citing *Ayotte v. Planned Parenthood of N. New Eng.*, 46 U.S. 320, 330 (2006)).

#### IV. CHIEF JUSTICE ROBERTS'S JUDICIAL ACTIVISM DISGUISED AS JUDICIAL RESTRAINT

Although Chief Justice Roberts allegedly modeled the *Sebelius* decision on a philosophy of judicial restraint, an examination of both the individual mandate and Medicaid provision proves otherwise. Both the individual mandate and Medicaid provision could have easily been upheld under the Commerce Clause and the power to tax and spend, respectively. Adopting a philosophy of judicial restraint, Roberts argued the Court should adhere to a “general reticence to invalidate the acts of the Nation’s elected leaders” and should only do so when Congress lacks *clear* constitutional authority to so act.<sup>160</sup> This note argues true judicial restraint is impossible and, additionally, there are no clear, objective right and wrong answers in complicated issues of law and policy. The *Sebelius* decision evidences the impossibility of true restraint because in every judgment there can be found some amount of activism and some modicum of subjectivity. As will be demonstrated below, the individual mandate and Medicaid provision can both be found constitutional under the government’s initial arguments, namely the Commerce Clause and the Tax and Spend Clause. Thus, a truly restrained opinion would find the individual mandate and Medicaid provision constitutional, all the while demonstrating a reticence to invalidate either provision or place novel limitations on legislative action. That reticence is absent in the *Sebelius* decision even though Roberts and various other scholars have promoted the opinion as one rooted in restraint.<sup>161</sup> Such restraint, although much discussed, is rarely practiced, and the resulting opinion, influenced by Roberts’s position, policy and moral perspective, and political vantage point, evidences the inevitability of judicial activism.

##### a) **The Individual Mandate can be interpreted as a constitutional exercise of Congress’s Commerce Clause power.**

Chief Justice Roberts’s interpretation of the Commerce Clause is limited, retrogressive, and unsupported by recent Commerce Clause precedent.<sup>162</sup> A modern application of Commerce Clause precedent

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161. *Sebelius*, 132 S. Ct. at 2579 (emphasis added).

162. *See id.* (Justice Roberts advocating and adopting a philosophy of restraint); *see also* Minow, *supra* note 19, at 118–19; Kane, *supra* note 19, at 56; DiMugno, *supra* note 19, at 1.

163. Although his opinion may be *one* correct interpretation of the Commerce Clause power, it is curious that Roberts would take such a bold step when Congress’s actions could so easily be interpreted as a normal application of modern Commerce Clause power; *see Sebelius*, 132 S. Ct. at 2609 (Ginsburg, J., concurring) (finding that “[t]his rigid reading of the [Commerce] Clause makes scant sense and is stunningly retrogressive” and explaining that the Chief Justice’s “crabbed reading of the Commerce Clause harks back to the era in

demonstrates the individual mandate could be found constitutional under the Commerce Clause. In order to decipher the modern precedent defining the scope of the Commerce Clause, it is helpful to examine a brief history of its application.

Modern Commerce Clause interpretation begins with an analysis of the Court's decision in *United States v. Darby*, which overturned the limiting holding of *Hammer v. Dagenhart*.<sup>163</sup> In *Hammer*, the Court found the Child Labor Law, which prohibited the sale of goods manufactured by children under the age of fourteen, was beyond the scope of the Commerce Clause.<sup>164</sup> The Court held the Commerce Clause is limited to the interstate transportation of goods, not their manufacture, and the "production of articles, intended for interstate commerce, is a matter of local regulation."<sup>165</sup> In 1941, the Court overturned this limited application of the Commerce Clause, and found that Congress had the power to regulate interstate and intrastate activity when it was "so related to commerce and so affects it as to be within the reach of the power of Congress to regulate it."<sup>166</sup>

In 1942, the Court continued to expand the scope of the Commerce Clause. In *Wickard v. Filburn*, the Court found the Agricultural Adjustment Act, which penalized a farmer for growing wheat for personal use above the allotted quota, was within the scope of the Commerce Clause.<sup>167</sup> The Court explained, "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."<sup>168</sup> The Court went on to emphasize that the scope of congressional power is valid "irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"<sup>169</sup>

As recently as 2005, the Court continued to give broad latitude to the Commerce Clause. In *Gonzales v. Raich*, the Court found the Controlled Substance Act ("CSA") could regulate homegrown, localized marijuana, which had been legitimized through the Compassionate Care

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which the Court routinely thwarted Congress's efforts to regulate the national economy in the interest of those who labor to sustain it.").

164. See *United States v. Darby*, 312 U.S. 100 (1941).

165. *Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918).

166. See *id.* (finding "[t]he making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof").

167. See *Darby*, 312 U.S. at 115, 117 (finding that the Fair Labor Standards Act was a valid exercise of the Commerce Clause because "[w]hatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Subject only to that limitation, presently to be considered, we conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress.").

168. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

169. *Id.*

170. *Id.*

Act.<sup>170</sup> The Court emphasized that the scope of Commerce Clause applicability was based on the substantial relation of the act in question to interstate commerce.<sup>171</sup> The Court clarified that Congress had never been required to prove a “scientific exactitude,” but rather must only prove that the “total incidence” of an act “poses a threat to the national market.” When such a substantial effect is established, Congress “may regulate the entire class.”<sup>172</sup>

Although the Court reemphasized the broad scope of the Commerce Clause in *Raich*, it had taken historic steps several years earlier in both *United States v. Lopez* and *United States v. Morrison* to define the limitations of Congress’s commerce power.<sup>173</sup> In *Lopez*, the Court set forth three categories of Commerce Clause power. The first category involves the regulation of interstate economic activity; the second includes any instrumentalities, persons, or things in interstate commerce, even if the actions in question resulted from only intrastate activity; and finally, the third category encapsulates the power to regulate any activities that have a “substantial relationship to interstate commerce.”<sup>174</sup> However, the Court stated that the “substantially affects” criteria does not allow for piling “inference upon inference,” and the Commerce Clause power is limited to those subjects that directly link and directly affect commerce.<sup>175</sup> In *Morrison*, the Court upheld this limitation, demanding a concrete economic

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171. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005).

172. *Id.*

173. *Id.*

174. The Court in *Raich* distinguished the CSA from both the legislative acts in *Lopez* and *Morrison* through its regulation of activity that was chiefly economical in nature. *See id.* at 25–26 (distinguishing the CSA by explaining that “[u]nlike those [Acts] at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic”). In *United States v. Lopez*, the Court found that the Gun-Free School Zones Act, which made it a federal offense to possess a firearm within a school zone, was beyond the scope of Congress’s commerce power because it was regulating activity that did not “substantially affect interstate commerce” but was in fact a criminal statute and not an “essential part of a larger regulation of economic activity.” *See* 514 U.S. 549, 560–61 (1995). In *United States v. Morrison*, the Court struck down the Violence Against Women Act because Congress’s provision of a civil remedy for gender-motivated violence did not substantially affect interstate commerce. 529 U.S. 598, 613–14 (2000).

These cases can be distinguished from *Raich* based on the “substantially affects” test employed in all three cases. *See* 545 U.S. at 25–26; *Morrison*, 529 U.S. at 614; *Lopez*, 514 U.S. at 560. In *Raich*, the Court found that the regulation of marijuana growth and distribution substantially affected interstate commerce, whereas the legislative acts in *Lopez* and *Morrison* were not reasonably linked to economic activity. 545 U.S. at 38–39. However, the Court went even farther and explained that the scope of Congress’s commerce power is not only that activity which substantially affects interstate commerce, it is any activity, be it local and even noneconomic, so long as that regulation “is a necessary part of a more general regulation of interstate commerce . . . the relevant question is simply whether the means chosen are ‘reasonably adapted’ to the attainment of a legitimate end under the commerce power.” *Id.* at 37 (citing *United States v. Darby*, 312 U.S. 100, 121 (1941)).

175. *Lopez*, 514 U.S. at 558–59.

176. *Id.* at 567.



link to any regulated activity.<sup>176</sup> The Court found such a link crucial to upholding federalism and the constitutional distinction between what is “truly national and what is truly local.”<sup>177</sup>

However, even with these limitations, the Court has applied the “substantially affects” criteria broadly.<sup>178</sup> The Court in *Raich* emphasized the scope of the commerce power when it held Congress could regulate any activity that “is a necessary part of a more general regulation of interstate commerce” as long as “the means chosen are ‘reasonably adapted’ to the attainment of a legitimate end under the commerce power.”<sup>179</sup> As Justice Ginsburg explained in her *Sebelius* concurrence, and as the preceding cases illustrate, there are two principles of Commerce Clause interpretation. First, Congress has the power to regulate any area that substantially affects interstate commerce, and second, the Court provides a great deal of deference and latitude to congressional action regulating economic and social activity.<sup>180</sup> With these principles in mind, the individual mandate, which substantially affects the interstate healthcare market, could easily fall within the scope of Congress’s commerce power. In light of these principles, it is curious why Chief Justice Roberts’s interpretation of the individual mandate was so stringent. Such an interpretation seems antithetical to principles of deference and restraint, regardless of a distinction between activity and inactivity.

The majority in *Sebelius* spent a great deal of time discussing the distinction between activity and inactivity. They found Congress does not have the power to regulate economic inactivity or to propel consumers into the market.<sup>181</sup> This holding is justified through the same automobile and vegetable analogy, namely that although an individual is likely to buy a new car or broccoli at some point in their life, the government does not have a right to mandate or regulate possible future purchases.<sup>182</sup> The reliance on activity versus inactivity is flawed for several reasons.

Primarily, the Court has never distinguished between activity and inactivity. The Court, instead, has implied the opposite by affirming legislative regulation of future activity and the use of the Commerce Clause to propel individuals into the market. In *Wickard*, the Court upheld the penalty because it found the legislature had a valid interest in protecting the wheat market and stimulating trade.<sup>183</sup> It allowed the penalty for the primary purpose of discouraging private crop cultivation and propelling farmers into the wheat market.<sup>184</sup> In *Raich*, the Court upheld congressional

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177. *Morrison*, 529 U.S. at 613.

