The Layer Cake, the Marble Cake, the Fig Leaf, and

Other Understandings of Federalism in *NFIB versus Sebelius* (2012)

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Abstract

This working draft gambols over constitutional rhetoric and romps across notions of federalism in analyzing *National Federation of Independent Business versus Sebelius* (2012). Beginning from the dissenting opinion of Justices Scalia, Kennedy, Thomas, and Alito as a “layer-cake federalism” argument that conjures an “All-Plenary National Government Horrible,” the draft then considers the “marble-cake federalism” deployed by Chief Justice Roberts as he invokes a “Police Power Horrible.” The draft maintains that Justice Ginsburg displayed little layered or marbled rhetoric; instead, she invoked “The Twilight Zone of Dual Federalism Horrible.” This spectre poses the perils of state governments incapable of addressing health care and a national government prevented by judges from doing so. These three parades of horribles reveal anew that the degree to which U. S. Federalisms serve as a fig leaf that covers a range of understandings that accommodate multiple practices and designs.

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**“ … *rules of law*, *alone*, do not, because they cannot, decide any**

**appealed case *which has been worth both an appeal and a response*.”[[1]](#footnote-1)**

The title of this draft plays on three figures of speech for U. S. Federalisms:[[2]](#footnote-2) the layer cake, the marble cake, and the fig leaf. Morton Grodzins proposed the layer cake view and the marble or rainbow cake view to make the point that federalism properly understood consists less in three or more strata of governance and politicking that may profitably be analyzed separately but more like a marble cake in the United States or a rainbow cake in Great Britain with multiple levels of politick­ing and governing swirled one into the other.[[3]](#footnote-3) The layer cake figure of speech is too simple to de­scribe any genuine logic of discovery in court or elsewhere but corresponds to a facile logic of justi­fication by means of line-drawing that renders U. S. federalism a static, linear understanding that re­duces the dimensions along which federalist institutions and interrelations may range.[[4]](#footnote-4) Grodzins’ marble cake overcame the layer cake’s linearity and arguably made for three dimensions but re­mained static and far from helpful as metaphor, model, or ideal. The marble cake may have im­par­ted some apparent dynamism in divisions between powers but preserved too much dual fed­er­alism[[5]](#footnote-5) to accommodate other sorts of federalism rampant in the United States since the New Deal. The fig leaf describes how justices marshal understandings as a logic of justification in appellate adjudication over intergovernmental relations. This understanding of U. S. federalisms accommo­dates far more dynamism and far more dimensions than either of Professor Grodzin’s metaphors because those who so understand U. S. federalisms acknowledge the origins, evolutions and con­volutions, practices and liturgies, and especially the bricolage[[6]](#footnote-6) and buncombe involved in applica­tions of the ideals, models, metaphors, and myths of U. S. Federalisms to specific cases and patterns of facts. Like the layer-cake and marble-cake metaphors, the fig-leaf trope modestly covers the po­ten­tially embar­rassing or offensive. Unlike the cake metaphors, the fig leaf unabashedly acknowl­edges embar­rassing­ly ad hoc and offensively illegitimate nature of appellate adjudication about federalism.

I intend this working draft to be a gambol over constitutional rhetoric and a romp across notions of federalism in analyzing *National Federation of Independent Business versus Sebelius* (2012).[[7]](#footnote-7) I shall attempt an analysis of rhetoric and an anatomy of ritual, though I am neither rhetorician nor ethnomethodol­ogist. In the next section of this draft I begin from the dissenting opinion of Jus­tices Scalia, Ken­nedy, Thomas, and Alito—I refer to them as “The Four”[[8]](#footnote-8) hereafter—as an ap­proxi­ma­tion of layer-cake rhetoric. The Four invoke a structural understanding of U. S. Federalisms in nearly absolutist, almost reactionary rhetoric that conjures a spectre,[[9]](#footnote-9) the “All-Plenary National Gov­ern­ment Horri­ble” against which The Four draw very dark lines to save the circumscription of na­tional govern­ment and politicking that The Four take to define U. S. Federalisms. In the next sec­tion of this draft I contrast this adamant if not angry rhetoric with the more modulated rhetoric of Chief Justice John Roberts. The Chief Justice invokes a “Police Power Horrible” and concomitant individual liberties and state autonomy to circumscribe national power but admits that lines between limited national sovereignty and state sovereignties have shifted since 1787. This I take for an un­derstanding more marbled than the layer-cake boxes The Four draw in contravention of 20th century developments in U. S. Federalisms. I then characterize the opinion of Justice Ruth Bader Ginsburg. Justice Ginsburg displays little layered or marbled rhetoric; instead, she invokes the ends for which the cake was baked in the 18th century and sliced and styled by justices and judges and other politi­cians since: a federal government up to challenges and problems. Justice Ginsburg’s understanding of U. S. Federalisms stresses cooperation between or among the national government and state gov­ernments to meet the trials of delivering health care and health insurance to people living in the United States. Against the “All-Plenary National Government Horrible” conjured by The Four and the “Police Power Horrible” summoned by the Chief Justice, Justice Ginsburg revived “The Twi­light Zone of Dual Federalism Horrible.” This spectre poses the perils of state governments in­capable of addressing health care and a national government prevented by judges from doing so.

