It’s Not What They Say; It’s What They Do Not Say

[and Perhaps Do Not Even Think]

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Abstract

This working draft considers what written opinions of the U. S. Supreme Court may have communi­cated to audiences in two Obamacare cases. I presume that appellate ar­guments reach mass media and, through media, reach attentive audiences by means of juristic rites and *bricolage*, the fitting of resolutions of instant disputes to limited cul­tural and jural premises and commonplaces available. I show why the Obamacare landmark, *NFIB v*. *Sebelius* (2012), demanded some much *bricolage*: de­notations and connotations, synonyms, and correlates describing Madison’s “Compound Republic” range widely and proliferate to such a degree that advocates and adjudicators alike must opt to emphasize some and to de-emphasize or overlook others. Then I show how opinions in the first Obamacare decision of the United States Supreme Court pivoted on rites and *bricolage*. I focus on what opinions made patent and at times blatant, on what opinion-writers might have ac­knowl­edged but did not, and on aspects of the Compound Republic in practice about which appel­late advocates and adjudicators need not be aware. I conclude that rites and *bricolage* limit the learning of journalists and of attentive audiences because even elite media cannot afford the airtime or words to convey either curbs on the Commerce Clause and hence the law­mak­ing authority of Congress that at least five justices endorsed or how justices’ recoiled from the pros­pect that Congress might regulate largely or entirely whatever and however the institution pleases.

This is a working draft.

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Like almost every major engagement over domestic policy in U. S. history, the fight over universal health insurance came to revolve around federalism —the powers of Congress to regulate, to tax, and to bargain with states. And, inevitably, the controversy ended up in the Supreme Court. *NFIB v. Sebelius* (2012) and *King v. Burwell* (2015) joined bare-knuckle politics with high-toned constitutional argument. The cases were part of a fierce ideological battle, [*sic*] and a lawyers’ game.[[1]](#footnote-1)

In this working draft I consider what written opinions in landmark cases may communicate to audiences.[[2]](#footnote-2) I use opinions in two Obamacare cases before the United States Supreme Court to argue that claims and arguments in the Obamacare cases vary in their clarity and cogency owing in part to what is left implicit and what justices may not know or acknowl­edge. What opinion-writers make explicit and what they leave implicit, unacknowledged, or unexplored will condition what reporters and audiences can gather from opinions, so even experienced, astute reporters and educated, critical citizens may be unlikely to appreciate how equivocal, capricious, and contingent decisions and especially opinions may be. If so, what is not acknowledged overtly and what is unknown to advocates and opinion-writers may inhibit communication to and education of communicators and consumers even more than what is stated prominently in opinions.[[3]](#footnote-3)

This working draft builds toward a larger survey of landmark litigation since 2000. In that larger survey I shall presume—realistically or cynically or even anthropologically—that appellate decision-makers often resolve disputes rendering[[4]](#footnote-4) the U. S. Constitution through *bricolage*, a species of the “lawyers’ game” to which the inset quotation above refers. I shall also make bold to claim that landmark renderings always manifest *bricolage* if reporters and editors read them thoroughly, carefully, and critically, which journalists seldom appear to do. As a result opinions as disseminated mystify communicators and consumers alike.[[5]](#footnote-5) In a subsequent working draft of the Obamacare chapter of the larger survey, I shall analyze and interpret briefs and argu­ments that tried to sway the Court and follow the decisions and opinions of the Court through mass-mediated coverage and into the blogosphere. In like manner I shall subsequently trace inputs to and outputs from *Bush v. Gore* (2000), *Lawrence v. Texas* (2003), *District of Columbia v.* *Heller* (2008), *Citizens United v. Federal Election Commission* (2009), *McDonald v. City of Chicago* (2010), *Shelby County v. Holder* (2013), and *Obergefell v. Hodges* (2015) as constitutional rationalizations ever more unmoored owing to transactional jurisprudence and constitutional *bricolage*.

In this paper, I study parts of opinions—not even the entire opinions—in *National Federation of Independent Business v. Sebelius[[6]](#footnote-6)* (2012) [hereafter *Sebelius*] and *King v. Burwell* (2015) [hereafter *Burwell*] to show 1) how shenanigans such as slippery slope fallacies regarding what Congress must not be allowed to regulate shaped opinions, 2) how an ungrounded, unsourced rendering of the Commerce Clause and the Tax and Spend Clause of the U. S. Constitution camouflaged a radical restriction of both clauses and, thus, the sway of Congress in an opinion by the Chief Justice, and 3) how a one-vote majority rationalized their splitting differences on Medicaid. I selected *Sebelius* because its opinions display “bare-knuckle politics with high-toned constitutional argument” over conceptions of the U. S. Compound Republic to be found “. . . nowhere *in* the Constitution . . .” but throughout the Constitution, “. . . a foundational principle inferred from the document’s conjunction of silence and specificity.”[[7]](#footnote-7) I selected the second Obamacare decision of the United States Supreme Court, *Burwell*, because itpresents a normalizing of highly political battles over constitutional principles, ideological shibboleths, a partisan sloganeering, and capacious policies that concern a major fraction of the economy and the budgets of states and nation, not to mention adversarial wrangling between and among Bench and Bar. *Sebelius* may have agitated; *Burwell* may have acquiesced; taken together, the landmark and its follow-up may illustrate phases in mystification.

*Sebelius* and *Burwell* not only reveal what gets said, what goes unsaid, and what is not known to reporters and audiences but perhaps to opinion-writers and decision-makers; but also how estab­lished but not truly settled verities are subjected to normalizing, “juralizing” rites. In the ground-breaking *Sebelius* the justices of the Roberts Court sorted through established but unsettled verities by means of rites rhetorical as well as jural. The combination of verities and rites was assisted by *bricolage* and badinage. In the normalizing *Burwell*, the Roberts Court reverted to lawyerly semantics that, while *bricolage* and badinage still, reflects a different pattern of what is made patent, what is left latent, and what may never appear in appellate discourse. *Sebelius* and *Burwell* involve much more than what is said, what is unsaid, and what may be unseen, but the stated, the unstated, and the un­acknowledged are my focus in this working draft. Thus, my aim in this paper is to understand how trails get blazed and how they then get paved without almost all of the citizenry being any the wiser.

Momentous cases, like hard cases,[[8]](#footnote-8) answer or resolve jural issues but need not settle or clari­fy jural puzzles because decisions and opinions almost always challenge appellate verities with rites. Verities follow not merely from precedents, which may obviously support contrasting outcomes in an instant case[[9]](#footnote-9) and may obscurely buttress unanticipated outcomes, but also from stray premises of nearly forgotten legal lore and even from the absence of precedents or indisputable rules [“black-let-ter law”[[10]](#footnote-10)]. The rites involve tactical deployment of patent premises [“What They Say” in the title of this paper] as well as instrumental or inadvertent neglect of latent premises [“What They Do Not Say”] as well as omission of unacknowledged or even unknown premises [“Perhaps Do Not Even Think”]. Thereafter, appellate courts may rework landmarks into better law—“nor­ma­lized law”—in venues freer from political or cultural exigencies that make the landmarks momentous.

This paper proceeds in four sections. In the first section below I presume that appellate ar­guments reach mass media and, through media, reach attentive audiences by means of jural rites and *bricolage*, among other communications. Rites assure and perhaps even assuage readers, listeners, and viewers that advocates and adjudicators have followed appropriate, warranted logics of dis­covery and logics of justification. Of course, if ordinary jural logics dictated irrefutable resolutions of dis­putes, decisions would be unanimous below courts of last resort and would be decided summarily or declined by courts of last resort. Instead, alleged logics of discovery and published logics of justification demand the fitting of resolutions of instant disputes to limited cultural and jural premises and commonplaces available,that is, *bricolage*. Thus, in the second section of this paper I show why the Compound Republic of the United States in particular demands so much *bricolage*: de­notations and connotations, synonyms, and correlates describing Madison’s “Compound Republic” range widely and proliferate to such a degree that advocates and adjudicators alike must opt to emphasize some and to de-emphasize or overlook others. In section three I show how opinions in the first Obamacare decision of the United States Supreme Court pivoted on rites and *bricolage*. I focus on what opinions made patent and at times blatant, on what opinion-writers might have ac­knowledged but did not, and on aspects of the Compound Republic in practice about which appel­late advocates and adjudicators need not be aware. In my concluding section I argue that rites and *bricolage* limit the learning of journalists and of attentive audiences because even elite media cannot afford the airtime or words to convey either curbs on the Commerce Clause and hence the law­mak­ing authority of Congress that at least five justices endorsed or how justices’ recoiled from the pros­pect that Congress might regulate largely or entirely whatever and however the institution pleases.

**§1 Out-of-the-ordinary appellate adjudication from time to time calls for greater use of *bricolage* that manages the revealed, the concealed, and the unknown/unacknowledged in a manner different from normal and normalizing rites. A high ratio of *bricolage* to rite will be called for when highly ambiguous symbols—such as the nature of the U. S. Com­pound Re­public—must be treated as if they extruded settled jural doctrines or political verities.**

. . . The traditional activity of constitutional interpretation is best de­scribed in the essentially untranslatable French word *bricolage*. *Bricolage* is a process of fabri­cating “make-do” solutions to problems as they arise, using a limited and often severely limiting store of doctrines, materials, and tools—the way a household handyman must respond to a novel “fix-it” task, relying only on his ingenuity and a small kit bag of mending tools. The source of the doctrines and exegetical tools employed by constitu­tional judges is the society’s “political culture.” The irony is that broader cultural influences are not themselves always broadening in their effect on the law, but rather, through the constraints of *bricolage*, are often limiting.

Constitutional *bricolage*, the art of judges, reflects the larger process by which a society tries to maintain its . . . consistency and identity over time . . . by selecting responses to problems as they arise from a limited cultural reserve.[[11]](#footnote-11)

When lawyers and judges are customizing the U. S. Constitution to fit novel circumstances, they especially desire to minimize the overtness of their discretion. This appellate advocates and judges do through, among other arts and artifices, jural rites and forensic *bricolage*. This is particularly so in landmark disputes, appeals that challenge settled verities and compel appellate courts to make or to remake law. What the appellate Bench and Bar have said, what they have not said, and what advocates and judges have overlooked or have not known are hard to restate amid arguments writ­ten and oral, decision-making latent and transactional, and opinion-writing strategic and tactical. While a consumer of media need not be oblivious to the precariousness of votes or the contentious­ness of arguments, lessons and accountability beyond the most obvious defy most observers. The more contentious the dispute—in this paper, the first rendering of the constitutionality of Obama­care in *NFIB v. Sebelius*provides our focal instance of a fraught landmark while *King v. Burwell* pro­vides our focal contrast of a more ordinary “working out” of a landmark precedent in a follow-up consideration of Obamacare—the more challenging the resolution will be for journalists, pundits, and attentive publics. Rites and *bricolage*, of course, at onceassist observers journalistic and academic in asserting that decisions and opinions are within a normal range and therefore legitimate and abet observers journalistic and academic into assailing decisions and opinions as aberrant and illicit, another lawyers’ [and pundits’ and lobbyists’] game.

Of course, rites of providing reasons are shaped in part by hiding less worthy, more capri­cious reasoning behind worthier, more jural motives. To illustrate this presentation of more “judi­cious” rhetoric to camouflage more arbitrary gambits, I schematize *Sebelius* based on the syllabus of the Court to reveal the complexity of what was decided and what was argued alike. Even a glance at Diagrams One and Two makes clear why reporting landmarks challenges laypersons and lawyers and why no small part of appellate justification involves husbanding the blatant, the patent, and the la­tent. The complexities of landmark outputs of appellate courts distinguish them from worka­day ad­judication. Those complexities include, in general, alignments of decisions and votes [Diagrams One and Two] and, specific to this paper, cherry-picking notions of “the Compound Republic.”

I derived Diagram One from the syllabus provided by the clerk of the Court and the open­ing paragraph of each opinion. The Court’s inventory of holdings permits the justices to frame their resolutions in juristic[[12]](#footnote-12) terms. These explicit statements, thus, are readily available to media and users online. I draw attention to how “performative” and apparently formal such “holdings” are.

Chief Justice Roberts’ opinion—the only opinion that the syllabus from the clerk schema­tizes—is at once a unanimous opinion of the Court [Holding One on the Anti-Injunction Act], two apparent majority opinions of the Court [Holding Two with which Justices Scalia, Kennedy, Thomas, and Alito agreed but did not join; Holding Three drew the assent of Justices Ginsburg,

Diagram One—Results Announced in *NFIB v. Sebelius* (2012)

HOLDING ONE The anti-injunction act does not bar this lawsuit. [pp. 11-15]

HOLDING TWO The individual mandate is a valid exercise of neither the commerce clause nor the necessary and proper clause nor both in combination. [pp. 16-30]

HOLDING THREE The individual mandate, construed as a tax, is a valid exercise of the tax and spend clause. [pp. 31-44][[13]](#footnote-13)

HOLDING FOUR Medicaid expansion that threatens states with loss of existing Medicaid funding if they decline to comply with expansion would be inconsistent with federal system; however, absent the authorization of the secretary of health and human services to penalize states that declined to comply with the expansion, the A.C.A. is constitutional. [45-58]

Breyer, Sotomayor, and Kagan to create a majority of five justices], an opinion of three to five jus­tices with respect to Holding Four, and in some respects the Chief Justice’s solo opinion re­garding Holding Two. If such a cacophony seems convoluted, pity specialized, experienced reporters even for elite media, let alone generalist reporters and broadcast journalists. Diagram One shows how the juristic rites of the United States Supreme Court and its syllabi may frustrate the ability of even of astute observers to unravel any lessons from *Sebelius*. If we sometimes wonder why sophisticated citizens often seem to rejoice that they won while neglecting justifications for their victories, we may want to consider that such citizens, even given abundant education and leisure, are able to fathom results but seldom to draw from the reports of decisions and opinions reasons for the results.

Among the ritual elements apparent in the syllabus are conclusory performatives. Conclu­so­ry formulations inform journalists and others who read slip opinions what the justices decided, so results resound even if reasons recede. Performative[[14]](#footnote-14) formulations enact through statement, as when the syllabus notes Chief Justice Roberts’ declaring [see the third page of the syllabus] that “Even if the individual mandate is ‘necessary’ to the Affordable Care Act’s other reforms, such an expansion of federal power is not a ‘proper’ means for making those reforms effective.” The de­cla­ra­tion that the individual mandate is not “proper” makes it unconstitutional. Other “mandatory” phrasings dot the syllabus: “The individual mandate thus cannot be sustained under Congress’s power to ‘regulate Commerce’ ” [the four justices would so sustain it cannot once the Chief Justice proclaims that they cannot]; “… the individual mandate must be construed as imposing a tax on those who do not have health insurance, if such a construction is reasonable” [despite Roberts’ call­ing the tax a penalty to evade the Anti-Injunction Act as Holding One]; and “this Nation’s system of federalism” [valorizing a rendering in *South Dakota versus Dole[[15]](#footnote-15)* (1987) reifies a representation].