178. *Id.* at 617–18.

179. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578–79 (2012).

180. *Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (citing *Darby*, 312 U.S. at 121).

181. *Sebelius*, 132 S. Ct. at 2616 (Ginsburg, J., concurring).

182. *Id.* at 2590–91 (majority opinion).

183. *Id.* at 2591.

184. *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942).

185. *Id.*

action that regulated possible future activity. The Controlled Substance Act assumed local marijuana growers cultivating crops under California's Compassionate Care Act would inevitably flood the interstate market and, thus, the government had the right to preemptively regulate and penalize such cultivation.<sup>185</sup>

Further, the individual mandate relies upon action that is inevitable and involves a market in which practically every American is already engaged. The healthcare market is vastly different from the automobile industry or vegetable marketplace. As Justice Ginsburg explained, although most Americans purchase automobiles and broccoli within the course of their lives, such purchases are in no way absolute or inevitable.<sup>186</sup> Not all Americans drive, and there is surely a fair constituency of Americans who are averse to eating their vegetables. But virtually all Americans get sick, and virtually all Americans need healthcare at some point in their lives.<sup>187</sup>

Further, just because the Court has never expressly distinguished activity from inactivity does not mean Congress is precluded from pursuing legislation that regulates future activity.<sup>188</sup> Chief Justice Roberts is concerned with the novelty of the individual mandate, but mere novelty of action has never discouraged the Court in the past.<sup>189</sup> The Court is consistently asked to review new issues and interpret the scope of constitutional powers in novel contexts, and the Court has historically provided Congress the latitude to institute laws and regulations that are designed to meet the country's current economic and social needs.<sup>190</sup>

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186. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

187. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2619–20 (2012) (Ginsburg, J., concurring).

188. *Id.* at 2610 (Ginsburg, J., concurring) (clarifying that “[u]nlike the market for almost any other product or service, the market for medical care is one in which all individuals inevitably participate. Virtually every person residing in the United States, sooner or later, will visit a doctor or other health-care professional.”).

189. Other Supreme Court Justices and federal courts have taken the opportunity to minimize the distinction between activity and inactivity already. *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 296 (1990) (Scalia, J., concurring) (noting the “the irrelevance of the action-inaction distinction”); *Archie v. City of Racine*, 847 F.2d 1211, 1213 (7th Cir. 1988) (*en banc*) (noting that “it is possible to restate most actions as corresponding inactions with the same effect.”).

190. *See Sebelius*, 132 S. Ct. at 2625 (Ginsburg, J., concurring); *see also* 3 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1123–1142 (1833) (explaining that just because Congress has yet to act in a certain manner “is clearly what lawyers call a non sequitur. It might with just as much propriety be urged, that, because congress had not hitherto used a particular means to execute any other given power, therefore it could not now do it. If, for instance, congress had never provided a ship for the navy except by purchase, they could not now authorize ships to be built for a navy, or à converso. [ . . . ]. If they had never erected a custom-house, or court-house, they could not now do it. Such a mode of reasoning would be deemed by all persons wholly indefensible.”).

191. *See Sebelius*, 132 S. Ct. at 2625 (Ginsburg, J., concurring) (reminding “[a]s our national economy grows and changes, we have recognized, Congress must adapt to the

Chief Justice Roberts limited the application of the Commerce Clause due to fear of opening the floodgates of unchecked legislative power.<sup>191</sup> However, this slippery slope analysis balks against precedent and does not provide a proper grounding for limiting the commerce power when Roberts simultaneously advocated for deference and restraint. Roberts believed upholding the individual mandate under the Commerce Clause could lead to a “parade of horrors” that would allow Congress to mandate the purchase of anything from cars to broccoli.<sup>192</sup> Yet, this analysis is directly opposed to Supreme Court jurisprudence. Just as the Court in *Lopez* explained the link to economic activity cannot be substantiated by piling “inference upon inference,”<sup>193</sup> the same rule applies in reverse. The Court should not pile inference upon inference to imagine the worst-case scenario of legislative action.<sup>194</sup> When addressing the scope of Congress’s spending power, the Court in *Butler* explained that:

A tortured construction of the Constitution is not to be justified by recourse to extreme examples of reckless congressional spending which might occur if courts could not prevent expenditures which, even if they could be thought to [a]ffect any national purpose, would be possible only by action of a legislature lost to all sense of public responsibility.<sup>195</sup>

The Court’s analysis in *Butler* can easily be applied to the Commerce Clause. Not only could the same “parade of horrors” be used in reverse (if Congress cannot issue an individual mandate to compel activity, what happens in the case of an outbreak of a deadly virus that will only be combated by a certain antibody?), such analysis goes against a basic tenet of the Commerce Clause power—to defer to Congress on issues of economic and social policy.<sup>196</sup> Not only should the Court endeavor to

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changing ‘economic and financial realities.’”) (citing *N. Am. Co. v. SEC*, 327 U.S. 686, 705 (1946)).

192. *Id.* at 2588–90 (majority opinion).

193. *Id.* at 2591 (2012).