As a result of the foregoing, I conclude that the Fig Leaf—federalism as jural shibboleth and constitutional talking point—better describes the justices’ pretenses to principle masking the making of policy. *Sebelius* yields as little candor about the present as guidance about the future. This sorry state reiterates complaints of Thurman Arnold during the New Deal and Theodore Lowi in the pre­sent century. Arnold’s and Lowi’s understanding of U. S. politics, I conclude, best helps us to see federalism as the symbolic confidence game that the judges make it.

FOUR DISSENTING JUSTICES’ LAYER-CAKE RENDERING OF FEDERALISM

Justices Scalia, Kennedy, Thomas, and Alito—The Four—rendered U. S. Federalisms to suit their finding the ACA flatly unconstitutional in six paragraphs that introduced their slip opinion.[[10]](#footnote-10) The Four proclaimed principles and principledness. The Four made it clear beyond peradventure that the very structure of U. S. Federalisms precluded national commandeering of sovereign states and national conscripting of free individuals. The “All-Plenary National Government Horrible” that, according to me, The Four offered featured line-drawing and sharp reductions of dimensions and complexities of U. S. Federalisms.

After setting out the thesis of their opinion in a manner that any college professor might admire,[[11]](#footnote-11) The Four contrasted questions of first impression[[12]](#footnote-12) with settled structural principles that the four justices pronounced straightforward. Since those structural principles are my focus in this romp, I pass by the commerce clause,[[13]](#footnote-13) the tax and spend clause,[[14]](#footnote-14) and other matters to get to the “easy and straightforward” understanding of federalism rendered by The Four. I aim to show that the structural argument that The Four brandished involved drawing of emphatic lines and establishment of doctrinaire borders about the authority of the national government.

The Structural Layer-Cake Line-Drawing of The Four

So clear-cut were the lines that Congress transgressed with the ACA according to The Four that their justification bristled with emphatic terms:

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. 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.

The Four argued from the general structure of the Constitution and other authorities that the national government and thus Congress could not constitutionally regulate all individual acts and could not coerce sovereign states to administer national programs.[[15]](#footnote-15) I am unaware of anyone who ever has or ever would contest that generalization phrased so hyperbolically. The hyperbole did not end there, however. The four opined in the next paragraph that

… *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.[[16]](#footnote-16)

This unidimensional[[17]](#footnote-17) rendering of *Wickard* established that The Four located *Sebelius* beyond *Wickard* and hence beyond the limits of the commerce power. The Four then asserted that the Court had long ago exceeded Madison’s narrow reading of the Tax and Spend Clause—that taxing and spending for general welfare would fall within the powers listed in Article I, section 8[[18]](#footnote-18)—but offered that Congress could vote funds to states to administer health care as states pleased. This, The Four averred, would preserve the structure of U. S. federalism.

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.