In characterizing features in Diagram One as “rites,” I do not demean them. Rather I mean that they represent a persistent aspect of the “oracular tradition”[[16]](#footnote-16) in rendering constitutional law in the United States. Mythic beliefs and ritualistic practices have together dramatized courts’ and judges’ transcendence of battling parties political and otherwise, contentious causes instant and far-flung, and seething issues contrived and sincere. When Chief Justice Marshall ended *seriatim* opin­ions in favor of collective opinions, he concocted a “rite” that em­phasized or synthesized unified judgment and consensus as well as minimized or disunity and dis­sensus. Syllabi, headnotes, and other formulations assist audiences of appeals courts in finding more legality, formality, and unity than might otherwise be apparent. “Rites,” then, are devices for fram­ing resolutions and priming audiences to approve them by accentuating how published reason­ing resembles established rules, settled precedents, longstanding traditions, and other indicators of retrospective consistency.

Diagram Two—Reasons Dispensed in *NFIB v. Sebelius* (2012)

HOLDING ONE The anti-injunction act does not bar this lawsuit *because Congress did not intend for the payment in lieu of complying with the individual mandate to be treated as a tax but as a penalty*. [pp. 11-15]

HOLDING TWO The individual mandate is a valid exercise of neither the commerce clause nor the necessary and proper clause nor both in combination *because precedents understand “regulation” in Commerce Clause to presuppose activity, whereas individual mandate penalizes inactivity; because applying Commerce Clause to inactivity would vastly enlarge the power of Congress to regulate and even to compel commerce; and because the Necessary and Proper Clause applies only to means necessary to carrying out enumerated, granted power*. [pp. 16-30]

HOLDING THREE The individual mandate, construed as a tax, is a valid exercise of the tax and spend clause *because Court must construe the individual mandate’s penalty for noncompliance as a tax if it is reasonable so to construe the penalty*. [pp. 31-44][[17]](#footnote-17)

HOLDING FOUR Medicaid expansion that threatens states with loss of existing Medicaid funding if they decline to comply with expansion would be inconsistent with federal system; however, absent the authorization of the secretary of health and human services to penalize states that declined to comply with the ex­pan­sion, the A.C.A. is constitutional *because the majority may bar the Secretary of Health and Human Services from withdrawing existing Medicaid funds for states’ failing to comply with the aca’s expansion*. [45-58]

Diagram Two affords us a slightly more detailed view of the Court’s juristic rites. In *Sebelius*, “opinion of the Court” is term of art such that saying what any majority decided remains a bit risky, but what the reasoning of the Chief Justice was is a bit clearer. The Court’s rationale, then, seems co­hesive, a juristic rite that makes the Court seem less dividedthan reading 193 pages of the opin­ions would disclose. The syllabus, as should be expected, followed the reasons in the opinion of the Chief Justice and scanted reasoning from other opinions, thereby reducing if not minimizing patent dissensus. Moreover, even as presented in the syllabus of the Court, opinions reveal selective casuis­try in choosing postulates and premises. Line-ups of decisions and opinions make stating who won and who lost, even when examined more closely in Diagram Two, imprecise at best and misleading at worst.[[18]](#footnote-18) That is, what the Court decided and what it propounded are themselves sub­jects of and subject to cherry-picking. Chief Justice Roberts’ reasoning for the second major hold­ing—that the Commerce Clause authorizes regulation of activity but not of inactivity—turned on semantics of “activity” in Commerce Clause precedents; such semantic parsing not only seems juris­tic in itself but also plays down the Chief Justice’s trading on the fear that upholding the ACA’s penalizing of inactivity would permit Congress to regulate anything and everything. In sum, the rites highlighted by the syllabus play up the jural and play down the political and compel journalists and other laypersons to dig into opinions to understand what eight of the nine deciders thought.[[19]](#footnote-19)

Thus, before an educated, critical “consumer” of Supreme Court reports gets past the sylla­bus of the landmark, that consumer is regaled with and perhaps mired in what got decided and why. Whether that consumer is a journalist, pundit, or professor, jurisprudential myths and formal rituals of adjudication abound. Once the landmark settles, the Court will be able to claim prece­dent and to indulge in the arcane and the abstruse in an obscurity and with an impunity that the justices have constructed. The arcane and the abstruse transcend and thus escape popular un­derstanding, so intri­cacies of appellate “discovery” and justification are among the matters that a mass-mediated court in effect “does not say” to almost all audiences. The more pertinent matter for the present exercise is that even students of law and of courts likely will miss in what the unmediated court does say the understated, unstated, and sometimes even unknown alternatives that the justices eschewed.

What is more, any follow-ons to landmarks may bury all the deeper postulates and premises used—blatantly, patently, or latently—by most or all of the judges. The second Obamacare decision of the Roberts Court, *Burwell*, “normalized” the rendering of the Constitution in *Sebelius*. In the lat­ter case, six members of the Court indulged in Talmudic casuistry to declare that what the ACA stated was not what the ACA meant. Since “[i]t is emphatically the province and duty of the judicial department to say what the law is,”[[20]](#footnote-20) when justices interpret what rules mean in particular instances, such working out of specifics yields a higher ratio of rites to *bricolage* than we should expect in land­mark cases. That in turn means that key questions, issues, and uncertainties become unstated or understated as landmarks mellow or mold into doctrines and precedents smooth into mystifications.

Compare the singular holding of the Court as synopsized by the syllabus for *Burwell* with the four-way split in the syllabus for *Sebelius*. Diagram Three consists of one starkly straightforward per­formative: Tax credits bestowed under Obamacare extend to states that eschewed creating health-insurance exchanges. In Diagram One I stripped the syllabus for *Sebelius* down to four holdings for the sake of clarity; the syllabus itself set out at least five holdings. The syllabus for *Burwell* explicitly identifies only one holding. That holding announces the “correct” reading of the allowance of tax credits only for taxpayers enrolled in an established, state insurance plan. The pitched constitutional issues of *Sebelius* are by the second Obamacare decision reduced to a squabble over construction of a few words or phrases in the ACA.

Diagram Three—Results Announced in *King v. Burwell* (2015)

HOLDING ONE Tax credits available in states that have established health-insurance exchanges are likewise available in states that elected not to create such exchanges and left creation of such exchanges to the U. S. Secretary of Health and Human Services. [pp. 7-21]

Moreover, Diagram Four shows how reasons for the singular holding in partook far more of worka­day appellate reasoning and lawyerly parsing than Chief Justice Roberts’ convolutions in Diagram Two. To be certain, Chief Justice Roberts used *bricolage* to tailor the majority’s reading of a key phrase to the immediate case before the Court. Still, the opinion of the Court avoided renderings of the Compound Republic and focused on semantics of the ACA. Performative rites are still present in *Burwell* and tailoring a plain, general provision for tax credits to the holding of the majority involved forensic as well as jural *bricolage*. After the constitutional convolutions of *Sebelius*, however, semantics and statutory construction “work out” subsidiary issues: whether to apply the *Chevron* pre­ce­dent[[21]](#footnote-21) and the plain language of the ACA in a manner that would obstruct Obamacare or to dis­tin­guish *Chevron* and to expand the plain language of the ACA the better to suit Congress’s intentions and system in the ACA. It is easy to read each opinion in *Burwell* as making explicit a logic of justi­fi­cation that relies little on tactical silences. In short, with *Burwell* the reader seems to get from what they—the six and the three—say a great deal more than in opinions in *Sebelius*, in which what was not said or might not even be known was far more significant.

Diagram Four—Reasons Dispensed in *King v. Burwell* (2015)

HOLDING ONE Tax credits available in states that have established health-insurance exchanges are likewise available in states that elected not to create such exchanges and left creation of such exchanges to the U. S. Secretary of Health and Human Services *because deference to the IRS would be inappropriate in this instance despite the seemingly plain language of the ACA and a ruling precedent [Chevron] that the majority distinguish; because the majority find the plain language [“established by the States”] ambiguous in the context of the ACA;* and *because the majority find that reading “established by the States” to include exchanges created by the Secretary Health and Human Services makes greater sense relative to the system established by Obamacare and that reading that ambiguity as the three dissenters and the petitioners would prefer would undermine or destroy the ACA*. [pp. 7-21]

In sum, to get from extraordinary landmarks to normalized pronouncements, courts [espe­cially courts of last resort] must adapt verities and rites to novel circumstances. Enter *bricolage*! Opinion-writers selectverities deftly sorted by briefs and oral arguments [and sometimes by prior appellate decisions] without violating rites by means of *bricolage*. To reiterate Gerald Garvey’s defi­nition inset above, *bricolage* is an art and a process of “fabricating ‘make-do’ solutions to problems as they arise, using a limited and often severely limiting store of doctrines, materials, and tools—the way a house­hold handyman [*sic*] must respond to a novel ‘fix-it’ task, relying only on . . . ingenuity and a small kit bag of mending tools.”[[22]](#footnote-22) The late Professor Garvey chose “fabricating” well, for read­ing, interpreting, and applying the Constitution always to some extent to demand “making things up,” especially in unprecedented cases. *Bricoleurs* aim to jury-rig but not to jerry-build: they ingeniously concoct makeshift solutions out of materials at hand but strive for solutions that last until better materials are available rather than for fixes that are cheap in two senses of the word. Constitutional *bricoleurs* remake jural precedents, texts, and usages to suit novel disputes. Popular audiences, media, and chattering classes decide in an evanescent short term whether jury-rig or jerry-built is the more applicable description even as activists and Bench and Bar determine over a longer term how to make permanent the makeshift. Just as societies and polities strive to seem consistent over time by selecting from a limited cultural reserve responses to problems as they arise, jural rhetors strive through *bricolage* to maintain consistency over time by adapting from an even more limited selection of settled premises resolutions of instant disputes.[[23]](#footnote-23)

Landmark decisions—hard cases, controversial issues, massed forces—will call for greater *bricolage* or a higher ratio of *bricolage* to rites because usual jural rites will not resolve novel dis­putes. Through *bricolage* verities and rites are mutually accommodated to fresh disputes, brewing is­sues, and brutal conflicts. Examples abound in U. S. history. Faced with threat from his dis­tant cousin, Chief Justice John Marshall fabricated a conflict between the Judiciary Act of 1789 and Article III and formulated judicial review through *bricolage* in *Marbury v. Madison* (1803). Faced with precedents valorizing the security of vested rights, Chief Justice Roger B. Taney parlayed a dy­namic view of property rights and capitalism with popular resentment against monopolies in *Charles River Bridge*.[[24]](#footnote-24) [Indeed, Chief Justice Taney and Associate Justice Story engaged one another with dueling theories of how best to promote economic and material progress—a stunning example of *bricolage*!]

In this conference paper I restrict myself to what *bricoleurs* emphasize, de-emphasize, and may not even know. *Bricolage* is far more varied, as the late Professor Garvey showed, and the arts of mystification are more varied than formalistic rites and inventive *bricolage*. Looking to what *bricoleurs*, especiallyin out-of-the-ordinary cases, concoct *ad hoc* reveals to a great degree how and why what is not said and what may not even be understood can defeat or diffuse the understanding of even elite audiences, which of course leaves an aristocracy of the robe in charge of asymmetric politicking. That juristic *bricoleurs* will, when they can, adapt jural or juristic rites in their appellate tool kits to novel problems and patterns forewarns us that we must expect “What They Say” to resemble greatly standard appellate reasoning.

**§2 Vagaries and varieties of slogans, shibboleths, and symbols for “the Compound Re­public” in the United States exacerbate what gets selected and stated and what goes unac­knowledged or unknown, especially amid *bricolage* of landmarks. Indeed, ubiquity, cen­trality, multiplicity, multivocality, and multidimen­sionality of terms invite when they do not compel juristic *bricolage*, and such juristic *bricolage* will selectively emphasize and de-emphasize renderings of “the Compound Republic.”**

Federalism is nowhere *in* the Constitution. But it is also *everywhere* in the document … Federalism, then, is a foundational principle inferred from the document’s conjunction of silence and specificity. The Constitution’s federalism is not protean; it has ascertainable metes and bounds. Still, there is more than one way of understanding the principle, and political crises and changed economic and social circumstances have occasioned frequent, probing re-examinations.

In light of the tensions between federalism’s permanence and its adaptations, and between law and politics, it is perilous to approach constitutional federalism as a single, definable “it.”[[25]](#footnote-25)

In this section I presume that, if opinions in cases landmark and normalized tend to exploit multiple words, phrases, concepts and conceptions, symbols and shibboleths as I claimed in section one, exploitation of constitutional terms should be expected to tend away from rites and toward *bricolage* when stakes increase in cases of first impression, especially cases before a Court infallible because it is final.[[26]](#footnote-26) I presume further that, in cases of first impression that are also socially, fiscally, electorally, or governmentally momentous, opinion-writers will read and interpret key terms for rela­tions between or among national and subnational governments to take advantage of multiple mean­ings, ambiguities, and abject vagueness, thereby upping the ratio of *bricolage* to rites or other normal verbiage in opinions. And, overall, I presume that invocations and images of the U. S. compound republic in appellate arguments and opinions will tend toward common sense[[27]](#footnote-27) expressed in com­mon parlance rather than sophisticated considerations of “The U. S. Federal System” or “Federal­ismS.”[[28]](#footnote-28) And I presume that terms of art and argument for “the Compound Republic” are vague or ambiguous or multivocal[[29]](#footnote-29) beyond many other words, phrases, and terms of art in constitutional disputing.[[30]](#footnote-30) Worse, these vagaries and varieties[[31]](#footnote-31) of constitutional terms for “the Compound Republic” are arguably implicated nearly everywhere and adequately explicated almost nowhere in constitutional disputes and disputation.

As Professor Greve conveys in the inset quotation above, issues and conflicts about the United States’ “Compound Republic” pervade the Constitution and the polity of the United States. Renderings of that republic inform adjudication as concepts and notions, as principles and shibbo­leths, and as instruments and aspirations. As a result one or more denotations or connotations of terms seem ever-present and ubiquitous, often central but easy to marginalize, usually multivocal, and sometimes multidimensional. We may stipulate that “federalism,” the least demanding and thus most common set of terms for the Compound Republic, denotes a system with two sovereignties at least somewhat autonomous from each other and at least somewhat accountable to different elector­ates,[[32]](#footnote-32) yet we mustconcede that even such plain “federalism” admits of myriad connotations and usages.[[33]](#footnote-33) Indeed,“federalism” in appellate argumentation may take too many variants to overlap with competing formulations. That is why Greve cautions us against treating “federalism” as a singular “it.” Moreover, if that “it” reduces “the Compound Republic” to a national sovereignty and state sovereignties with somewhat differing electorates, “it” glosses over many of the tensions that have characterized and continue to characterize the U. S. compound republic in practice.

Amid the vagaries and varieties of conceptions of “the Compound Republic,” then, we may discern ordinary usages—what I signal in this paper by “federalism”—that appellate judges and ad­vocates will often invoke [that is, “What They Say” in the title of this paper]; more sophisticated usages, which I label “U. S. Federal System,” that appellate advocates and judges will usually invoke barely or not at all [“What They Do Not Say” in the title of this paper]; and thorough-going appre­ciation of practices and behaviors of intergovernmental relations—“FederalismS”—that appellate judges and advocates may seldom or never think about [the rest of the title of this paper]. Appellate *bricoleurs* use “federalism”rhetorically to combine a folk principle, a cultural symbol, a civics-book trope, and a political shibboleth with which audiences beyond Bench and Bar may be familiar, so such aspects of opinions may resonate with media [specialized as well as mass] and have a greater propensity to reach lawyers and laypersons. Such commonsense understandings of “the Compound Republic” of the United States will also serve as cant as suitable in appellate briefs and arguments and in judges’ opinions as in reports in specialized and in mass media. Advocates and adjudicators will depend less on understandings of the compound republic as the “U. S. Federal System” because relative or absolutely scholarly characterizations by specialists and experts aim to describe precisely and accurately observable characteristics, institutions, tensions, and processes of the American spe­cies of compound republic in comparative perspective and thus overshoot both jural and attentive publics. Specialized, scholarly ren­derings and representations of the compound republic, especially in practice rather than in theory, will overmatch advocates and adjudicators themselves, which is why I expect advocates and adjudicators not to mention such in written briefs, oral arguments, or opinions and, perhaps, not to think of them or even to be aware of them.