194. *United States v. Lopez*, 514 U.S. 549, 567 (1995).

195. *United States v. Butler*, 297 U.S. 1, 67, 87 (1936).

196. *Id.*

198. See Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825, 1829, 1868 (2011) (noting that slippery slope analysis is detrimental and works against the deference owed to Congress, especially in regards to federal measures such as compulsory healthcare that “might, someday soon, be desperately needed”). Not only is the slippery slope analysis unhelpful in determining the constitutionality of the individual mandate, it evidences the overall thesis that judicial determinations are not and cannot be purely restrained and objective, but instead are a product of myriad subjective influences and factors. Roberts’s use of the “parade of horrors” illustrates the other influences that contributed to his decision, such as public policy and political and ethical concerns. Roberts’s fear that compulsory healthcare will create a slippery slope into

support the separation of powers between the judiciary and legislative branches, as Roberts himself pointed out, it is beyond the scope of the Court's power and responsibility to weigh in on the wisdom and prudence of legislative action.<sup>197</sup> Justice Ginsburg most recently reaffirmed this principle in stating: "we owe a large measure of respect to Congress when it frames and enacts economic and social legislation."<sup>198</sup> Justice Clarence Thomas reminded the Court that "[i]n areas of social and economic policy, [t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process, and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."<sup>199</sup> Justice Stevens adopted Justice Thurgood Marshall's oft repeated mantra that "[t]he Constitution does not prohibit legislatures from enacting stupid laws."<sup>200</sup>

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unbridled commerce power is illustrative of the influences Justice Holmes identified as part and parcel of judicial decision making. *See* Scott, *supra* note 13, at 64 (noting that Holmes identified several factors that influence the judiciary, all reaching beyond objective logic, and including "the felt necessity of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than syllogism in determining the rules by which men should be governed"). Roberts's concern that compulsory healthcare can turn into compulsory produce purchases is rooted in his own public policy concerns and the prevalent political and moral concerns a Supreme Court Justice must inevitably consider. *See* Llewellyn, *Law and the Social Sciences*, *supra* note 3, at 1296 (identifying this practice of interpretation as judges not only finding law but creating it and arguing that such creation is inevitable. He explains that judges "create with given materials which come to them [ . . . ] which strain and 'feel' in one direction rather than another and with one color and tone rather than another," and these subjective materials reveal "the misconception that things get done by rules of law 'and not men.'"). Roberts's policy concerns are made of the stuff of his subjective experience, and such a "parade of horrors" could just as easily be dismissed or applied in reverse. *See Sebelius*, 132 S. Ct. at 2619–20 (Ginsburg, J., concurring) (dismissing Roberts's fear that compulsory healthcare can bleed into other markets such as the automobile and agriculture industries as inapplicable to other markets due to the "inevitable yet unpredictable need for medical care"); Hall, *supra* note **Error! Bookmark not defined.**, at 1829 (identifying a parade of horrors that could come pass *without* compulsory healthcare) (emphasis added).

199. *See Sebelius*, 132 S. Ct. at 2579 (Roberts clarifying that it is not the Court's job to "protect people from the consequences of their political choices").

200. *Id.* at 2616 (Ginsburg, J., concurring).

201. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–14 (1993) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

203. *See* *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 209 (2008) (Stevens, J., concurring). The Court adopts a "presumption of constitutionality" for "regulatory legislation affecting ordinary commercial transactions" and the Court is reticent to question the legislature's judgment and reasoning. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). However, as clarified in *Carolene*, that presumption may not apply to legislative action that is unconstitutional on its face or infringes on the Fourteenth Amendment, especially pertaining to "discrete and insular minorities." *Id.* at n.4. When confronted with legislative action of this nature the Court applies a stricter standard of review. *Id.*

The individual mandate can find solace in the two principles of Commerce Clause jurisprudence, as identified by Justice Ginsburg.<sup>201</sup> First, the mandate is substantially related to interstate commerce.<sup>202</sup> Indeed, the individual mandate is likely necessary to regulate and create equilibrium in the healthcare market. “The large number of individuals without health insurance, Congress found, heavily burdens the national health-care market,”<sup>203</sup> and the mandate serves to address an economic and social problem that is at a breaking point for millions of Americans. Over fifty million people are uninsured and unable to secure the necessary care they need due to the high expense of insurance.<sup>204</sup> Further, due to the uninsured’s inability to secure consistent primary care, they are funneled into emergency rooms of hospitals across the country, which are prohibited from refusing care.<sup>205</sup> The use of emergency care for non-emergency purposes, especially by those that are unlikely to have the means to pay the ensuing high medical bills, pushes the cost of healthcare up to unwieldy levels for those Americans that can afford health insurance.<sup>206</sup> Congress recognized this dire social and economic issue and issued the individual mandate as part of the cure.