The structural objections of The Four contrast clearly with Chief Justice Roberts’ marble-cake line-drawing regarding Medicaid [discussed below]. The Chief Justice based his argument on a constitutional fiction of consent and contract: If states validly might be said to have agreed at all voluntarily to receive U. S. funds that came with U. S. conditions, then the intergovernmental “con­tract” was consensual; if receipt of funds was conditioned on commands from the national sover­eign, by contrast, then the inter­governmental “contract” was coercive and sovereign states were un­der duress. Roberts’ cooperative federalism at least blurred lines between national and state powers. The layer-cake line-drawing practiced by The Four did not argue that the Medicaid provision put states under duress. Instead, The Four argued that Uncle Sam had conscripted sover­eign states into a national welfare state.[[19]](#footnote-19)

The Four’s “All-Plenary National Government Horrible” would exemplify a slippery slope fallacy if the four did not proclaim that individuals’ being mandated to purchase insurance and states’ being coerced were already tantamount to regulation of breathing in and out. The hyperbole of The Four, then, may seem rhetorical excess but may serve as a construction of the facts to evade the opinion’s slippery slope fallacy.

Nonetheless, the “All-Plenary National Government Horrible” seems to be premised on a prediction or presumption that, in the absence of an articulated limit to the reach of the national government, citizens would be subjected to congressional tyrannies over private conduct [probably not quite including congressional regulation of breathing]. The Four made much both at oral argu­ment and in their opinion of the inability of lawyers for the U. S. government to specify what the na­tional government could not do under the extensive Necessary and Proper Clause the national gov­ernment claimed in *Sebelius*. In sum, The Four grounded their “All-Plenary National Govern­ment Horrible” in the failure of lawyers to specify stopping points along the slippery slopes of hypothetical national overreaches. The lawyers’ and justices’ inability to discern limits to national power, The Four stated, doomed the Individual Mandate of the ACA.

The rhetoric, especially the hyperbole, that The Four deployed in their introductory yet conclusory six paragraphs differed markedly from subtler argumentation in the opinion of Chief Justice Roberts [next section of this draft]. The line-drawing of The Four superficially resembled the line-drawing of Chief Justice Roberts but substantially differed. An “all-plenary” encroaching and enslaving national government made not only for a nearly atavistic rendering of limits to national powers but also for stark, heavy lines containing national authority. The “All-Plenary National Gov­ernment Horrible” foresaw, at the bottom of a steep slope with nary a foothold to slow the descent, a fearsome negative. Citizens turned subjects and coordinate sovereigns turned subordinates made for a bleak vision of U. S. federalism. The Four offered a positive vision of U. S. federalism. In this alternative vision the national government funds politically sovereign but financially dependent states in health care schemes that those states elect and administer in their own fashions. State, may­be even local, laboratories of democracy would deploy their reserved powers to police public health, safety, morals, and welfare in a repub­lican diversity of relatively if not absolutely democratic self-governance. That virtuous vision of U. S. Federalisms was, I suppose in this draft, the largely unstated alternative that The Four offered – and preferred.

The Spectre The Four Conjured

A spectre was haunting The Four—a spectre of an All-Plenary National Government tyrannizing states, counties, municipalities, and citizenry. Congress, not inducing individuals to buy health insurance but compelling them to do so by the Individual Mandate and not persuading states to follow national policies but threatening states’ Medicaid, terrified The Four for their country, for the constitu­tional order, and for the survival of their understanding of U. S. federalism.

Lest my summing of the dissent of The Four seem exaggerated, please read The Four’s final six paragraphs from pages 64-65 of their slip opinion, especially the passages I here “embolden:”

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

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

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

The values that should have determined our course to­day are caution, minimalism, and **the understanding that the Federal Government is one of limited powers**. But the Court’s ruling undermines those values at every turn. In the name of restraint, it overreaches. In the name of consti­tutional avoidance, it creates new constitutional questions. **In the name of cooperative federalism, it un­dermines state sovereignty**.

The Constitution, though it dates from the founding of the Republic, has powerful meaning and vital relevance to our own times. **The consti­tutional protections that this case involves are protections of struc­ture**. Structural protections—notably, the restraints imposed by federal­ism and separation of powers—are less romantic and have less obvious a connection to personal freedom than the provi­sions of the Bill of Rights or the Civil War Amendments. Hence they tend to be undervalued or even forgotten by our citizens. It should be the responsibility of the Court to teach otherwise, to remind our people that **the Framers considered structural protections of freedom the most important ones**, for which reason they alone were embodied in the original Constitution and not left to later amendment. **The fragmentation of power produced by the struc­ture of our Government is central to liberty, and when we destroy it, we place liberty at peril**. **Today’s decision should have vindicated, should have taught, this truth**; instead, our judgment today has disregarded it.