Denotations and connotations range across “federalism,” “The U. S. Federal System,” or “FederalismS.” These multiple ranges of denotations and connotations abet *bricolage* as *bricoleurs* exploit the explicit when they believe they can get away with collapsing the multiple ranges into some “it” compatible with civics textbooks but leave implicit or well-hidden choices that *bricoleurs* would rather not defend in the open. Hence, we expect *bricoleurs* to render the compound republic in the United States as some well-formed, well-defined system—again, the “it” against which Greve warned us above!—as suits the immediate circumstances in which the *bricoleurs* are inventing justifications. This expectation seems reasonable given some of the most obvious features of “federal­ism,” “The U. S. Federal System,” and “FederalismS.”

**Half-Baked Tropes More Evident than More Sensible Tropes—**Consider in the first place bakeshop metaphors for the Compound Republic. Journalistic generalists and ordinary Americans at all familiar with “federalism” will tend to invoke the unsophisticated notion that the national government lies atop state governments as if national and states were layers in a cake.[[34]](#footnote-34) The layer cake is a lay conception that overlooks even ranges of mun­dane meanings of “federal” as a descript­tor and “federalism” as a system, that oversimplifies com­plexities of interactions between and among levels of governance, and that disregards dynamic even dialectic tensions across levels of governments. Elementary instruction in college if not in advanced placement coursework in secon­dary schools proposes the marble cake metaphor to remedy deficiencies of this wide­ly held layer-cake [mis]understanding, so perhaps some educated folks are wise to the manifest deficiencies of the layer cake metaphor and of simplistic drawing of lines between national and subnational sovereign­ties that assume—usually latently—neat layers. The marble cake or rainbow cake trope has its short­com­ings if thought through[[35]](#footnote-35)—which may explain why some textbooks do not think it through—but may impart enough appreciation of pluralities, overlaps and interpene­trations, dynamics, and tensions to induce educated consumers of reports to resist neat layers and tidy lines. Educated con­sumers who have continued to attend to public affairs may approach understandings apropos to “U. S. Federal System” thinking, but only in graduate school if at all will students encounter the “FederalismS” of Intergovernmental Relations and Professor Deil S. Wright’s metaphor of a picket fence in which pickets represent policy entrepreneurs and constituencies that cooperate and com­pete across national, state, and local authorities and governments. The commonness of [half-]baked metaphors and rareness of picket-fence [or other complex, realistic] thinking guarantee that *bricoleurs* will render constitutional conceptions before audiences rife with naïve notions of “the Compound Republic,” audiences unacquainted with more sophisticated conceptions of ranges of denotations and connotations, dynamics of modern intergovernmental relations, and tensions without which the checking and balancing inherent in a Compound Republic becomes more apparent than real. *Brico­leurs* who would transcend “federalism” for tactical purposes or given specific fact-patterns may call upon “The U. S. Federal System” from time to time, then quickly repair to the safer vacuities, ambi­guities, and sophistries of everyday, elementary “federalism.” In the everyday discourses to which appellate courts dispatch decisions and opinions, of course, “FederalismS” and picket fences will belong to a foreign language. All of the above counsels us to expect appellate *bricoleurs* often to invoke “federalism” in what they say, seldom to raise “the U. S. Federal System” overtly, and never to betray awareness of “FederalismS” even if the advocate or adjudicator possesses such awareness.

**Shibboleths Spoken; Sophisticated Conceptions Unspoken—**The centrality or ubiquity of “federalism” as folk precept explicitly defined nowhere but tactically available everywhere makes “federalism” a powerful concept, trope, symbol, and shibboleth with which *bricoleurs* conjure both jurisprudentially and ideologically because so much of even lowly “federalism” may be deliberately unspoken, under-emphasized, or even unknown. Among most audiences [even attentive audiences and the professional auditors of the Bar and Bench] “The U. S. Federal System” will be at best as vaguely recalled as “The Wife of Bath’s Tale,” “The Quadratic Formula,” and other stuff that educated folks are supposed to have learned. Hence, we expect aspects of “The U. S. Federal Sys­tem” to surface explicitly in appellate *bricolage* seldom if at all, for advocates would risk losing ad­judi­ca­tors and opinion-writers would risk baffling opinion-readers the more that advocates or adjudica­tors relied on sophisticated, realistic accounts of “the Compound Republic” in practice. “Federal­ismS” *bricoleurs* tend not to speak or write because they tend not to think or to know of the intrica­cies of intergovernmental relations or because they realize that to broach sophisticated under­stan­dings of far-flung, intricate interrelations between and among nearly 100,000 governments in the United States would complexify argument and compromise suasion. It follows that however often considerations or implications of the Compound Republic might inform argument and decision-making, they will be compacted and conformed to “federalism” or left inexplicit.

**The Supreme Court as Umpire Overt; Alternative Arbiters Covert—**What is more, “federal­ism” is much likelier to induce *bricoleurs* and their audiences alike to posit the role of the Supreme Court of the United States as established umpire in disputes between state government(s) and na­tional government than more advanced renderings. As part of *bricolage* and “federalism,” the Su­preme Court of the United States may profess modesty and reluctance in accepting its customary mantle as decider. That allegedly bitter cup might pass the Supreme Court of the United States by were the more complex features of “The U. S. Federal System” or “FederalismS” overtly acknowl­edged to make clashes of sovereignties seem less justiciable and more political. For example, the more cooperative and the less conflictual that relations between national and subna­tional govern­ments are supposed to be, the less obvious it will seem that such relations should be or need be litigated at all. Instead, blatant brandishing of “federalism” pushes out of public, patent considera­tion sophisticated concepts of longstanding practices—the *bricolages*, if one will, of legisla­tors, execu­tives, bureaucrats, and implementers local, countywide, statewide, and nationwide—as Bench and Bar “bigfoot” mutual accommodations, negotiations, and work-arounds that make republican gov­ernance practicable and the theory of the Compound Republic less scholastic.

**Dual versus Cooperative Federalism Invoked and Overlooked—**What is still more, the few members of audiences who have mastered “the U. S. Federal System” will have some appreciation of the “Dual Federalism” that prevailed prior to the Roosevelt Court and the “Cooperative Federal­ism” that has prevailed since, but the rest of even elite audiences need not appreciate opportunities for “arguing in the alternative” [in less lawyerly language, “cherry-picking”] that the ancient constitu­tional regime and the modern constitutional regime afford rhetors.[[36]](#footnote-36) Advocates and adjudi­cators may, as suits their forensic interests instant or longer-term, invoke or disregard long­standing, large-scale traditions and practices by wielding “constitutional terms” that are the specialized pro­vince of lawyers and law.[[37]](#footnote-37) Atavistic “Dual Federalism” provides wily rhetors opportunities to in­dulge in layer-cake line-drawing that New Deal *bricoleurs* found inapt for a compound republic nationalized and nationalizing. That is, advocates and adjudicators may voice *ad hoc* delineation of national sover­eignty delimited by powers said to have been enumerated by Eighteenth-Century framers and ex­pounded by Nineteenth-Century jurists. At the same time and in the same cases, when it pleases some courts, the categorical dodges and other line-drawing *bricolage* of long-dead framers and jurists may be abandoned in favor of “Cooperative Federalism” that emphasizes con­current over exclusive national and subnational sovereignties and presumes that nation and states will work together more than work against one another. In sum, before unsophisticated journalists and civics-minded audi­ences, national and state powers may be as exclusive or concur­rent, as over­lapping or heterogeneous as suits rhetors and rhetoric. “Dual Federalism” and “Co­operative Fede­ralism” alike partake of jural rites that normalized them yet cater to the exigencies of this issue or that quandary.

**Process Federalism Ubiquitous but Unacknowledged—**Yet another set of notions, “Process Federalism,” variegates arguments about “the Compound Republic” still further. Almost no advo­cate or adjudicator, much less audience, will understand “FederalismS” at all, so practical experi­ences, concrete observations, and advanced understandings may guide but need not task *bricoleurs* in constructing arguments based on “Process Federalism.” If the balances between and among sovereignties and governments were protected more by institu­tions other than or in addition to courts and litigation, then layer-cake drawing of lines or marble-cake swirling of lines and utter heterogeneity of national and subnational as well as other jural pretexts and pretenses might yield before practical, pragmatic blending of authorities and expertise. Nonetheless, “Process Federalism” was theorized by law professors[[38]](#footnote-38) and implemented by Supreme Court justices.[[39]](#footnote-39) In working out “Process Federalism” over the last 75 years or so, the Court provided many precedents with which attorneys and adjudicators could, at their discretion, permit or even promote wide-ranging wrangling and bargaining among local, county, state, and national authorities. When advocates favored gradual, incremental steps, the blurring of national-state lines and the overlaying of national and subnational “plies” could resemble normalized rites of adjudication in which advocates professed great deference to and respect for political processes and “popular” accommodations of principles with practices. When advocates favored revolution, by contrast, they could resound “Dual Federal­ism,” echo framers’ intentions or expressions, and pick and choose the precepts and concepts that best suited the decisions they argued in a specific case on a specific day. Justices on the Supreme Court of the United States must know of “Process Federalism,” and so when they do not engage jural usages of the last three-quarters of a century, we should class such choices under what judges know but do not say. Lower courts may feature judges unaware of “Process Federalism,” so we may want to them under those who do not say what they do not know.

**Multiple Dimensions and Multivocality—**Even the truncated list above reveals the sheer number of renderings of the compound republic of the United States: representations and reifications, images and ideals, symbols and signals, models of and models for, notions, conceptions, slogans, and shibboleths [such as the naming of “The Federalist Society”]. These vagaries and varieties make what gets said and what does not get said and may not even be acknowledged or known each and all complicated and confusing. The multiplicity and multidimensionality of interrelations across the U. S. compound republic muddle matters still further. The late Deil Wright defined multiple phases of intergovernmental relations all of which might modify or qualify or demolish our conceptions of “federalism,” “The U. S. Federal System,” and “FederalismS.”[[40]](#footnote-40) Greve[[41]](#footnote-41) posited at least four dimen­sions of federalism after the New Deal: try defining each of those four in a half hour interrupted by judges or justices! Beyond plurality and multi-dimensionality, permutations of “The U. S. Federal System” and “FederalismS” reveal how selective invocations of “federalism” must be. Indeed, *bri­co­leurs* manage “FederalismS” [which Bench and Bar may not know well or at all] and “The U. S. Fed­eral System” [which Bench and Bar may know something of]—**if at all**—by means gross duali­ties that obscure finer-grained observations or representations or characterizations of the practical re­ali­ties whence cases arise. And, of course, when but one part of a duality or one region/endpoint of a dimension is explicitly invoked and other regions or endpoints unacknowledged, readers not re­minded of what is neither said nor admitted.

**Boldfaced Lines and Faint Tensions**—The bargaining and negotiation and the conflict and co­op­eration[[42]](#footnote-42) inherent over time in practicable, practical “U. S. federalism” redirect par­ticipants and ob­servers alike from the casuistry of the Supreme Court of the United States and other courts toward con­volutions, concavities, and convexities that liberate decision-makers from the exegetic and eise­getic line-drawing of eighteenth-century writers and ratifiers and nineteenth-century ex­pounders. Marbling of national and subnational authority, by contrast, attends to and accommodates the prac­tices of and the demands on modern positive states national as well as subnational and so indulges less formalistic and more pragmatic understandings of federalism. This blurring or erasure of black-letter lines between the limited but plenary authority said to be defined by the 1787 Constitution and the nearly limitless authority reserved by the states at the founding of course tends to advantage posi­tive-state or welfare-state perspectives as well as New Deal and Great Society liberalism and the proclaimed commitments of Democrats [especially over the aims of libertarians and members of this or that tea party]. These blurred or vestigial lines, then, are worked out between and among legisla­tors, executives, bureaucrats, and partisans much more than by jurists and litigation.

**Center and Periphery Interpenetrate rather than See-Saw—**Further, tensions between gover­nance too centralized to afford subnational governments autonomy, liberties, and rulers kept close to the ruled as opposed to and by governance too decentralized to allow national government effici­ent, effective sovereignty characterizes so much of popular discourse that it may tend to go less men­tioned or unmentioned lest judges admit ideology or partisanship. To acknowledge that central governments and peripheral governance overlap may increase understanding but may also accen­tu­ate discretion, so opinion-writers have considerable incentives to dichotomize sovereigns.

The partial inventory of terms for “the Compound Republic” above justifies Professor Greve’s summation:[[43]](#footnote-43)

The judiciary’s federalism has a somewhat aimless nature. It emphasizes the federal state [*sic*] “balance” but seems unconnected to any coherent set of federalism values. [footnote omitted] Aggressive defenses of states against perceived congressional overreach have alternated with equally aggressive rights-based rulings, from gay rights to gun rights, that pay little heed to federalism values This ambivalence gives the Court’s jurisprudence a distinctly “activist” coloration: Congress and the states often receive a chilly reception. The Court seems intent on shaping federalism’s contours, as it has throughout American history. It does not seem very confident about its course, or about the point of the exercise.

While I agree with Professor Greve’s encapsulization I can profess no surprise at the Court’s *bricolage* or that case law is ad hoc.

**§3 *Sebelius* illustrates use of *bricolage* in a momentous, mass-mediated landmark and *Burwell* illustrates reliance on workaday juristic rites in a less news-worthy, more normal case. What opinion-writers in *Sebelius* tended to say was *bricolage* to rationalize the result the justices preferred; what justices tended not to say was, of course, what other readings or renderings of the Constitution would disclose tensions and ranges that would cut against what the justices tended to state. The most sophisticated understandings of the Compound Republic—“The U. S. Federal System” and “FederalismS”—may not even have crossed the minds of justices or their clerks. By the second Obamacare decision, semantic parsing crowded out almost any renderings of the U. S. Compound Republic, reducing what the justices did say to mostly juristic rites and leaving unsaid how Obamacare suited or strained models or theories of “the Compound Republic.”**

. . . the *rules of law*, *alone*, do not, be­cause they cannot, decide any appealed case *which has been worth both an appeal and a response*.[[44]](#footnote-44)

We have just seen in section two how manifold and multi-dimensional renderings of the American Compound Republic have been and must be, especially in landmarks that call for *bricolage*. Yet jurists routinely invoke the symbols of and slogans for and shibboleths concerning that com­pound republic as singular, unequivocal “it,” to reprise Professor Greve’s apt observation. Beyond ritualistic boilerplate, a rite that Karl Llewellyn long ago reminded us gets them not far in any case worthy of an appeal and an answer, advocates and adjudicators alike must deploy *bricolage*. Appellate arguments written and oral and appellate opinions must repurpose ideas, inventions, and inspirations to seem to resolve some imperative issues in some instant dispute. In this section we see how jus­tices arrayed such ideas, inventions, and inspirations in *NFIB v. Sebelius*, an extraordinary case, then repaired to more routine rites of justification in *King v. Burwell*. In *Sebelius* we analyze at length what intuitions about “the Compound Republic” *bricoleurs* included and excluded. In *Burwell*, we notice that the opinions fussed about semantics in a more ordinary juristic manner—that is, with a higher ratio of rites to *bricolage* than in the prior landmark. Taken together, *Sebelius* and *Burwell* show, first, why students of the courts and especially of the Court must attend to what justices say, to what jus­tices might have said but did not, and to what justices did not say because the notion or nostrum did not occur to the writers; and, second, why attentive publics, including reporters, pun­dits, and other members of the chattering classes, will seldom be informed about what was decided and why. Tiny elites may inform themselves, but even specialized media likely cannot inform them much.