Second, the Court is typically highly deferential to congressional regulation of economic activity,<sup>207</sup> and in *Sebelius*, the Court could have adhered to precedent and granted Congress latitude in its promulgation of the individual mandate under the Commerce Clause. Because the individual mandate is directly and substantially related to interstate commerce and does not violate the traditional scope of the Commerce Clause, the Court could easily have practiced judicial restraint and deferred to Congress in addressing this economic and social crisis.<sup>208</sup>

As discussed above, legal realism argues there is not a clear, objective, singular answer to any complicated rule of constitutional law.<sup>209</sup> The philosophy of judicial restraint advocates for an objective and deferential judicial perspective in order to minimize the personal influences on the judiciary with the hope that such deference will afford predictability

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204. *Sebelius*, 132 S. Ct. at 2616 (Ginsburg, J., concurring).

205. 42 U.S.C. § 18091(A) (2006) (“The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.”).

206. *Sebelius*, 132 S. Ct. at 2611 (Ginsburg, J., concurring).

207. See Carmen DeNavas-Walt, et al., *Income, Poverty, and Health Insurance Coverage in the United States: 2009*, Dept. of Commerce, Census Bureau, 23 (2010) available at <http://www.census.gov/prod/2010pubs/p60-238.pdf>.

208. *Sebelius*, 132 S. Ct. at 2611 (Ginsburg, J., concurring).

209. 42 U.S.C. § 18091(2)(F) (2006).

210. *Sebelius*, 132 S. Ct. at 2616 (Ginsburg, J., concurring); 42 U.S.C. § 1395dd (2006).

211. *Id.* at 2615 (Ginsburg, J., concurring).

212. See Llewellyn, *Remarks*, *supra* note 1, at 399 (arguing that the presumption that precedent has but one single meaning or that for every case there is one clear answer is false).

and narrow the number of interpretations that can result from a legal question.<sup>210</sup> This note argues that true restraint is a fiction because every judgment is inevitably a product of the judge.<sup>211</sup> This principle is illustrated by Justice Roberts's interpretation of the individual mandate. The point is not that Justice Roberts was wrong, but that a decision in the opposite would have been just as right. Therefore, if finding the individual mandate constitutional under the Commerce Clause would have been another right answer, Justice Roberts's opinion was not a product of restraint but of activism. It is a product of the myriad of subjective influences that naturally surround the judicial process.

**b) The Medicaid provision can be interpreted as a valid exercise of Congress's power to tax and spend.**

Chief Justice Roberts took an unprecedented step in striking down the ACA's Medicaid clause, "for the first time ever find[ing] an exercise of Congress's spending power unconstitutionally coercive."<sup>212</sup> Roberts took strides to distinguish *Sebelius* from *South Dakota v. Dole*, by adhering to the rule set forth in *Dole* which defined the scope of the spending power, but found the Medicaid provision went a step too far. Roberts found the Medicaid provision represented a virtual "gun to the head" because of the large percentage of funds that states' could lose if they did not accept the program.<sup>213</sup> Roberts noted the financial inducement in *Dole* was only 5 percent of highway funds, whereas, Medicaid spending amounts to as much as twenty percent of a state's budget.<sup>214</sup> Despite the fact Medicaid funds are tendered upon the express stipulation the program can be adjusted and changed at Congress's will, the majority found such a threat overly coercive and ambiguous.<sup>215</sup> Roberts found the Medicaid provision ambiguous because it was, in effect, not a change in degree but a "shift in kind," thereby creating an entirely new program.<sup>216</sup>

Although the majority determined the Medicaid provision to be unduly coercive, another interpretation is just as plausible. Under *Dole*, the Court set forth the scope of the spending power. Any actions taken under the grant of Congress's spending power must be "in pursuit of the general welfare" of the nation, unambiguous, not overly coercive, and related to a

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213. See Fuller, *supra* note 5, at 435–37 (explaining that traditional judicial philosophy values a restrained approach that roots its decisions on the technical, objective and logical aspects of the law because such an approach leads to greater predictability).

214. See Holmes, *supra* note 6; Llewellyn, *Remarks, supra* note 1, at 400; Kennedy, *supra* note 7, at 363.

215. See *Sebelius*, 132 S. Ct. at 2630 (Ginsburg, J., concurring) (emphasis in the original); *Skinner*, 884 F.2d at 448; *Schweiker*, 655 F.2d at 406.

216. *Sebelius*, 132 S. Ct. at 2604.

217. *Id.*

218. *Id.* at 2604–05.

219. *Id.* at 2605.

federal interest.<sup>217</sup> Further, the judiciary should provide great deference to legislative action.<sup>218</sup>

It is clear and undisputed throughout the *Sebelius* decision that the Medicaid provision was created in pursuit of the general welfare of the nation to cure the current health care crisis in the United States.<sup>219</sup> The real question becomes whether the provision is indeed overly coercive and ambiguous. When considering these questions, in spite of the deference owed to Congress, Roberts found the answer to be “yes.”<sup>220</sup> However, it is just as plausible to answer with a resounding “no.”

The argument that the Medicaid provision is unduly coercive and ambiguous is open to attack when compared with the Social Security Act itself. The Act expressly reserves to Congress “[t]he right to alter, amend, or repeal any provision” of the Medicaid program.<sup>221</sup> This reservation is not tempered by a restriction of any kind.<sup>222</sup> It is unambiguous in that it gives Congress the absolute right to alter and amend the program as it sees fit.