For the reasons here stated, we would find the Act in­valid in its entirety. We respectfully dissent.

In sum, The Four proclaimed themselves bold truth-tellers decrying the perils to liberty posed by an unlimited [or not limited enough] national government—reason enough for drawing stark lines to keep the limited national powers within the layer the framers designed for it.[[20]](#footnote-20)

CHIEF JUSTICE ROBERTS’ MARBLE-CAKE RENDERING OF FEDERALISM

Chief Justice Roberts, like The Four, claimed to argue from principle. While The Four intro­duced an understanding of U. S. Federalisms then stated “That clear principle carries the day here,” the Chief Justice concluded his remarks prior to Section I of his opinion with a teaser: “The ques­tions before us must be considered against the background of these basic princi­ples.” Roberts’ opinion, like that of The Four, exalted fundamental principle. Roberts’ basic principle, unlike the boldfaced line-drawing of The Four, was that national govern­ment possessed no police powers. Although relations between limited national powers and powers reserved to the states and to local self-governance were many, varied, and complex—Roberts’ reading of the Constitution and of prac­tice was far more marbled and far less emphatic than the reading and rendering of The Four—even powers expressly accorded the Con­gress must yield no national authority to legislate for the general welfare of the nation as a whole. Informed by his principled negation of national police powers, Chief Justice Roberts drew lines. Those lines were, however, far more blended and blurred and wa­vering than those of The Four. Relatively if not absolutely, Roberts’ rendering of U. S. Federalisms was “marbled,” not “layered.”

Chief Justice John Roberts began and ended his opinion of and for the Court in *Sebelius* with familiar disclaimers that I urge readers of that opinion to consider more than bromide. In his penul­timate paragraph on page 59 of his slip opinion Chief Justice Roberts intoned:

The Framers created a Federal Government of limited powers, and assigned to this Court the duty of enforcing those limits. The Court does so today. But the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people.

This closing bracket matched somewhat the second paragraph of the introductory paragraphs of Roberts’ opinion:

We do not consider whether [the Patient Protection and Affordable Care] Act [of 2010] 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.[[21]](#footnote-21)

With good reason might readers regard these passages as liturgy for line-drawing.[[22]](#footnote-22) Since at least *Marbury versus Madison* (1803) the Supreme Court of the United States has legitimized its decision-making if not its decisions by disclaiming substantive judgments about the wisdom or prudence of policies or laws and by claiming solely jural judgments about the consistency of policies, practices, or laws with supreme law(s) of the land. Both the denial of political discretion and the avowal of legal determination are liturgical and ritualistic; however, matched abnegation of politicking and affirma­tion of adjudicating are also instrumental. The rhetoric of abnegation permits opinion-writers to hold their noses at unsound, unwise policies implicitly or explicitly[[23]](#footnote-23) to marshal evidence that they truly must be following law if they find results distasteful but legal. At opinion’s end Chief Justice Roberts leaves judgments of the wisdom of the Patient Protection and Affordable Care Act of 2010 to the people in a presidential election year. At opinion’s beginning Chief Justice Roberts directs detractors to elected leaders, perhaps especially to leaders standing at the time for re-election. The liturgical, rhetorical flourishes at opening and closing, I suggest, may be poignant in fending off evil(s) and embracing good(s). Such flourishes may also legitimize, even glorify, a drawing of jural lines that renders United States Federalisms to suit the instant case and, of course, to suit the writer of the opinion. Spatial fictions, whether pretenses or delusions, impart to judicial opinions and, through those opinions, future cases and controversies a partial rendering of the meaning and prin­ci­ples of the Constitution and of the particulars and processes of a given case. Roberts introduces the sovereignty of states and the liberty of individuals as foci most consonant with his arguments; socio-economic structures and the problems of guaranteeing and delivering health care recede into the background as Roberts delineates his understanding of U. S. Federalisms.