Appellate adjudicators[[45]](#footnote-45) select among a range of descriptors in a man­ner that plays down if it does not obscure alternatives. In this section I attend primarily to meta­pho­ri­cal readings—layer-cake line-drawing, marble-cake line-swirling, and picket-fence boun­dary-cros­sing—and invocations of relatively “Dual FederalismS” as opposed to relatively “Process Feder­alismS.” I show what is said but, far more important to my immediate purpose, what is unsaid in opinions of the U. S. Supreme Court in *National Federation of Independent Business versus Sebelius* (2012). Note well that I attend prima­rily to prefaces in the opinions of Chief Justice Roberts and of Scalia, Kennedy, Thomas, and Alito because those prefaces reveal unmistakably and accessi­bly versions of “the Compound Republic” that the writers or joiners of opinions state. That covers what the jus­tices said. Then I turn to what the justices in those prefaces might have said but did not.[[46]](#footnote-46) These opinions throw into stark relief conceptions and understandings of “the U. S. Federal System” that the justices de-em­phasize rather than reject. Along the way I comment on the solo dis­sent of Justice Thomas and the opinion of Jus­tice Ginsburg, but I reckon them more as ex­am­ples of what even close students of the Court will lit­tle note nor long remember. *Sebelius* bristled with *brico­lage* in a way that the second Obamacare opinion did not, so readers and reporters of *Burwell* will like­ly read what the majority said—the “cor­rect” reading and performative interpretation of the ACA—and miss some or all of the minority’s argument for the ACA’s meaning what its words say. Of course, no opinion in *Burwell* will say any­thing about “federalism,” let alone “the U. S. Federal System” or “FederalismS.”

**§3.1 Illustration One—Chief Justice Roberts’ Crabbed Canon as *Obiter Dictum***

**Chief Justice Roberts’ preface provided an example of what got said not merely patently but blatantly. He conjured a “crabbed canon” that transmogrified grants of powers in Article I, §8 into limits on the powers of Congress. Although this might suggest that sometimes “what they say” matters, even elite media may not convey Roberts’ narrow, novel take on the Commerce Clause that Roberts then renders beside the point by upholding Obamacare under the Tax and Spend Clause. Nor need even astute observers be well versed on ques­tions in oral argument and in multiple opinions about what, other than the layer-cake line-drawing of Chief Justice Roberts, stops Congress from doing whatever it pleases.**

This case concerns two powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to the police power.

Let us begin our survey of opinions in Sebelius with Chief Justice Roberts’ amazing concoct­tion of how to read grants[[47]](#footnote-47) of authority explicit in the Constitution so as to avoid granting na­tional government police power or anything that judges could mistake for police power. Through sheer juridical brio and jurisprudential chutzpah, the Chief Justice rehearsed mythic rites of a na­tional gov­ernment limited to enumerated powers, then opined that powers explicitly granted nation­al govern­ment must be pared lest they create national authority that too much resembled police powers.Chief Justice Roberts’ invention[[48]](#footnote-48) might seem to indicate that often what advocates and adjudicators argue explicitly is what matters most. However, more careful consideration will reveal that at least as consequential is what Chief Justice Roberts did not state. Chief Justice Roberts did not state whence he derived what I shall label his “crabbed canon” for reading powers that were enumerated. Nor did Roberts explain how his “crabbed canon” could elide language in the Tax and Spend Clause that reads as if the clause explicitly authorized police-like powers. Nor did Roberts advertise that a majority of the Court seemed prepared if not poised to delimit the sweep that the Commerce Clause had acquired over the last five or seven decades, although I am certain that some analysts lay and legal picked up that harbinger.[[49]](#footnote-49)

Amid the “opinion of the Court,” Chief Justice Roberts performed[[50]](#footnote-50) the remarkable alchemy by which authority explicitly accorded Congress in Article I, §8 became a limit on the Commerce Clause[[51]](#footnote-51) never before stated to the best of my knowledge. The Court’s discussion of the Commerce Clause seems surplusage once the Chief Justice upholds the ACA on the Tax and Spend Clause, yet what was said “by the way” or “on the way” may augur future decisions and certainly diagnoses peculiar notions of five justices regarding the balance—note well that I do not write balances or tensions or any other plural rendering—between national regulatory power and prerogatives reser­ved to states. We can be sure that five justices were determined to delimit Commerce Power; they said so unmistakably. All five likewise drew lines. Resoundingly what got said upfront in Roberts’ “opinion for the Court”[[52]](#footnote-52) and the very different line-drawing in the opinion of Scalia, Kennedy, Thomas, and Alito [to be covered in the next section] is *bricolage* rather than any analogic[[53]](#footnote-53) or apodic­tic arts common to juristic rites.

Even though Chief Justice Roberts stated his circumscription of Congress’ authority to re­gu­late commerce starkly, journalists and other observers might be forgiven for missing it or for find­ing it hard to convey to others. Roberts conjured a prohibition on the national government’s regula­ting health, safety, welfare, or morals that seems at odds with the phrasing of the Tax and Spend Clause: “…for the Common Defence and general Welfare of the United States . . .” [spelling and capitaliza­tion as in the second constitution of the United States]. I should not care to try to explain —on dead­line and in a few words—that the second power to which the Chief Justice applied his “crabbed canon” explicitly invokes part of the traditional definition of police power(s).[[54]](#footnote-54) [I am struggling with explaining what the Chief Justice did and I have a lax deadline and, to my readers’ rue, nearly un­limited words.] For the conscientious reporter or pundit, however, matters are even worse! The Chief Justice ex­tended his rhetorical fabrication into a prohibition on reading explicit powers in a man­ner that would permit such express powers from bearing family resemblance to police powers. Let me state that once more with feeling or at least boldface: **The national government may not exercise powers listed in Article I, §8 of the United State Constitution if such powers look too much like authority reser­ved to states.** We need not ask which institu­tion will judge whether congressional enact­ments too much resemble the powers of police exclusive to states. That the Chief Justice may leave unstated.

Now imagine yourself explaining on cable news or on the front page of a national newspaper what was perhaps even more remarkable: “what got said” that need not have been said or even con­sidered. Chief Justice Roberts’ opinion regarding the individual mandate and the Commerce Clause becomes at least somewhat surplusage—what lawyers call *obiter dictum[[55]](#footnote-55)*—once the Chief Justice there­after upholds the ACA under Taxing and Spending Clause. What the Chief Justice said about the Commerce Clause provided a fifth voice for circumscribing the authority of Congress to regulate interstate commerce. Chief Justice Roberts thereby put a few close, comprehensive, critical readers on notice that in future cases restrictions on the commerce power might command a majority. I grant that such news is what the Chief Justice blatantly said; however, I doubt that very many readers or observers picked it up.[[56]](#footnote-56)

The Chief Justice’s surplusage becomes all the harder to transmit to even attentive publics given that the Chief Justice rhapsodized rites of judicial restraint and deference to elected officials.[[57]](#footnote-57) Whatever our views of the preface of Justices Scalia, Kennedy, Thomas, and Alito to be discussed next, at least the four did not protest their reluctance to overturn the act of coordinate branches of the U. S. government. The “Opinion of the Court” offered by Chief Justice Roberts offered such a litany and liturgy of judicial restraint.[[58]](#footnote-58) The Chief Justice’s prefatory remarks—please recall that justices’ overviews are my primary focus in this section—feature at least two protests of restraint complemented—of course and almost by rote—by an admonition against judicial abdication. The opening paragraph of Chief Justice Roberts’ preface concludes with a familiar disclaimer: “We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation’s elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions.”[[59]](#footnote-59) Later in his preface, Chief Justice Roberts paired the Court’s general reti­cence[[60]](#footnote-60) with the Court’s fierce dedication to policing constitutionality to yield a familiar denial of judicial discretion, another Supreme Two-Step.[[61]](#footnote-61)

Our permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Nation’s elected leaders. “Proper respect for a co-ordinate branch of the government” requires that we strike down an Act of Congress only if “the lack of constitutional authority to pass [the] act in question is clearly demon­strated.” *United States* v. *Harris*, 106 U. S. 629, 635 (1883). Members of this Court are vested with the authority to interpret the law; we possess neither the ex­pertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation’s elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.

Our deference in matters of policy cannot, however, become abdica­tion in matters of law. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the con­stitution is written.” *Marbury* v. *Madison*, 1 Cranch 137, 176 (1803). Our respect for Congress’s policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed. “The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitu­tional.” Chief Justice John Marshall, A Friend of the Constitution No. V, Alexandria Gazette, July 5, 1819, in John Marshall’s Defense of *McCulloch* v. *Mary­land* 190–191 (G. Gunther ed. 1969). And there can be no question that it is the responsibility of this Court to en­force the limits on federal power by striking down acts of Congress that transgress those limits. *Marbury* v. *Madi­son*, *supra*, at 175–176.

Experienced, savvy readers should at least chuckle if not guffaw at “…Our respect for Congress’s policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed” for both punchlines therein. First, opinion-writers invoke the Supreme Two-Step when they are about to abandon judicial deference, so professions of great respect for the policy judgments of elected officials assume all the dignity of a leader calling “The Virginia Reel.” Second and more important, the text of the U. S. Constitution did not construct, carefully or rashly, most restraints on the power of the national government nor did those who wrote the second constitution of the United States in 1787. The Chief Justice of the United States well knows that lawyers, judges, and other politicos have often wielded the symbol “federal­ism,” confabulated a Compound Republic mythical when not fanciful, and ginned up shibboleths to con­struct limits on national power that suited the immediate interests of this faction, the longstanding policy preferences of that coalition, or the passing whim of this or that majority more than anything explicit in the wording of the Constitution. The Chief Justice dared not state as much but did not need to state as much. Specialists at national newspapers, experts on cable networks, and almost all observers who know that the Chief Justice’s remarks are at best drollery cannot in limited column-inches or airtime clarify the manifold hilarity and absurdity of this law-rite and laugh-riot.

Nonetheless, judicial abdication exorcized and judicial abstemiousness emphasized, Chief Justice Roberts freed himself to draw lines—reticently, reluctantly, but doggedly—to construct the Constitution in an extraordinary manner. He started from traditional mythopoeism.

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

Having invoked a dictum from Chief Justice John Marshall that, read in a light less liturgical and less filiopietistic, controverts Chief Justice Roberts’ claim that the Constitution “carefully constructed” limits on national power, the Chief Justice turns to meticulously constructing limits on the authority of the other two branches of the national government.

The Federal Government “is acknowledged by all to be one of enumerated powers.” *Ibid.* That is, rather than granting general authority to perform all the conceiv­able functions of government, the Constitution lists, or enumerates, the Federal Government’s powers. Congress may, for example, “coin Money,” “establish Post Offices,” and “raise and support Armies.” Art. I, §8, cls. 5, 7, 12. The enumeration of powers is also a limitation of pow­ers, because “[t]he enumeration presupposes something not enumerated.” *Gibbons* v. *Ogden*, 9 Wheat. 1, 195 (1824). The Constitution’s express conferral of some powers makes clear that it does not grant others. And the Federal Government “can exercise only the powers granted to it.” *McCulloch*, *supra*, at 405.

Chief Justice Roberts’ next “move” may seem anodyne, even digressive, but let us attend to it because he therein approaches a “Process Federalist” understanding as closely as in his preface he will. The Bill of Rights [and other limits on the power of the national govern­ment that Roberts does not mention] checks and balances Congress, the President, and the rest of the national government. It follows that the bounds that the Chief Justice is con­structing around the power of Congress are hardly the only restraints on national authority.

Today, the restrictions on government power foremost in many Americans’ minds are likely to be affirmative pro­hibitions, such as contained in the Bill of Rights. These affirmative prohibitions come into play, however, only where the Government possesses authority to act in the first place. If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.

Indeed, the Constitution did not initially include a Bill of Rights at least partly because the Framers felt the enu­meration of powers sufficed to restrain the Gov­ernment. As Alexander Hamilton put it, “the Constitution is itself, in every ra­tional sense, and to every useful purpose, A BILL OF RIGHTS.” The Federalist No. 84, p. 515 (C. Ros­siter ed. 1961). And when the Bill of Rights was ratified, it made express what the enumeration of powers neces­sarily implied: “The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people.” U. S. Const., Amdt. 10. The Federal Government has expanded dramatically over the past two centuries, but it still must show that a consti­tutional grant of power authorizes each of its actions. See, *e.g., United States* v. *Comstock*, 560 U. S. \_\_\_ (2010).

That “(t)he Federal Government has expanded dramatically over the past two cen­turies, but it still must show that a consti­tutional grant of power authorizes each of its actions …” is not quite true, but works to set up a radical dichotomy that serves Roberts’ police powers prestidigitation:

The same does not apply to the States, because the Con­stitution is not the source of their power. The Consti­tution may restrict state govern­ments—as it does, for example, by forbidding them to deny any person the equal protection of the laws. But where such prohibitions do not apply, state governments do not need constitutional au­thorization to act. The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitu­tion’s text does not authorize any government to do so. Our cases refer to this general power of govern­ing, possessed by the States but not by the Federal Gov­ernment, as the “police power.” …

In this language the Chief Justice transmogrified two kinds of empowerment—the authori­ty of na­tional government and reserving the authority states possessed before the Constitu­tion of 1787—into a denial of authority to Congress, so we must read the passage inset immediately above carefully and think about it critically—luxuries denied, of course, to reporters, commentators, and most mem­bers of even elite let alone merely attentive audiences. Arti­cle I, §8 of the second con­stitution of the United States granted authority to Con­gress to legislate con­cerning vari­ous mat­ters. That listing ended with the notoriously elastic Neces­sary and Proper Clause to endow Congress with authority to formulate legislative means by which to accomplish the powers listed. This was a positive grant of power. Among the powers retained by states was autho­rity to legislate or to regulate for public health, safety, welfare, or morals—the Police Power—ano­ther posi­tive grant of power. Concerning the divvying of positive grants of national and sub­national authority, we each and all should go along with the Chief Justice. We need not, how­ever, read that dual distri­bution of sov­ereignties in 1787 or in interpretations of the ensuing 225 years as some categorical, line-drawing, layer-cake denial of police powers to the national gov­ernment. The Chief Justice trans­forms two grants of the authority to regulate into a prohibition on any na­tional legis­la­tion that even resembles the power of police. This “crabbed canon” is a novel, convenient trick! What is more, the “crabbed canon” is a safe trick, for any journalist who exposed the trickeration would risk seeming at least argumentative, more than a little subjective, and way too abstruse for any mass medium.