Not only is Congress’s right to alter and amend the Medicaid provision clear and unequivocal, Congress’s ability to use its Tax and Spend power to induce behavior is well founded. Not only did Roberts reinforce this principle himself,<sup>223</sup> but the Court has long upheld such a right. In *Butler*, the Court assured that “the power to tax and spend includes the power to relieve a nationwide economic maladjustment by conditional gifts of money.”<sup>224</sup>

However, even though *Butler* allowed the Tax and Spend power to be used to induce behavior, such actions must still be done unambiguously and in a manner that allows states to accept such conditions “voluntarily and knowingly.”<sup>225</sup> Under the Medicaid provision, the states are aware Congress has to the right to alter and amend the program at any time, the requirements are clear and unambiguous, and the states may choose or decline to implement the program.<sup>226</sup> It is arguable that because Congress has the right to repeal Medicaid entirely, it surely has the right to amend its provisions and condition its funds however it sees fit, especially when done

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220. *South Dakota v. Dole*, 483 U.S. 203, 207–08, 211 (1987).

221. *Id.* at 207–08.

222. *Sebelius*, 132 S. Ct. at 2607; *see also id.* at 2630 (Ginsburg, J., concurring).

223. *Id.* at 2604–05 (majority opinion).

224. 42 U.S.C. § 1304 (2006).

225. *Id.*; *Sebelius*, 132 S. Ct. at 2639 (Ginsburg, J., concurring).

226. *Sebelius*, 132 S. Ct. at 2596 (majority opinion) (explaining that “taxes that seek to influence conduct are nothing new [ . . . ] ‘the taxing power is often, very often, applied for other purposes than revenue.’”) (citing J. Story, *supra* note 189, at §§ 962, 434).

227. *United States v. Butler*, 297 U.S. 1, 88 (1936) (Stone, J., dissenting).

228. *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

229. *Sebelius*, 132 S. Ct. at 2637 (Ginsburg, J., concurring).

in pursuit of the national welfare and to address a national economic crisis.<sup>227</sup>

It is difficult to reconcile Roberts's holding with his promotion of judicial restraint when Congress has long maintained right to repeal and amend Medicaid per 42 U.S.C. § 1304. Not only does Congress clearly have such right, but the Medicaid provision satisfies *Dole*, in that it was created to benefit the national welfare and the requirements are set forth unambiguously.<sup>228</sup> When discussing the individual mandate, Roberts reminded the Court that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."<sup>229</sup> However, despite promoting a position of restraint, Roberts struck down the Medicaid provision in its entirety, and for the first time, the Court found that Congress's action under the spending power was overly coercive.<sup>230</sup> This holding not only goes against long held Supreme Court spending power precedent, it denies the deference typically owed to Congress. In *Butler*, the Court emphasized the importance of the separation of powers and the restraint that should be imposed on the judiciary. Justice Stone explained that while the Executive and Legislative powers are checked by judicial review, "the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government."<sup>231</sup>

Again, the question is not whether Roberts's interpretation is wrong, it is whether the opposite view could be just as right. Similar to the possible interpretations of the individual mandate, the Medicaid provision could have been upheld as constitutional under Congress's power to tax and spend. Roberts's holding is again illustrative of the lack of judicial restraint actually applied in *Sebelius* and evidences Roberts's judicial activism. A truly restrained position would apply any and "every reasonable construction . . . in order to save a statute from unconstitutionality."<sup>232</sup> Yet Roberts declined to accept the reasonable constructions set forth by the government, evidencing not restraint but an opinion influenced by subjective factors. Why Roberts practiced judicial activism disguised as restraint is discussed below.

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230. *Id.* at 2639 (Ginsburg, J., concurring) (admonishing the Chief Justice for virtually rewriting 42 U.S.C. § 1304 to "the right to alter *somewhat* or 'amend, *but not too much*.' Congress, however, did not so qualify § 1304. Indeed, Congress retained discretion to 'repeal' Medicaid, wiping it out entirely.") (emphasis in the original).

231. *See* *South Dakota v. Dole*, 483 U.S. at 203, 207–08, 211 (1987).

232. *Sebelius*, 132 S. Ct. at 2594 (citing *Hooper v. California*, 155 U.S. 648, 657 (1895)).

233. *Id.* at 2604. For evidence of the unprecedented nature of Roberts's decision *see id.* at 2630 (Ginsburg, J. concurring); *Nevada v. Skinner*, 884 F.2d 445, 448 (1989); *Oklahoma v. Schweiker*, 655 F.2d 401, 406 (D.C. Cir. 1981).

234. *United States v. Butler*, 297 U.S. 1, 79 (1936) (Stone, J., dissenting).

235. *Hooper*, 155 U.S. at 657.