However liturgical, ritualistic, and instrumental Roberts’ bracketing remarks, the Chief Jus­tice emphasizes his adherence to principle in paragraphs 3-14 of his slip opinion. Roberts’ early, de­tached statement of principles “renders” a partial understanding of U. S. federalism that—what a surprise!—fits Chief Justice Roberts’s dispositions of the case. Although I delight that Chief Justice Roberts provided an explicit model of federalism, an understanding so clear that I need not perform interpretational derring-do of which I am far from capable, and I note that Roberts introduced a sec­ond, perhaps complementary understanding of federalism to suit his [and six colleagues’] disposition of the Medicaid issue [for which, alas, I shall perform some interpretation derring-do], I direct atten­tion to alternative aspects and understandings of U. S. federalism that would, at the least, complicate Roberts’ argument.

Chief Justice Roberts’ Preface of Principles

Before the section of his opinion that he enumerated with the Roman numeral “I,” Chief Justice Roberts anticipated the overall logic[[24]](#footnote-24) of his opinion by mustering premises familiar from narratives or myths of the writing and ratification of the second constitution of the United States of America. According to this origin-myth, sovereign states in 1787-1789 granted to the inchoate national government[[25]](#footnote-25) limited powers listed[[26]](#footnote-26) in the U. S. Constitution. Delegates and ratifiers listed most such powers in Article I, section 8 because they were assigning such powers to Congress. To complete this transfer of authority, the myth goes, the national government and specifically Con­gress must justify their acts and actions by fitting acts and actions under or within one or more pow­ers explicit or implicit. This, Chief Justice Roberts noted, both authorized and delimited the authori­ty of the Congress, for states’ granting of powers amounted to a withholding of powers that could not be read in or implied from the text of the Constitution. By contrast, Chief Justice Roberts con­tinued, the Constitution delimited—most obviously in Article I, section 10—some powers that states might be said to possess but did not list the powers of states because states reserved all pow­ers not explicitly or implicitly ceded to Congress or other parts of the national government. The states thus possessed general powers of governance long and often referred to as “police power.”[[27]](#footnote-27)

Chief Justice Roberts emphasized that the presence of broad power to legislate for public health, safety, morals, and welfare in state governments and the absence of corresponding police power in the national government guaranteed substantial liberty to states as co-sovereigns and to individuals as free citizens. Assigning police power to several states and denying such power to the national sovereign not only kept government and administration closer to the governed but also kept encumbrances on individuals in governments “more local and more accountable than a distant federal bureaucracy.”[[28]](#footnote-28) Local, accountable, independent states check the national government as an integral part of U. S. federalism. Of course, Roberts’ accentuating the marvels of localized police powers and the perils of nationalized police powers also set up Roberts’ invocation of the “Police Power Horrible” that I argue was an important aspect of his rendering of U. S. federalism.

Having articulated a general understanding of federalism, Chief Justice Roberts used that general un­derstanding to organize his opinion. “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.” Please note Roberts’ rhetorical turn at this juncture of his preface: the Chief Justice seems to me to argue that even if a power explicitly granted to Con­gress in Article One, section eight authorized the ACA, that authorization must nonetheless be read “carefully”[[29]](#footnote-29) lest authority resembling a national police power be created. In my reading, that is, Chief Justice Roberts explicitly writes that avoidance of police power in the national government and especially in Congress is a defining principle of U. S. Federalisms.

The Constitution explicitly grants Congress power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”—the commerce power—as well as the power to tax and spend “…for the common Defence and general Welfare of the United States.” Chief Justice Roberts detailed precedents that had extended these powers to regulate international and interstate commerce and to spend for general welfare, then noted implied powers Congress possessed under the Necessary and Proper Clause.

These express and implied powers of Congress, Chief Justice Roberts intoned, put the Supreme Court in a bind between its many permissive renderings of powers and the Court’s duty to police boundaries carefully. He traced the stylized if not ritualized two-step of judicial deference to elected decision-makers but judicial fidelity to settled law on page 6 of his slip opinion:[[30]](#footnote-30)

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. … 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.