More to my immediate purposes in this paper, however, we must note that Roberts does not even feint toward recognition of how much of the evolution of inter-governmental relations and of “Fe­deralismS” over the last eight decades of constitutional, legal, and political practice his Police Pow­er gambit would contradict. If the national sovereign must be denied any authority that resem­bles regulation for the health, safety, welfare, or morals of the people, then how many of Dr. Wright’s phases of inter-governmental relations, what understandings other than layer-cake fed­eral­ism, and what “Process Federalism” could survive? Of course, because Roberts’ liturgical exercise does not raise alternatives to a Dual Federalism premised on strenuous avoidance of Police Powers in the nation’s capital, Roberts need not acknowl­edge how his argument would or must vitiate most versions of “the Compound Republic since the New Deal.” Roberts’ novel, convenient, and neat trick is not merely rhetorical but radical![[62]](#footnote-62) “What They Do Not Say” matters.

Roberts’ preface then bolsters his tricky, neat, radical argument from the exclusivity of Police Powers with arguments from democratic theory for delimiting national sovereignty. Police powers controlled by 50 states and denied to national legislators and regulators keep de­cision-making closer to the People, Roberts argued. More, restricting Police Power to states and denying national gover­nors any authority that bears likeness to Police Power permits states to check and balance national government, Roberts intoned. The Chief Justice failed to mention that his Police Power gambit also permitted the Supreme Court to draw lines and to arbitrate likenesses. I suspect that what did not get said, then, was at least as important as what Roberts did say.

My admiration for and marveling at the Chief Justice’s jujitsu “for the Court” should not dis­tract us from a signal feature of the “opinion of the Court:” Roberts’ converting police powers from a reserved power once used to restrict the constitutional authority of state govern­ments[[63]](#footnote-63) into a stringent restriction on the constitutional authority of national government occludes the many “Fed­eralismS” that would uphold the ACA. Any marbling of national and state authority over public health or insurance practices, various slats cutting across national, state, and local governments and governance by means of which policy-making com­muni­ties and constituencies have long colla­bora­ted to create policies and regimes for health care, and protections of states built into “Process Feder­alism” with regard to provision of health-care insurance and health care itself all may be disregarded once Roberts has for­mulated a singular layering of national authority based in ab­stemious avoidance of any trace of national police power. Here as elsewhere, what the Chief Jus­tice does not write af­fects “the opinion of the Court” at least as much as what he does write. The Chief Justice by his “crabbed canon” snuck a layer-cake model of “federalism” into “the opinion of the Court.”

Although I have not elected to analyze Chief Justice Roberts’ complicated reading of Medi­caid expansion, suffice for this paper for me to note that Roberts’ argument drew the assent of Jus­tices Breyer and Kagan albeit his holding elicited the votes of Justices Ginsburg and Sotomayor to get to five. To call the Chief Justice’s reasoning *bricolage* would be a step up from what the four jus­tices in dissent had to say, but like other *bricolage* Roberts’ final rescue of the ACA would be diffi­cult—a much more pleasant adjective than impossible—to convey in any medium aside from a law review. What the justices do say but audiences do not hear may be very important but will not be very informative for almost all readers, listeners, viewers, bloggers, tweeters, and the like.

**§3.2 Illustration Two—The dissenting opinion in which Justices Scalia, Kennedy, Thomas, and Alito found Obamacare unconstitutional drew lines, layered and limited Congress’s authority, indulged a unidimensional understanding from *Wickard v. Filburn*, and cast aside Process Federalism even more starkly than the Chief Justice’s opinion, each and all of which eschewed and excluded alternatives implicitly and tacitly.**

While Chief Justice Roberts’ rite of judicial modesty to start off the alleged opinion of the Court in *Sebelius* immediately clashed with his concoction of the crabbed reading of the Commerce Clause in what became surplusage—albeit a warning—once Roberts invoked the Tax and Spend Clause, “The Four”—Justices Scalia, Kennedy, Thomas, and Alitoin order of seniority—drew lines matched to structures that crowded out Process Federalism. “The Four” were crafting no *obiter dictum*,so they needed to locate the individual mandate outside bounds of the Commerce Clause. Dismissing the individual mandate while admitting 50-75 years of “Process Federalism” and modern Commerce Clause prece­dents would have been rites too difficult, so the opinion of the four left “Process Federalism” unre­marked. The mass of Commerce Clause doctrine and jurisprudence throughout the lives of the four justices were what they did not say. Other aspects of intergovern­mental relations and modern globalization were also left unremarked, although I am unsure how aware each justice might be of these developments since the New Deal.[[64]](#footnote-64) What was said? The dis­senting opinion of “The Four” that found the ACA unconstitutional featured a preface that drew stark lines, layered and limited Congress’s authority, and cast aside Process Federalism even more starkly. Line-drawing and the boundary-setting jump out of the beginning of the opinion.

The preface of the four began only a bit tendentiously[[65]](#footnote-65) to state that the ACA exceeded the powers allotted Congress under the U. S. Constitution.

Congress has set out to remedy the problem that the best health care is beyond the reach of many Americans who cannot afford it. It can as­sur­edly do that, by exercising the powers accorded to it under the Constitu­tion. The question in this case, however, is whether the complex struc­tures and provisions of the Patient Protection and Affordable Care Act (Affordable Care Act or ACA) go beyond those powers. We conclude that they do.

The four then turned an unprecedented case into a case suited to Supreme Court line-drawing.

This case is in one respect difficult: it presents two questions of first impression. The first of those is whether failure to engage in economic activity (the purchase of health insurance) is subject to regulation under the Commerce Clause. Failure to act does result in an effect on com­merce, and hence might be said to come under this Court’s “affecting commerce” criterion of Commerce Clause jurisprudence. But in none of its decisions has this Court extended the Clause that far. The second ques­tion is whether the congressional power to tax and spend, U. S. Const., Art. I, §8, cl. 1, permits the conditioning of a State’s continued receipt of all funds under a massive state-administered federal welfare program upon its acceptance of an expansion to that program. Several of our opinions have suggested that the power to tax and spend cannot be used to coerce state administration of a federal program, but we have never found a law enacted under the spending power to be coercive. Those questions are difficult.

Although I set it beyond the scope of my reflections in this paper, I deem it worthwhile to note that the gambit inset immediately above may accomplish much the same as Chief Justice Roberts’ pro­fes­sions of the reticence of the justices and their reverence for the policies of Congress. That is, the four profess to take the ACA very seriously despite the sheer novelty of Obamacare.[[66]](#footnote-66)

This set-up quickly yielded to a drawing of lines but an icing of the national layer of authority.

The case is easy and straightforward, however, in another respect. What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, is that there are structural limits upon federal power—upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States.

That there are structural limits to the authority of Congress, the four claimed, is and long has been absolutely clear. Where the lines are to be drawn and what institutions or decision-makers draw the lines may not be clear or consistent, but that there are boundaries is not merely relatively clear but utterly so. Those who fix the limits to apply the Constitution to cases may see the layer(s) of na­tional authority as shallower or deeper or may disagree about the thickness of the frosting, but the authority of the national government is limited by structures evident in the text of the Constitution [including Amendment X] and in unspecified precedents so numerous that they cannot be counted.[[67]](#footnote-67) This federal arrangement is layered rather than even marbled [let alone crossed by slats like a picket fence as Professor Wright posited] and is structural rather than processual. I trust that the layer-cake metaphor and the Dual Federalism policed, of course, by the Supreme Court are evi­dent in the passage inset immediately above.

And how are these unmistakable [except, recall, to Justices Ginsburg, Breyer, Sotomayor, and Kagan and, to some extent, Chief Justice Roberts, who need not have conjured his “crabbed canon” to circumscribe the Commerce Power if he had joined the Scalia Four] structural limits to be discerned? The preface of the opinion of the four elected to deposit the ACA on the far side of whatever conceptual limits however blurred.

Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct and to compel the States to function as administrators of federal programs.

I salute the candor of this passage, for the passage displays the horror professed by Justices Kennedy and Alito in oral argument and Chief Justice Roberts in his opinion that the Congress might be per­mitted to regulate all commercial activity as well as inactivity. This passage is candid in another re­spect. “Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend …” forthrightly states that the Scalia Four will not be defining the commerce power as might be expected both given the layer-cake metaphor invoked and given ordinary rites of juristic line-drawing. The four may not be sure where to set the bounds of commerce power but are certain that the terror of plenary congressional regulation of interstate commerce must be fended off.

The reader of *Sebelius* may regard the passage of the preface that I have quoted immediately above to be the furthest extent of the hyperbole in which the four indulged, but the four are just warming up!

That clear principle carries the day here. The striking case of *Wickard* v. *Filburn*, 317 U. S. 111 (1942), which held that the economic activity of growing wheat, even for one’s own consumption, affected commerce suf­fi­ciently that it could be regulated, always has been regarded as the *ne plus ultra* of expansive Commerce Clause jurisprudence. To go beyond that, and to say the *failure* to grow wheat (which is *not* an economic activi­ty, or any activity at all) nonetheless affects commerce and therefore can be federally regulated, is to make mere breathing in and out the basis for federal prescription and to extend federal power to virtually all human activity.

The inset performative betrays clever *bricolage*. While The Four cited *Wickard v. Filburn* (1942) as an ultimate bound on the authority of Congress to regulate interstate commerce, their opinion cited no authority for the universal acknowledgement of that limit. Perhaps the authors thought that citing no authority to warrant their “*ne plus ultra*” might suffice for journalists, pundits, viewers, and readers: What the authors do not state they need not state, for the boundary is so extreme and so clear, laypersons might believe. Those schooled in commerce cases must find the boundary far less clear and the Individual Mandate far less extreme, however, for they are aware of cases The Four left unstated. Professor Colin Starger diagramed multiple precedents available in 2012 to remind obser­vers that commerce case law was at the very least multi-dimensional, so The Four’s mete was insuffi­cient.[[68]](#footnote-68) What The Four did not say was that the juxtaposition of *Wickard* and the ACA enabled The Four to hype the Individual Mandate and to conjure a slippery slope on which one could not stop at the Individual Mandate but must enable Congress to regulate breathing [and broccoli]. This *bricolage* extended authority under the Commerce Clause to extremes unimaginable except in ideological fev­er swamps. This gambit enabled The Four not to say and therefore not to have to gainsay that “… the *failure* to grow wheat (which is *not* an economic activity, or any activity at all) …” was wordplay to fend off Congress’s judgment that decisions [rather than the clever dichotomy of actions versus inaction] that substantially affected interstate commerce might be regulated and Congress’s pre­sump­tion that, for example, economists would view such decisions as an action with implications for the health insurance system.

Then The Four turned in their preface to the Tax and Spend Clause. They proceeded in a manner that compels us to qualify my characterization of their argumentation. After they invoked overtly *U. S. versus Butler* (1936)—one of the most renowned misadventures of formalistic line-drawing at the very end of Dual Federalism—the four acknowledged developments after the Switch in Time (1937). The four then admitted that practicality rather than structures explicit or implicit in the Constitution might delimit the reach of U. S. powers.[[69]](#footnote-69)

As for the constitutional power to tax and spend for the general welfare: The Court has long since expanded that beyond (what Madison thought it meant) taxing and spending for those aspects of the general welfare that were within the Federal Government’s enumerated powers, see *United States* v. *Butler*, 297 U. S. 1, 65–66 (1936). Thus, we now have sizable federal Departments devoted to sub­jects not mentioned among Congress’ enu­merated powers, and only marginally related to commerce: the Depart­ment of Education, the Department of Health and Human Services, the Depart­ment of Housing and Urban Development. The principal practical obstacle that prevents Congress from using the tax-and-spend power to assume all the general-welfare responsibilities traditionally exercised by the States is the sheer impossibility of managing a Federal Government large enough to ad­minister such a system. That obstacle can be overcome by granting funds to the States, allowing them to administer the program. That is fair and consti­tutional enough when the States freely agree to have their powers em­ployed and their employees enlisted in the federal scheme. But it is a blatant vi­olation of the constitutional structure when the States have no choice.

That small concession to Process Federalism stands out from the layer-cake Dual Federalism of The Four. The Four narrowed Congress’s authority to tax and to spend for the general welfare—the part of the Tax and Spend Clause that seems obviously akin to police powers—to whatever taxing and spending might pertain to other enumerated powers. This narrowing, like the *ne plus ultra* in *Wickard* that I discussed above, is supported with no authority beyond the opinion’s as­ser­tion that James Madison would have viewed expansions of the taxing and expending power in the 75 years since the New Deal as beyond the “general welfare” phrase. The Four finished with the flourish that denying to states choices about participating in the ACA violated the structure of the Compound Republic, a flourish considerably more persuasive to those whose appreciation of theories and practices of and in the Compound Republic peaked at “federalism” of civics texts and did not extend to “The U. S. Federal System” of college texts or “FederalismS” of advanced work in Intergovernmental Relations. Hence, The Four did move away from layer-cake line-drawing into some marbling of national authority and originalist and structural arguments about “fed­eralism.” That The Four said. What The Four did not say [and may not have known] was how much precedent and how much practice since 1937 The Four were prepared to sweep away when those four justices might be five or more.

After the manifold acts of *bricolage* that I have identified above, the Four closed their preface with a familiar juristic rite. Four justices who had just fashioned bounds now proclaimed themselves bound by the Constitution rather than by their discretion to set aside an act of Con­gress. It is not a certainty that justices will be setting aside the judgment of one or more coor­dinate branches once justices summon the better angels of judicial restraint and republican reluc­tance, but that is the smart bet. It is also probable that the tone with be somber and conclusory:

The Act before us here exceeds federal power both in mandating the purchase of health insurance and in denying nonconsenting States all Medicaid funding. These parts of the Act are central to its design and operation, and all the Act’s other provisions would not have been enacted without them. In our view it must follow that the entire statute is inoperative.

Juristic determination of severability is often if not always performative, for the declaration that Congress would not have enacted the ACA absent the Individual Mandate and the Medicaid provisions makes the ACA unconstitutional. For that reason, the inset passage seems to me more rite than *bricolage*.

Like Chief Justice Roberts The Four left largely or entirely unsaid, at least in prefaces that journalists and readers and viewers were mostly likely learn of [if not to learn from], the panoply of options eschewed. To be sure, the opinions those prefaces summarized would engage such matters in greater detail and perhaps to greater effect. How many reporters, commenters, and conversa­tionalists would plunge into the 193 pages of *Sebelius* to ponder such questions and answers? What citizen would receive instruction in “Process Federalism,” “TUSFS,” or “FS” in the everyday workings of the republic? Whatever one’s answers to those largely rhetorical questions, one must admit that many more consumers would be bombarded with mystifying *bricolage*.