### V. WHY ROBERTS ADOPTED JUDICIAL RESTRAINT BUT PRACTICED JUDICIAL ACTIVISM AND THE FACTORS THAT INFLUENCED HIS DECISION

Chief Justice Roberts's opinion is touted as an exemplary act of judicial restraint.<sup>233</sup> Scholars seem to have based that opinion almost completely on the fact that Roberts said he was going to employ judicial restraint<sup>234</sup> and because he decided against members of his own party.<sup>235</sup> Yet such an interpretation is superficial and short-sighted. Roberts's *Sebelius* decision was not an exercise of judicial restraint, but was, in fact, judicial activism, as demonstrated by his interpretation and application of the Commerce Clause and Tax and Spend Clause. True deference and restraint would have upheld both the individual mandate under the Commerce Clause and the Medicaid provision as a valid exercise of Congress's power to tax and spend. Yet Roberts found otherwise, and that decision was based on a myriad of factors. Such influences are not meant to cast a shadow on Roberts or shine a spotlight on a weakness of judicial impartiality. They are meant only to show true judicial restraint is an impossibility, and any judicial decision is inevitably a creation of the judge and, thus, influenced by her own subjective experience.<sup>236</sup>

Although this note argues Roberts did not actually practice judicial restraint in the *Sebelius* decision, it does not say that Roberts does not value judicial restraint and espouse it as the backbone of his judicial philosophy. Nor is the argument as to the fictionality of judicial restraint meant to negate the fact that Roberts, like so many Supreme Court Justices before him, attempted in good faith to submit a restrained opinion. The only argument is this: judicial restraint is a fiction. Whether it is a detrimental or necessary fiction is yet to be seen.

Roberts's belief in judicial restraint is evident throughout his career and his tenure on the Supreme Court. Roberts advocated for "judicial humility" during his 2005 confirmation hearings<sup>237</sup> and continued to promote such a philosophy throughout his opinions.<sup>238</sup> Yet in the *Sebelius*,

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236. See Minow, *supra* note 19, at 132 (applauding Roberts's decision by explaining that "[a] superficial view might suggest that he forged a compromise—departing from principle—but a closer read shows that he instead reached a third position that converges with the two groups of Justices on different issues and methods while traveling his own line of analysis."); Kane, *supra* note 19, at 56 (complimenting Roberts's restrained approach by noting that "[t]hroughout his opinion, the Chief Justice demonstrated a commitment not only to adhere strictly to the law, but also to avoid inserting his or the Court's policy choices for those of our elected leaders").

237. *Sebelius*, 132 S. Ct. at 2579.

238. See Minow, *supra* note 19, at 118–19, 135–36, 140; Kane, *supra* note 19, at 56.

239. See Holmes, *supra* note 6, at 1; Llewellyn, *Remarks*, *supra* note 1, at 400; Kennedy, *supra* note 7, at 363.

240. *Confirmation Hearing*, *supra* note 22, at 55.

241. See *Citizens United v. Fed. Election Com'n*, 558 U.S. 310, 373 (2010) (Roberts, J. concurring) (advocating for restraint and explaining that "[j]udging the constitutionality of

despite an adoption of judicial restraint, Roberts, especially due to his position of Chief Justice, was influenced by factors such politics, reputation, and legacy.

Chief Justice Roberts, like all Chief Justices before him, has much to consider beyond the multitude of briefs, oral arguments, and opinions that will flow through the Court during his tenure. In an interview with Jeffrey Rosen in 2007, Chief Justice Roberts discussed the characteristics of the judiciary most important to him, and chief among those is the concern to achieve bipartisanship and create a cohesive court. Roberts explained that “every justice should be worried about the Court acting as a Court and functioning as a Court, and they should all be worried, when they’re writing separately, about the effect on the Court as an institution.”<sup>239</sup> He further affirmed “[i]t’s a high priority to keep any kind of partisan divide out of the judiciary as well.”<sup>240</sup> With these goals in mind, Roberts explained his role as Chief Justice is to help create a unified Court, and to do so he could and would reward those Justices who wrote opinions that were able to attract more votes and lessen the number of dissenting and concurring opinions.<sup>241</sup>

These goals and intentions are indeed lofty and worthwhile, but in their very espousal demonstrate the other factors at play in the creation of judiciary opinions. Roberts’s *Sebelius* decision shows the effects of these factors. As Eric Schepard explains, “Chief Justice Roberts likely recognized that striking down another major act of Congress along partisan lines would severely threaten his Court’s legitimacy.”<sup>242</sup>

Roberts’s decision regarding the individual mandate further shows the influence of political philosophies and pressures. Although upholding the individual mandate at first resembles a win for the Obama Administration, the opinion in full actually takes significant strides to limit congressional power in ways unprecedented. It would be insulting to infer that such political gains were unintentional. The Chief Justice crafted an opinion that allowed him to successfully walk the tight rope between partisanship, the need to create a unified court, and the desire to institute the type of constitutional limitations he felt were necessary.

There is no reason to assume that such influences and factors are unworthy of the Chief Justice’s position. In fact, they infuse the core of his

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an Act of Congress is ‘the gravest and most delicate duty that this Court is called upon to perform.’”) (citing *Blodgett v. Holden*, 275 U.S. 142, 147–48, (1927) (Holmes, J., concurring)). Roberts continues, explaining that the Court’s policy of judicial restraint “underlies both our willingness to construe ambiguous statutes to avoid constitutional problems and our practice ‘never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.’” (citing *United States v. Raines*, 362 U.S. 17, 21 (1960)).