**§3.3 Illustration Three—Associate Justice Thomas’s originalist, line-drawing coda regarding commerce conceals far more than it reveals but that probably mattered little to almost all audiences.**

Readers may find the 215 words of Associate Justice Clarence Thomas’s solo opinion in *Sebelius*—please keep in mind that Justice Thomas also joined Scalia, Kennedy, and Alito in a dissent—a perverse inclusion in my inventory of bricolage. Justice Thomas’ paragraph pertains to the Commerce Clause more directly than to understandings of federalism. What is more, Justice Thomas’s solo effort is a coda, not a preface like my prior foci in this paper. However, the terseness and brio of Justice Thomas’s “personal stare decisis” affords us a straightforward view of an opinion-writer’s selectively invoking symbols and shibboleths. Justice Thomas’s addendum, I hope, will reiterate the importance of what is not said.

Although Justice Thomas joined Justices Scalia, Kennedy, and Alito in some baking of their layer cake and summoning from the distant past of *Butler* and *Wickard*, for the present moment I draw attention to Justice Thomas’s bounding paragraph. Justice Thomas in a single paragraph reminded readers that he has propounded on the perils of a shift in Commerce Clause doctrines during “the Switch in Time” [*circa* 1935-1938].[[70]](#footnote-70)

In Professor Wright’s terms Justice Thomas directed readers to the “Conflict Phase” of inter-governmental relations and the U. S. federal system that began after the Civil War and endured into the New Deal. During the “Conflict Phase,” courts and especially the Supreme Court of the United States umpired statutes and regulations primarily but not exclusively by means of layer-cake line-drawing. The marble-cake federalism and five subsequent phases about which Professor Wright wrote so magisterially reduced or at least complicated the Court’s domination of other branches of the national government and other decision-makers in subnational governments closer to “The People.” In my reading, Justice Thomas forthrightly, explicitly yearned for bygone judicial activism and line-drawing by aristocrats in robes.

Justice Thomas may seem to have acknowledged competing conceptions of the Compound Republic, but closer reading, I contend, reveals that the justice stripped away decades of “Process Federalism” to confine his [and, he may hope someday, the Court’s] rendering the Commerce Clause. Observe:

The joint dissent and THE CHIEF JUSTICE correctly apply our precedents to conclude that the Individual Mandate is beyond the power granted to Congress under the Commerce Clause and the Necessary and Proper Clause. Under those precedents, Congress may regulate “economic activity [that] substantially affects interstate commerce.”

Nothing unusual about an adjudicator’s citing precedents, I admit. Indeed, Justice Thomas bol­stered the opinion of The Four with his assertion that precedents had been applied in a correct manner. [I believe I have made it apparent above that plenty of assertions in the opinions of The Chief Justice and the Four were not attached to recent precedents that most students of constitu­tional law would have regarded as controlling, but let us play past Justice Thomas’ rite.] However, please attend to the sandwich—my own half-baked metaphor?—of framers’ intent and Dual Feder­alism that Justice Thomas promptly prepared: “I adhere to my view that ‘the very notion of a ‘sub­stantial effects’ test under the Commerce Clause is inconsistent with the original understanding of Congress’ powers and with this Court’s early Commerce Clause cases.’ ” In order, Justice Thomas invoked an understanding from the 18th century and expositions of the Commerce Clause in the 19th century, when Dual Federalism, layer-cake line-drawing that the regulatory authority of Congress be limited to interstate and international commerce but, within those bounds, the authority of Congress be plenary, perhaps even dormant.[[71]](#footnote-71) What Justice Thomas said in his solo dissent in *Sebelius* is fuzzy absent resort to his expoundings in previous cases, so most reporters and audiences will have to take his assertions of personal *stare decisis* on faith.

Readers who persisted through my tedious review of the evolution of theories of “the Com­pound Republic” both inside and outside courts since the 19th century[[72]](#footnote-72) will espy Justice Thomas’s revanchist rejection of constitutional and political developments in Dr. Wright’s six phases of inter-governmental relations and federalism from the New Deal to the present. Why does Justice Thomas reject evolution over the past decades? “As I have explained, the Court’s continued use of that test ‘has encouraged the Federal Gov­ernment to persist in its view that the Commerce Clause has virtu­ally no limits.’” That is what Justice Thomas said; what he did not say was that the view he ascribed to the national government is also the view of dozens of justices and judges and law professors since the 1930s.[[73]](#footnote-73) As Justices Alito and Kennedy had said in oral arguments, so Justice Thomas said in his solo dissent: The Commerce Clause must be confined lest the power of Congress and the nation to regulate interstate commerce be as plenary as Chief Justice Marshall proclaimed in *Gibbons v. Ogden*.

Justice Thomas’s solitary protest, while not on the central point of the present paper, illus­trates not only leapfrogging more recent understandings of commerce power and “the Compound Republic” to repair to Dual Federalism that, among others, Justice Ginsburg thought long past if not long gone but also shunting aside myriad, mutually reinforcing juridical precedents in favor of a few personal, not quite to say idiosyncratic, precedents.[[74]](#footnote-74)

Justice Thomas’ coda seems to me not *bricolage*, for it pertains little to the specifics of *Sebelius* and thus little reflects “make-fit” invention.Speaking openly of long-gone doctrine, Justice Thomas dissented, in effect, from dozens of rulings. What Justice Thomas did not admit, of course, was that his idiosyncrasy was not rite, either.

**§3.5 Illustration Four—Justice Ruth Bader Ginsburg swirls Cooperative Federalism and perhaps Marble-Cake Federalism throughout her opinion but—alas!—not in her preface where reporters and audiences might be able to find it.**

Justice Ruth Bader Ginsburg’s opinion, joined by Justices Stephen Breyer, Sonia Soto­mayor, and Elena Kagan,[[75]](#footnote-75) starkly diverges from the “Layer-Cake Federalism” and line-draw­ing rhetoric of the three opinions reviewed already in this paper, but it does so without a pithy preface suitable for dissemination by mass media. Justice Ginsburg, depending on one’s reading, may have articulated a “Mar­ble-Cake Federalism” that revealed intergovernmental policy-making that Dr. Wright had de­scribed as “Cooperative.” Her eventual swirls of national and state governments’ collabora­ting with insurers and other major interests and her rejection of retrogressive “Layer-Cake” line-drawing by the Supreme Court stopped short of Wright’s “Picket-Fence Federalism” in my read­ing. Justice Ginsburg did not in her opinion clearly address the “Process Federalism” that dis­placed “Dual Fed­eralism” over 75 years of constitutional adjudication and argumenta­tion. However much support for “Process Federalism” her denunciations of Chief Justice Roberts’ “crabbed,” “retrogressive” reading and his twists on the Police Powers under the “Du­al Federalism” regime of laissez faire courts might have generated implicitly, she buried that message in the latter 58 pages of her opinion and did not allude to it in her two-page preface.

Instead, in that preface Justice Ginsburg pursues a conventional opening that engages Chief Justice Roberts’ rejection of justifications for the ACA by means of the Commerce Clause. Al­though Justice Ginsburg chides the Chief Justice for setting limits on Congress’s authority over in­terstate commerce in an opinion in which he will eventually uphold the ACA on Congress’s authori­ty to tax and spend, she devotes much of her opening and much of the first pages of her opinion to refuting Roberts’s delimitations of the Commerce Power. This, of course, accedes to Chief Justice Roberts’ framing of the Commerce Power, diverting Justice Ginsburg from tested, established un­derstandings of the Commerce Clause. Worse, Justice Ginsburg’s refutation of the Chief Justice’s novel conjuring obscures when it does not flat-out occlude modern conceptions of intergovernmen­tal relations and of federalism. Later in her opinion Justice Ginsburg rehearsed the interpreta­tions of the Commerce Clause, the Tax and Spend Clause, and other features of the U. S. federal system articulated by the Court and by other authoritative interpreters that would per­mit or promote Oba­macare. To my point in this paper, however: Justice Ginsburg did not publicize the many conceptions, understandings, models, and phases of “the U. S. Federal System” or “FederalismS since the invention of “the Compound Republic” in 1787.

For instruction of journalists and commentators in the many choices that members of made too implicitly, I find Justice Ginsburg’s opinion understandable but underwhelming. The few citi­zens and probably far fewer commentators and journalists who read through Ginsburg’s opinion would profit from her practicality and common sense, for Justice Ginsburg emphasized that the ACA had included governments at national and subnational levels alongside corporate and private interests in efforts to redress problems that otherwise might admit of few or no solutions. As a “Republican schoolmaster,” Ginsburg imparted lessons in how and why the Positive State had arisen to deal with the Great Depression—see Ginsburg’s discussion of Social Security—and how the pro­cesses of cooperation among national government, state governments, and other interests might be the best and perhaps only means by which to catch the U. S. polity up to provision of health care in otherwise comparable modern states.

**§3.6 Contrasting Illustration Five—*King v. Burwell* shows how much that got said about “the Compound Republic” went unsaid in follow-up cases that contest peripheral matters.**

While I make it a habit to agree with my betters in constitutional scholarship, I dis­agree with Professor Greve’s contention that “*NFIB v. Sebelius* (2012) and *King v. Burwell* (2015) joined bare-knuckle politics with high-toned constitutional argument.”[[76]](#footnote-76) *Sebelius* featured bare-knuckle politick­ing hiding behind high-toned arguing. *Burwell*, by contrast, featured juristic rites and semantic par­sing far more than the *bricolage* that rationalized and judicialized result-oriented opinions in *Sebelius*. Models of the Compound Republic, terrors of Congress’s wielding plenary power over interstate commerce, and other elements of constitutional *bricolage* and political badinage from the electorally fraught and con­stitutionally taut *Sebelius* gave way to normalizing, jural or juristic dis­pu­ta­tion in the follow-up *Burwell*. In the latter Obamacare case juristic rites did what they usually do: they simu­la­ted continuity, feigned pre­dictability, and shammed formality. In an opinion of the Court for six jus­tices, what Chief Justice Roberts said looked “backward” to general precepts of statutory construc­tion far more than “forward” to specifics of the instant case. To be sure, the Chief Justice indulged bits of case-specific *bricolage*. Relatively and absolutely, however, he fussed to make what the ACA actually said recede behind lawyerly imaginings of what Congress must have meant. The result, of course, was that whatever instruction that *Sebelius* provided was almost entirely unsaid in *Burwell*.

Semantics in *Burwell* yielded a six-to-three vote, two opinions, and an opin­ion of the Court that was thoroughly a majority opinion rather than a pastiche of majority, plurality, and faction as in *Sebelius*. Diagrams Three and Four earlier in this paper showed how the semantics in *Burwell* yielded a greater ratio of backward-looking, precept-preserving, genera­lizing and formali­zing rites to the casuistry by which *bricoleurs* refashion general renderings of law—for *Sebelius* Consti­tution; for *Burwell* ACA—to meet difficulties raised by par­ticular cases. The opin­ion of the Court found leeways for constructing the ACA to say what six justices would have pre­ferred Congress to have said explicitly. Having exercised discretion in “making sense” of the ACA in a manner con­trary to its words, the majority opinion disguised its discretion by showing what other courts had done to minimize or to mask their arbitrariness in similar statutory situa­tions—a juristic rite redolent of common law reasoning. What was obviously case-specific, *ad hoc* justification simulated deduc­tion, analogy, and other arts of appellate argumentation. A momentous clash of shibboleths and symbols in *Sebelius* was reduced by *Burwell* to quibbling about connotations, denota­tions, and contexts.

**§4.0 Conclusion**

Even in this preliminary, working draft I cannot claim to have “found” that jural interpre­ters a) construe “federalism” mythically, ritually, practically, or aspirationally as suits **what they say** to prevail in immediate forensic contexts and b) discount or disregard “U. S. Federal System” and “FederalismS” in **what they do not say** because it might complicate or impair their result-orientation. If I have demonstrated that

* Chief Justice Roberts a) propounded a Dual Federalism that he concocted or conjured out of the pressing urgency of denying Congress or the national government anything resembling police power while b) slighting the myriad phases, metaphors, and practices by which governance has proceeded at least since Chief Justice Roberts was born; and
* Justices Scalia, Kennedy, Thomas, and Alito a) expounded a Dual Federalism that was becoming obsolete when the eldest of the four was born and engaged in layer-caked line-drawing by means of b) ignoring six of Professor Wright’s subsequent phases of intergovernmental relations, four of Professor Greve’s features of modern “Cooperative Federalism,” two of Professor Grodzins’ metaphors for federalism, and almost any notion of “Process Federalism;” and
* Justice Thomas a) offered an originalist coda that reiterated an atavistic “Conflict Phase” rendering of Congress’s authority to regulate interstate commerce by dint of b) presuming away almost all authoritative interpretations and applications of the Commerce Clause [let alone phases of intergovernmen­tal relations of “FederalismS” and understandings of “the U. S. Federal System”] since the 1930s; and
* Justice Ginsburg, joined largely or entirely by Justices Breyer, Sotomayor, and Kagan, a) proferred modern intergovernmental relations but b) buried the workaday prac­tices of the “U. S. Federal System” and the conceptual or theoretical “FederalismS” in convoluted subtleties that guaranteed that mass media and citizenry would learn almost nothing about the choices available to the Court;

then I have explored what gets said and what goes unsaid in important appeals. While I await col­leagues’ comments on my shortcomings in this exposition, I thank colleagues for their patience in slogging through a paper than no one wished longer.

Two astute observers long ago counseled us to expect no better of the Court than we have found in this working draft. The late Professor Wright summed up matters:[[77]](#footnote-77)

How has this conflict over the nature of the Union been resolved? It has been settled in practical and probably unalterable terms in favor of the nationalist view, Reagan to the contrary notwithstanding. The means of settlement have been multiple and varied. The Civil War (the War between the States?) was one manner of settlement: by violence. Constitutional amendment, especially the Fourteenth Amendment, was a second means. Judicial interpretation has been a particularly prominent third means. … From a legal, historical, and conceptual standpoint we can treat the nature of the Union as being settled in favor of the nationalist interpretation. To assert this, however, does not imply that most legal and jurisdictional questions of national-state relations are stable or settled. There is [*sic*] an enormous body of writing and corpus of case law that address the past, present, and prospective dimensions of these formal power controversies.

And the late Professor Pritchett noted:[[78]](#footnote-78)

In summary, the American constitutional system is one in which im­por­tant policy questions are frequently cast in the form of a lawsuit and brought to the Supreme Court for decision. The Court is basically a pub­lic court, and its highest public law function is to determine the current meaning of the Constitution when that is necessary to settle a judicial controversy that comes before it. In the search for current meanings the justices inevitably consult their own policy preferences, but the institu­tional setting forces responsibility upon them and requires them to meet high standards of consistency and logic. Theirs is the difficult task of moving with the times, yet without departing from constitutional fun­da­men­tals or impairing that popular expectation of judicial stability that is so necessary an asset to the moral authority of the Court.

I have tried in this paper to reiterate the wisdom of Professors Pritchett and Wright. In de­vising schemes of intergovernmental relations and FederalismS, the justices have failed of the con­sistency and logic that Professor Pritchett expected. Far from adhering to precedental, consti­tu­tional, or practical rites to cultivate a stable, credible moral authority for the Court, at least five jus­tices have pursued public relations by means of prefaces [or in the case of Justice Thomas’s solo opinion, a coda] divorced from the experiences, practices, and regimes of the last eight de­cades. Jus­tice Ginsburg, without meaning to, has answered Professor Wright: Whatever case law or other writing has addressed the past, present, or future of commerce-clause jurisprudence or of “Federal­ismS” may be leapfrogged or even disregarded to fend off novel enactments or programs, so natio­nalist views are far from unalterable in Court even as nationalist practices are triumphant else­where in the polity.

So what? So this! Appellate adjudicators, especially on the Supreme Court of the United States, wield symbols, slogans, and shibboleths to mystify the unwary. Justices in *Sebelius* wielded “federalism” as a shibboleth [Justices Scalia, Kennedy, Thomas, and Alito pronounced *Sebelius* an easy case for Dual-Federalist, Layer-Cake line-drawing], as a slogan [Chief Justice Roberts denied that national government anything resembling powers of police as his line-drawing], and as a symbol [Justice Ginsburg found stunningly retrogressive the Dual Federalism she had hoped was discarded in the 1930s in favor of a progressive, prac­tical cooperation among national, subnational, public, and private forces]. Three opinions in *Sebelius* opened with oversimplified and perhaps overheated rhetoric that masked tensions that long have defined the “U. S. Federal System” in practice. This meant that mass media and attentive citizens were misdirected by rhetorical ploys and thereby misinformed about the “FederalismS” that have made the “U. S. Federal System” function as and to the extent that it does. Such misdirection and misinformation make symbolic systems such as the U. S. Compound Republic work, as Thurman Arnold claimed in volumes written amid the New Deal and the Switch in Time.[[79]](#footnote-79) So that!

But that may not be the worst of the matter. The worst of the matter may lie in the barriers to law students’, lawyers’, and other refined consumers’ appreciating and acknowledging what the Court did in *Sebelius* and routinely does in extraordinary cases. No realistic student of constitutional processes in the United States expects attentive citizens or members of the chattering classes to ponder the Compound Republic or to read 193 pages of *Sebelius*, but Bench and Bar should appreciate how 70-80 years of “Cooperative” Federalism and 60-70 years of “Process Federalism” may be disregarded to resolve a dispute fraught with electoral and social consequences. The rites by which constitutional or other jural verities are maintained and attentive audiences are mystified can withstand some candor. Greve opined that the Obamacare cases were “. . . .part of a fierce ideological battle and a lawyers’ game.” The lawyers’ games tend to dominate what gets said; the fierce ideological battles, by contrast, tend to go unsaid.

To sustain the perspective I have sketched in this paper, I must demonstrate how lit­tle each opinion-writer revealed in parts of opinions other than the first sections most accessi­ble to repor­ters, pundits, and others in mass media. This task I began in a paper presented to the Western Poli­tical Science Association some time ago.[[80]](#footnote-80) Beyond that task, I must trace understandings of federalism, the “U. S. Federal System,” and “FederalismS” into reporting and editorializing about *Sebelius* and about *King versus Burwell* (2015), the Roberts Court’s second pronouncement about Obamacare. My aim in analyzing such coverage will be to establish that attentive citizens will have far greater access to symbols, slogans, and shib­bo­leths regarding federalism than to serious, sensible characterizations of the variegated “FederalismS” that make the “U. S. Federal System” work.

If Supreme Court justices mislead attentive citizens and mass media as much as I have above claimed, I shall get to exclaim again, “Some Republican Schoolmaster!” That would please me greatly.

1. Michael S. Greve, “Federalism.” *The Oxford Handbook of the U. S. Constitution* (Oxford University Press 2015) p. 431. [↑](#footnote-ref-1)
2. I presume that appellate opinions range from flimsy to robust. I further presume that audiences vary from those who might read appellate opinions with profit to those oblivious to reasons and perhaps even to results. My primary aim in this enterprise is to reveal anew the mystification of even astute readers of landmark opinions by wily jural rhetors. [↑](#footnote-ref-2)
3. I do not in this paper discuss the degree to which those who write appellate opinions make assumptions, arguments, readings, and interpretations explicit or leave presumptions, arguments, readings, and interpretations implicit tactically, although I presume that the patent, the latent, and the blatant often result from calculation. [↑](#footnote-ref-3)
4. I intend “render” to include readings and interpretations of law [including the Constitution]. [↑](#footnote-ref-4)
5. Lest advantages be assigned to parties who prevail and disadvantages to parties who do not, please remember that winners and losers are often hard to discern in the present and even harder to predict for even the near future. In *Sebelius*, those who would scale back the Commerce Clause may have won much. I have no idea about Medicaid. [↑](#footnote-ref-5)
6. The full style of the first Obamacare landmark is *National Federation of Independent Business, et al., Petitioners v. Kathleen Sebelius, Secretary of Health and Human Services, et al.; Department of Health and Human Services, et al., Petitioners v. Florida, et al.; Florida, et al., Petitioners v. Department of Health and Human Ser­vices, et al*. <www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf; last accessed 6 March 2018.> The follow-up was styled *David* *King, et al., Petitioners v. Sylvia Burwell, Secretary of Health and Human Ser­vices, et al.* <[www.supremecourt.gov/opinions/14pdf/14-114\_qol1.pdf](https://www.supremecourt.gov/opinions/14pdf/14-114_qol1.pdf); last accessed 6 March 2018.> [↑](#footnote-ref-6)
7. I quote from Greve, “Federalism,” p. 431. [↑](#footnote-ref-7)
8. I play on the maxim that “hard cases make bad law” from *Winterbottom v. Wright* (1842) [Please consult everipedia.org/ wiki/Winterbottom\_v\_Wright/; last accessed 5 February 2018 for a brief of the English common law case.] and Justice Holmes’ adaptation of that maxim from the English common law of negligence in the 19th century to U. S. law of anti­trust in the early 20th century “Great cases like hard cases make bad law” *Northern Securities Co. v. United States* (1904).

   In *Sebelius* Associate Justice Antonin Scalia, in a dissenting opinion joined by Associate Justices Kennedy, Thomas, and Alito, pronounced *Sebelius* at once a hard case of first impression and an easy case of line-drawing. [↑](#footnote-ref-8)
9. Canons conflict in Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown 1960) pp. 521-535. [↑](#footnote-ref-9)
10. en.wikipedia.org/wiki/Black\_letter\_law; last accessed 19 March 2018. [↑](#footnote-ref-10)
11. Gerald Garvey, *Constitutional Bricolage* (Princeton University Press 1971) 5-6. [↑](#footnote-ref-11)
12. When I choose “juristic” instead of “jural” or “legal,” I mean to convey a judgment that advocacy or adjudication concerns the appearances more than the actualities of formal, legal logic. Please consider “juristic,” then, my humble portmanteau of the first syllable of “jural” and the last two syllables of “formalistic.” [↑](#footnote-ref-12)
13. The syllabus of the Court separated the construction of the individual mandate as a tax [pp. 31-32] from the determination that the individual mandate, construed as a tax, was valid under the Tax and Spend Clause. I supposed it more efficient to combine the third and fourth holdings in the syllabus into the third holding in Diagram One. [↑](#footnote-ref-13)
14. The classic formulation of “performative” may be J. L. Austin’s *How to Do Things with Words* (Harvard University Press 1975) (2nd ed.). A classic example of a performative is “I now pronounce you husband and wife.” [↑](#footnote-ref-14)
15. [supreme.justia.com/cases/federal/us/483/203/case.html](https://supreme.justia.com/cases/federal/us/483/203/case.html); last accessed 21 March 2018. [↑](#footnote-ref-15)
16. G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* (Oxford University Press 2007) Ch. 1. [↑](#footnote-ref-16)
17. The syllabus of the Court separated the construction of the individual mandate as a tax [pp. 31-32] from the determination that the individual mandate, construed as a tax, was valid under the Tax and Spend Clause. I supposed it more efficient to combine the third and fourth holdings in the syllabus into the third holding in Diagram One. [↑](#footnote-ref-17)
18. As a more “normal,” less dizzying brawl over semantics, *Burwell* furnished a “cleaner”lineup of votes, fewer opinions, andan unmistakable majority opinion. Normal appellate adjudication should yield more rites and less *bricolage*. [↑](#footnote-ref-18)
19. Fuller, future analysis will present objections of other justices to throw into distinct relief *bricolage*. [↑](#footnote-ref-19)
20. *Marbury v. Madison* (1803) law.duke.edu/publiclaw/supremecourtonline/editedcases/pdf/ marvmad.pdf; last accessed 1 March 2018. [↑](#footnote-ref-20)
21. # *Chevron U.S.A., Inc. v. NRDC* 467 U.S. 837 (1984) <supreme.justia.com/cases/federal/us/467/ 837/case.html; last accessed 21 March 2018> proclaimed that agencies must conform to clear statu­tory statements when interpreting and applying laws to instances.

    [↑](#footnote-ref-21)
22. Garvey, *Constitutional Bricolage*, p. 5. Garvey derived the concept of *bricolage* from Claude Levi-Strauss, *The Savage Mind* (University of Chicago Press 1962) p. 11. [↑](#footnote-ref-22)
23. *Ibid.*, pp. 5-6. [↑](#footnote-ref-23)
24. G. Edward White explained Marshall’s greatness at juristic rhetoric and Taney’s greatest debacle as a juristic rhetor by the mastery of rhetorical resources that the former possessed and the latter in *Dred Scott* did not. Please see White, *The American Judicial Tradition,* Chs. 1, 3, especially pp. 82-83**.** Concerning Chief Justice Marshall’s opinion in *McCulloch v. Maryland*, a Randolph opined that the opinion was “. . . wrong all wrong, but no man in the United States can tell why or wherein.” White, *The American Judicial Tradition,* p. 34. [↑](#footnote-ref-24)
25. Michael S. Greve, “Federalism,” in Mark Tushnet, Mark A. Graber, and Sanford Levinson (eds.), *The Oxford Handbook of the U. S. Constitution* (Oxford University Press 2015) p. 431. [↑](#footnote-ref-25)
26. I allude here to Justice Robert Jackson’s dictum in [*Brown v. Allen*](https://en.wikipedia.org/wiki/Brown_v._Allen), 344 U.S. 443, 540 (1953): “We are not final because we are infallible, but we are infallible only because we are final.” [↑](#footnote-ref-26)
27. Or, as H. L. Mencken wrote: “Explanations exist; they have existed for all time; there is always a well-known solution to every human problem — neat, plausible, and wrong.” “The Divine Affla­tus,” *New York Evening Mail* (16 November 1917); later published in *Prejudices: Second Series* (1920) and *A Mencken Chrestomathy* (1949). See en.wikiquote.org/wiki/ H.\_L.\_Mencken; accessed 24 February 2018. Wikiquote cautions us that “[t]he portion after the second semicolon is widely para­phrased or misquoted. Two examples are ‘For every complex problem there is an answer that is clear, simple, and wrong’ and ‘There is always an easy solution to every human problem -- neat, plausible, and wrong.’ ” [↑](#footnote-ref-27)
28. In this draft I juggle three similar terms for America’s “Compound Republic.” When I inscribe “federalism” or “federalist,” I refer to ordinary usages among educated citizenry that mix and match constitutional principle, cultural symbol, rhetorical reference, theoretical usage, and political shib­boleth. We see and hear such usages written and spoken casually across the polity, especially in civics books, textbooks, chatterers in mass media, and academia and other politicking and governing. While I presume that “federal­ism” to encompass one or more commonsense understandings of “the Compound Republic” of the United States, please keep in mind that my expectation is that such prosaic renderings will tempt *bricoleurs* in appellate opinions [if less so *bricoleurs* constructing written briefs or preparing oral arguments. A most sophisticated and well-informed version of the ranges of such common usages may be found in Anderson, *Federalism: An Introduction*.

    In contrast, when I write in this draft “the U. S. Federal System” I mean characteriza­tions of the U. S. compound republic by spe­cialists and experts in comparative politics. Such characteriza­tions aim to describe precisely and accurately observable characteristics, institutions, tensions, and pro­cesses of the American species of compound republic. For example, please see S. E. Finer, *The His­tory of Government* (Oxford University Press 1999) Volume Three, Part V, Ch. 2, §6 pp. 1501-1516. “U. S. Federal System” may even include political scientists’ demarcations such as “A system in which significant state powers, such as taxation, lawmaking, and security, are devolved to regional or local bodies.” Patrick H. O’Neil, *Essentials of Comparative Politics* (W. W. Norton 2017) (5th ed.) A-17. [Please note that however apt for comparative politics this definition, it departs from constitutional orthodoxy in the U. S. case because the thirteen states, first independent and then confederated, transferred to the novel central government designated powers and reserved to themselves or to the People—Amendment X—powers that those thirteen had previously possessed under and before the Articles of Confederation. Please note as well that the Forum on Federations subtitles itself “A Global Network on Federalism and Devolved Governance,” so Professor O’Neil’s definition seems apt globally if not domestically.] I presume, please recall, that *bricoleurs* will be at least somewhat conversant in subtle­ties and sophisti­cation impacted by academic specialists such as the late Professor Finer and my col­league Professor O’Neil. I expect *bricoleurs* of Bench and Bar, suspended in webs of meaning that must reach from *bricoleurs*’ training to *bricoleurs*’ target audiences, to invoke “federalism” as common­sense “it” obvious­ly and often but to allude to “U. S. Federal System” guardedly and seldom.