242. Jeffrey Rosen, *Roberts’s Rules*, ATL. MONTHLY, Jan.–Feb. 2007, at 105.

243. *Id.* at 112.

244. *Id.* at 110.

245. Eric Schepard, *Why Harlan Fiske Stone (Also) Matters*, 56 HOW. L. J. 85, 119–20 (2012).

station. As Roberts identified, a Chief Justice must concern himself with more than just the cases before the Court, but also with securing the sanctity, reputation, and reliability of the Court, as well as insuring the Court not only upholds law and the Constitution but also the separation of powers so vital to the fabric of the nation.<sup>243</sup> The only question is why the judiciary cannot and does not call a spade a spade. At every turn, the Chief Justice defended the majority opinion through a lens of judicial restraint, when in fact there were very real political and ideological issues on the line, and the Chief Justice took full opportunity to settle those accounts.<sup>244</sup> Such an opinion is not an exercise of judicial restraint, it is judicial activism.

### CONCLUSION

Through an examination of the *Sebelius* decision, Justice Holmes's proclamation that "[t]he life of the law has not been logic: it has been experience" rings true. Chief Justice Roberts was not wrong, he did not misapply the law, and he did not abuse or subvert his position. His opinion is balanced, constitutional, creative, and curative. But it is not judicial restraint, and just as he is not wrong in his analysis, neither is he definitively right. His opinion is influenced by his experience and his perspective. As Karl Llewellyn espoused, there is no one correct answer.<sup>245</sup> There are many correct answers. A true exercise of restraint would have shown proper deference to Congress and only found components of the ACA unconstitutional if the Act explicitly went beyond the legislature's enumerated powers. Yet, the ACA does not on its face fall outside of Congress's constitutional grant of power. As seen above, both the individual mandate and Medicaid provision can be interpreted to fall well within the scope of the Commerce Clause and the power to tax and spend, respectively. Due to the fact that the ACA could just as easily be interpreted through Justice Ginsburg's perspective as it could Justice Roberts's, there must be other factors at play. These factors manifest the inevitability of judicial activism and the impossibility of judicial restraint.

Judicial restraint is a fiction. Karl Llewellyn explained "[w]hat is inherent is that the man must always enter into the result: it is he who must read the words of the rule of law, it is he who must size up the facts as to whether a rule of law applies. No rule of law ever applied itself."<sup>246</sup> The

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246. Rosen, *supra* note 239, at 104.

247. Schepard, *supra* note 242, at 111–12 (arguing that with the *Sebelius* decision "[o]nce again, a conservative Court invalidated a rationale for constitutionality of controversial legislation that a liberal Congress passed to address a pressing national economic problem [ . . . ] [m]ost importantly, once again, the Court appealed to federalism to advance political/ideological 'predilections' in favor of economic liberty that the Constitution nowhere requires").

248. Llewellyn, *Remarks*, *supra* note 1, at 399.

249. Llewellyn, *Law and the Social Sciences*, *supra* note 3, at 1304.

only question is whether judicial restraint is a necessary or detrimental fiction.

On one hand, judicial restraint can serve as a check on the judiciary. By proclaiming the necessity and value of judicial restraint, the judiciary is reminded it is beyond its scope to evaluate the wisdom of law, and, instead, must only interpret the law.<sup>247</sup> Such a check on judicial powers is especially important when considering the entire allotment of powers distributed among the branches. The judiciary checks the executive and legislative branches along with the power of the people to cast their vote. Yet, who checks the unelected judiciary? Without some self-imposed restraint, is the whole system threatened?

On the other hand, continuing under a façade of judicial restraint may work to reinforce a partisan system and leave all three branches forever awash in the backwater of polarized, two-party political ideology. Karl Llewellyn explains that “the court uses a conventional vocabulary that continues to unfortunately presuppose there is only one correct answer and so then there are two opposing canons on every part.”<sup>248</sup> This dichotomy of correctness is unhealthy and moves the debate away from crucial issues, such as healthcare reform, to never-ending battles of political puffery.

The United States is indeed in the middle of a healthcare crisis. Millions of lower income Americans are without health insurance and millions who are sick go without care. Mothers, fathers, sons, and daughters die of illnesses that could be treated, all because of money and a lack thereof. In light of such a crucial issue, did Chief Justice Roberts’s promotion of judicial restraint serve the Court in its analysis, or would a bit of realism and recognition of judicial activism have served the Court better? To argue that reality is always preferable is persuasive. A forthright Court which acknowledges the inevitability of subjectivity may very well take a step closer to bipartisanship and empower justices to address a national crisis without overstepping their allotted constitutional powers. It is further arguable, in regards to the ACA and the restraint so promoted by Chief Justice Roberts, that the will of the legislature (and thus the people) should have been upheld in full. However, whether judicial restraint is a necessary fiction sustaining federalism and the separation of powers or a detrimental façade keeping the country locked in two-party conflict is a question that only time will tell.

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250. *United States v. Butler*, 297 U.S. 1, 78–79 (1936) (Stone, J., dissenting).

251. Llewellyn, *Remarks*, *supra* note 1, at 401.