    When I opt for “FederalismS” I mean the range of specialized, scholarly ren­derings and represen­tations of “federalisms” and the “U. S. Federal System” across time and space. I hope “Federal­ismS” draws attention to the multiplicity of conceptions of “federalism” and of the “U. S. Federal System,” especially in documents and arguments jural or judicial. Please see, for example, Michael S. Greve, *The Upside-Down Constitution* (Harvard Uni­versity Press 2012), an authoritative, erudite study of “federalism” and of “U. S. Federalism” that must daunt any *bricoleur* who happened across it. Still more daunting might be studies that pushed *bricoleurs* beyond tensions between states and nation into workaday processes by which nearly 100,000 governments control the United States. A classic in this scholarly tradition would be Deil S. Wright, *Understanding Intergovernmental Relations* (Pacific Grove, California: Brooks/Cole Publishing Company 1988). [↑](#footnote-ref-28)
29. I use “multivocal” to denote having more than two meanings of roughly equal probability and validity. [↑](#footnote-ref-29)
30. I concede that “commerce,” “due process,” “equal protection of the laws,” “separation of powers,” “the wall between church and state,” and other constitutional words, phrases, and passages are ambiguous when not vague and in many contexts may be multivocal. I do not explore in this paper whether usages and understandings of the U. S. compound republic may range widely relative to terms I have listed earlier in this note. For my immediate concerns it suffices that terms for the compound republic range widely in an absolute sense. [↑](#footnote-ref-30)
31. Thomas Reed Powell, *Vagaries and Varieties in Constitutional Interpretation* (New Orleans: Quid Pro Books 2012). [↑](#footnote-ref-31)
32. George Anderson, *Federalism: An Introduction* (Don Mills, Ontario: Oxford University Press 2008) p. 4. I select Mr. Anderson’s definition as a sophisticated and well-informed version of the ranges of such common usages [which we should expect of a president of The Forum of Federations. Seewww.forumfed.org/; accessed 27 February 2018]. [↑](#footnote-ref-32)
33. William H. Stewart listed 497 concepts of federalism in *Concepts of Federalism* (Lanham, Maryland: University Press of America, 1984). [↑](#footnote-ref-33)
34. See Joseph E. McLean, “Politics Is What You Make It,” (New York: Public Affairs Committee 1952) and Morton Grodzins, *The American System: A New View of Government in the United States* (Chicago: Rand McNally & Company 1966) p. 8. [↑](#footnote-ref-34)
35. The swirls of a rainbow or marble cake overcome **the linearity** of the layer-cake metaphor but continue the **hetero­geneity** of the layer-cake metaphor. National powers are utterly separated from non-national authority without blending or overlapping. Marbling improves on layering so little that I do not believe that the marble-cake metaphor raises understanding to even the level of “the U. S. Federal System.” [↑](#footnote-ref-35)
36. Please see Greve, “Federalism,” Sections III-V for a magisterial but succinct survey of “Dual Federalism” and “Cooperative Federalism.” [↑](#footnote-ref-36)
37. How often appellate courts might decline cases in favor of resolutions elsewhere may be obvious to educated, critical audiences yet under-acknowledged or unacknowledged in opinions and argu­ments and in elite responses. I was not impressed by reactions to *Bush versus Gore* (2000) and doubt that many folks outside academia recall the mash the Court made of that dispute. [↑](#footnote-ref-37)
38. See Herbert Wechsler, “The Political Safeguards of Federalism,” *Columbia Law Review* (1954) Vol. 53, pp. 543-578; Jesse H. Choper, *Judicial Review and the National Political Process* (University of Chicago Press, 1980). For a political scientist’s synopsis, please see John D. Nugent, “The Informal Political Safeguards of Federalism,” unpublished paper delivered to the Midwest Political Science Association 2000. [↑](#footnote-ref-38)
39. Please see Greve, “Federalism,” pp. 447-8. [↑](#footnote-ref-39)
40. Brendan F. Burke, “Understanding Intergovernmental Relations, Twenty-five Years Hence,” *State and Local Government Review* Vol. 46 p. 64. [↑](#footnote-ref-40)
41. Greve, *The Upside-Down Constitution*, p. 260. [↑](#footnote-ref-41)
42. The late Professor Wright loved alliteration and other wordplay, so he labeled his seven phases of in­tergovernmental relations by means of words beginning with the letter “C.” I urge readers not to miss amid that wordplay that the seven C’s may be groups to yield the reciprocal, comple­mentary tensions to which I allude in the main text. We may expect conflict alongside cooperation along each dimension. A phase of national concentration should be followed by some national contraction [or subnational clustering]. Creativity and Calculation will inspire Creativity. Please see Burke, “Understanding Governmental Relations,” Figure 1, p. 64. [↑](#footnote-ref-42)
43. Greve, “Federalism,” p. 449. [↑](#footnote-ref-43)
44. Llewellyn, *The Common Law Tradition,* p. 189 [italics in original]. [↑](#footnote-ref-44)
45. In future research I intend to approach briefs, especially “friend of the court” briefs, and treat­ments in mass media looking for what overtly forensic briefs, allegedly objective reports, and obvi­ously editorial comments de-emphasize or overlook as well as what they emphasize. [↑](#footnote-ref-45)
46. Please recall thatI selected *Sebelius* because “NFIB v. Sebelius (2012) and King v. Burwell (2015) joined bare-knuckle politics with high-toned constitutional argument. The cases were part of a fierce ideological battle, [*sic*] and a lawyers’ game.” Michael S. Greve, “Federalism,” p. 432. I agree that the two cases are sites of fierce political, partisan, and ideological battling. The lawyerly games in each case differ greatly in my view. [↑](#footnote-ref-46)
47. The two grants to which Chief Justice Roberts refers may be found in Article I, section 8 of the Constitution of the United States. Article I, section 8 begins “The Congress shall have Power . . .” and extends from the so-called Tax and Spend Clause (Article I, section 8, clause 1) to the so-called Necessary and Proper Clause (Article I, section 8, clause 18). Please consult Sue Davis, *Corwin and Peltason’s Understanding the Constitution* (Belmont CA: Thomson Wadsworth) (17th ed.) pp. 110-141. The Tax and Spend Clause reads “[The Congress shall have Power] to lay and collect Taxes, Duties, Im­posts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.” The Commerce Clause (Article I, Sec­tion 8, **Clause** 3) provides "[The Congress shall have Power] to regulate **Commerce** with foreign Nations, and among the several States, and with the Indian Tribes." The Necessary and Proper Clause reads “[The Congress shall have Power] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof.” [↑](#footnote-ref-47)
48. I chose to characterize the rule for reading congressional authority under Article I, section 8 of the United States Constitution as an “invention” not only to emphasize my judgement that the Chief Jus­tice was making up his “crabbed canon” ad hoc but also to allude to the late Professor Finer’s salute to six inventions of the founding period. Finer, *The His­tory of Government*, pp. 1501-1516. [↑](#footnote-ref-48)
49. The degree to which the limitations of Congress’s power to regulate interstate commerce foreshadowed the Court’s cutting back on a commerce power that Chief Justice Marshall deemed plenary in 1824 and that the Supreme Court has made plenary since 1937 likely cropped up in some coverage, but I do not pursue that empirical question in this paper. [↑](#footnote-ref-49)
50. I chose “performs” here to suggest **both** an entertaining feat **and** a performative tone to the Chief Justice’s rhetoric. [↑](#footnote-ref-50)
51. Although Chief Justice Roberts said that his “crabbed canon” applied alike to the Commerce Clause and the Tax and Spend Clause in successive paragraphs, he then considered the Commerce Clause separately from the Tax and Spend Clause. That separation distanced “. . . general Welfare . . .” in the Tax and Spend Clause from the Commerce Clause. I do not consider this matter at length lest I over-read or over-interpret [e.g., general welfare comes in clause 1 and so might have been read or interpreted to extend to clause 3]. I settle for what Chief Justice Roberts did not say: that a quite extensive part of the customary definition of police power lies in the very first clause of the powers enumerated in Article I, section 8 and thus belies the claim that Congress is denied any power that is “akin” to states’ power of police. [↑](#footnote-ref-51)
52. Diagrams One and Two in this paper show how sketchy the moniker “opinion of the Court” is in *Sebelius*. Perhaps such tends to be truer of landmarks than of more routine opinions. Nonetheless, what “the opinion of the Court” in *Sebelius* will be interpreted to be will provide more than ordinary leeways for future authors. [↑](#footnote-ref-52)
53. The classic formulation of analogic rites may be found in Edward H. Levi, *An Introduction to Legal Reasoning* (University of Chicago Press 2013). Other takes on the logics of opinions may be found in Ilmar Tammelo, *Modern Logic in Service of Law* (Springer-Verlag 1978); Aulis Aarnio, *On Legal Reasoning* (Turun Yliopisto 1977); Benjamin N. Cardozo, *The Nature of the Judicial Process* (Dover Publications 2012); and Lief H. Carter and Thomas F. Burke, *Reason in Law* (University of Chicago Press 2016)(9th ed.). [↑](#footnote-ref-53)
54. “The power vested in the legislature to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same.” Henry Campbell Black, *Black’s Law Dictionary* (West Publishing Company 1968) (Revised 4th ed.) p. 1317. [↑](#footnote-ref-54)
55. I here use *obiter dictum* in the sense of pronouncements not strictly necessary to the holding. In *Sebelius*, Chief Justice Roberts’ holding the Individual Mandate constitutional under The Tax and Spend Clause may have made his discussion of The Commerce Clause unnecessary. The Latin means “a thing said by the way.” [↑](#footnote-ref-55)
56. In future work I expect to explore what reports and retorts noted and did not note from the opinion. [↑](#footnote-ref-56)
57. I do not dwell on another feature of Chief Justice Roberts’ crabbed canon: The appointment of Judge Neil Gorsuch rather than Judge Merrick Garland to replace the deceased Justice Scalia may preserve a majority for restraining com­merce powers. Justice Garland might have supplied a fifth vote for continuing longstanding commerce authority. [↑](#footnote-ref-57)
58. I hope I am not too frivolous to call this oft-chosen gambit the “Supreme Two-Step.” An overstatement of the reluctance of the Court to perform a duty that—alas!—has fallen to the justices is then followed by understatement of the needlessness of the Court’s deciding the case at all. [↑](#footnote-ref-58)
59. I do not speculate herein whether the Chief Justice intended the quoted passage to answer Justices Scalia, Kennedy, Thomas, and Alito in full view of media. [↑](#footnote-ref-59)
60. I do not condone Chief Justice Roberts’ usage of “reticence” and should counsel him that he probably meant “reluc­tance” or one of its synonyms. I admit that many re­spec­ted, descriptive dictionaries might accept “reticence” as a syno­nym, how­ever rough, for “reluctance,” but it seems to me that “reluctance” is an even closer synonym for “reluctance” than “reti­cence” is. For a view far more expert than my own, please see Bryan A. Garner, *Garner’s Modern American Usage* (Oxford University Press 2009) (3rd ed.) p. 715. [↑](#footnote-ref-60)
61. I urge readers to re-read Anton Chekhov’s short story “The Kiss” or recall Senator Dale Bumpers’s closing argument on behalf of President Clinton: “H. L. Mencken said one time, ‘When you hear somebody say, ‘This is not about money’ – it’s about money.’ And when you hear somebody say, ‘This is not about sex’ – it’s about sex.”

    I solicit from my readers praise for my not guffawing at the sentence “Our deference in matters of policy cannot, however, become abdication in matters of law.” [↑](#footnote-ref-61)
62. I leave unexplored Roberts’ avoidance of Process Federalism, those protections of states’ sovereignty other than the police power dichotomy that judges, lawyers, treatise-writers, and authorities constructed alongside the U. S. Constitution. [↑](#footnote-ref-62)
63. Lest you despair of or for the poor, bedraggled states after 1937, please see Greve, “Federalism,” p. 447. “Process Federalism” and other “FederalismS” solicitously cosset the sovereignty of states. [↑](#footnote-ref-63)
64. We shall see *infra* that Justice Thomas in his separate opinion skipped back to pre-New Deal. [↑](#footnote-ref-64)
65. The ACA aimed less at the problem that the best health care was beyond the means of many Americans; the ACA aimed more at the problem that millions of Americans had no health insurance and no reasonable likelihood of acquiring coverage. However, this gratuitous swipe by the four justices at citizens and consumers priced out of the market in health insurance and the con­com­itant rhetorical reduction of the scope of the problems that Obamacare dared to address if not solve lies beyond the scope of the instant paper. The Four said their callous understate­ment of the lives and fortunes at stake in expanding health care—not “the best health care” but in many cases any health care outside of emergency rooms—but left the actual stakes in the battle unsaid. I do The Four the “honor” of presuming that they knew what they were understating and what they were deliberately not acknowledging. [↑](#footnote-ref-65)
66. Would I be too cynical to observe that when justices emphasize how seriously they take issues, policies, and enactments they are preparing to find enactments unconstitutional? Or would I be paying attention? Both? [↑](#footnote-ref-66)
67. I pass by at least two issues as not that pertinent to my current exercise. First, the authority of the national government to prescribe for individuals is a matter more complicated than this preface admits. Whatever authority we admit to be delegated to the government of the United States entitles Congress or another institution to act on individuals without the intervention or intermedia­tion of states. Second, however innumerable the precedents supporting the notion of **structural** limits on the authority delegated by the People to Congress or to the nation, there are other, more recent precedents that would seem to question if not to undermine the Dual Federalism that the four treat as indisputable and undisputed. [↑](#footnote-ref-67)
68. Colin Starger, “A Visual Guide to NFIB v. Sebelius,” scholarworks.law.ubalt.edu/cgi/ viewcontent.cgi?article=1519 &context=all\_fac; last accessed 10 March 2018. [↑](#footnote-ref-68)
69. To see how contrary to political and constitutional experience the sound and fury of the four was, please consult Michael S. Grieve, *The Upside-Down Constitution* (Cambridge, Massachusetts 2012), especially Parts Three and Four. [↑](#footnote-ref-69)
70. Of course, the Commerce Clause was pertinent both to the dissent in which Justice Thomas joined Justices Scalia, Kennedy, and Alito and to Chief Justice Roberts’ opinion. Please notice in addition that Justice Ginsburg contested Chief Justice Roberts’ arguing that the Commerce Clause could not justify the ACA was a gratuitous exercise because the Chief Justice was going to find the ACA constitutional under another clause. [↑](#footnote-ref-70)
71. # For the proposition that the authority of Congress is limited by powers listed in Article I, §8, please see *Gibbons v. Ogden* (1824). If Congress’ power to regulate interstate commerce were dor­mant, then Congress’ failing to regulate could be taken to be tantamount to Congress’ determination that some matter of interstate commerce not be regulated; even if there were no national law in the way, state laws could not regulate interstate commerce. Please see Felix Frankfurter, *The Commerce Clause under Marshall, Taney, and Waite* (University of North Carolina Press 2013).

    [↑](#footnote-ref-71)
72. Justice Thomas, having expounded on the Commerce Clause at length in the very cases he cites, could specify which early Commerce Clause cases he would add to framers’ intentions to limit the authority of the national government to commerce unmistakably **inter**state and to bar national in­tru­sions into commerce arguably **intra**state. For my purposes in this paper, it suffices to establish that Justice Thomas treats of decisions and opinions of the Supreme Court of the United States during Dr. Wright’s Conflict Phase, decisions and opinions premised on the U. S. Supreme Court’s drawing lines to confine national regulation. [↑](#footnote-ref-72)
73. # I deem it beyond this working paper to compare Justice Thomas’s originalism to the interpreta­tions of Edward A. Purcell in *Originalism, Federalism, and the American Constitutional Enterprise: A Histor­i­cal Inquiry* (Yale University Press 2014) and Michael S. Greve in *The Upside-Down Constitution*.

    [↑](#footnote-ref-73)
74. I want to be fair to Justice Thomas. In finishing his coda with “The Government’s unprecedented claim in this suit that it may regulate not only economic activity but also *inactivity* that substantially affects interstate commerce is a case in point,” Justice Thomas connects his solitary dissent to the majority view in *Sebelius* that the Constitution granted Congress no authority to regulate inactivity even if individuals’ decisions not to purchase health insurance might be deemed **inter**state. [↑](#footnote-ref-74)
75. While Justice Sotomayor joined all of Justice Ginsburg’s opinion, Justices Breyer and Kagan did not join Justice Ginsburg’s opinion with respect to Medicaid. [↑](#footnote-ref-75)
76. Greve, “Federalism,” p. 431. Please recall that this quotation is part of an epigraph from which I started this paper. [↑](#footnote-ref-76)
77. Deil S. Wright, 1988: 32-33. [↑](#footnote-ref-77)
78. Professor Wright quoted Professor Pritchett on p. 34 of *Understanding Intergovernmental Relations*. Professor Pritchett’s words appeared on p. 50 of *Constitutional Law of the Federal System* (Upper Saddle River, New Jersey: Prentice-Hall 1984). [↑](#footnote-ref-78)
79. Thurman Arnold, *The Symbols of Government* (Harcourt, Brace & World 1962) and Thurman W. Arnold, *The Folklore of Capitalism* (Piscataway, New Jersey: Transaction Publishers 2009). [↑](#footnote-ref-79)
80. Haltom, “The Layer Cake, the Marble Cake, the Fig Leaf, and Other Understandings of Federalism in *NFIB versus Sebelius* (2012),” unpublished paper presented to the Western Political Science Association in Las Vegas in 2015. [↑](#footnote-ref-80)