However true or false one takes Roberts’ dichotomy to be, Roberts has set up a principled contrast between powers explicitly or implicitly granted Congress and national police powers expli­citly or implicitly withheld from Congress. Chief Justice Roberts then suits the rest of his opinion to that principled dichotomy, arguing that the commerce power[[31]](#footnote-31) cannot be extended so far as to cover provision of health care but that Congress’s power to tax and spend may be.[[32]](#footnote-32) As Justice Ginsburg notes, Chief Justice Roberts might have gotten to Congress’s power to spend for the general welfare of the United States of America and averted discussion of the commerce clause or of congressional police power, but that would have impaired our viewing Roberts’ Police Power rendering of U. S. Federalisms.[[33]](#footnote-33)

Roberts’ general rendering of U. S. Federalisms in his preface invoked both an evil to be avoided and goods to be cherished. The evil to be avoided I style the “Police Power Horrible.”[[34]](#footnote-34) Chief Justice Roberts phrases his preface of principles as if the acquisition of police powers by the national government were in and of itself stoutly to be resisted. If the Constitution listed no explicit power that authorized congressional or other national action on health care or insurance, then the Court must resist efforts to claim general authority to legislate for public health, safety, morals, or welfare, an authority exclusive to states. So large does this peril of police power loom in Roberts’ opinion that readers might miss that Roberts’ determination on the Tax and Spend Clause makes his battle against national police power gratuitous for the instant cases.[[35]](#footnote-35) Once Roberts declares that the authority of Congress to spend in pursuit of the general welfare of the people of the United States will legitimize Obamacare, his remarks about National Police Power become jurisprudentially *obiter dicta* and logically a false alarm. In terms of judicial rhetoric, by contrast, Chief Justice Roberts’s “Police Power Horrible” forewarns observers that Sheriff Roberts will be policing police powers and restraining national overreach for some years to come.

Chief Justice Roberts will police national overreach to preserve individuals’ and states’ liberties, the goods he embraces as he eschews nationalized police powers. Roberts explicitly links Police Power and liberty in his prefatory statement of principles. He returns to this linkage later in his opinion when he borrows from Justice Kennedy’s opinion in *Bond versus the United States* (2011) the adage that “freedom is enhanced by the creation of two governments, not one.”[[36]](#footnote-36)

Chief Justice Roberts’ Line-Drawing on Medicaid

On the extension of Medicaid, Roberts did render U. S. Federalisms largely as The Four did: states challenging Obamacare’s extension of Medicaid contended that Congress exceeded its consti­tutional authority under the Spending Clause by threatening to withhold grants for Medicaid unless a state accepted conditions Obamacare attached to increased funding. States argued such threats constituted coercion inconsistent with the sovereignty of states and with precedents of the U. S. Supreme Court. Seven justices in Sebelius agreed with the states on this point. Roberts wrote:[[37]](#footnote-37)

The Court in *Steward Machine* did not attempt to “fix the outermost line” where persuasion gives way to coer­cion. … The Court found it “[e]nough for present purposes that wherever the line may be, this statute is within it.” … We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it.

Roberts professed no doubt that the ACA dramatically increased states’ Medicaid obligations as to coverage, benefits, and constraints. He allowed that the Spending Clause authorized Congress “to … provide for the . . . general Welfare of the United States” and that precedents es­tab­lished that Congress might deploy this power to fund States and might influence states by condi­tioning such funds on prescribed behavior, the Court had in multiple cases anticipated that the states’ sovereignty limits to national government’s conditions and influence to situations in which states voluntarily ac­cede to the terms of the funding. Because, Chief Justice Roberts argues, liberty is ensured and en­hanced by dual sovereignties rather than one, the sovereign­ty of states de­limited duress lest the dual-sovereignty system of 1787 devolve in practice to a unitary system with D. C. as command central.

The Chief Justice did not fix a line so much as specify an extreme to be avoided. Using verbs such as “commandeers,” “commands.” “coerces,” “compels,” and “controls,” Roberts de­fined a range of congressional conditions that denied states their due sovereignty and individuals their due liberties in local republican self-governance. Congress possessed ample authority to influ­ence, to induce, or to incentivize but lacked authority to force states financially to carry out congres­sional will. What Congress could not constitutionally regulate directly, Congress could not consti­tutionally regulate indirectly by financial blackmail.[[38]](#footnote-38)

When states may fiscally afford to accept or to reject national funding conditioned on na­tional directions, Roberts argued, state legislators may decide more voluntarily to implement a federal program—and with more politi­cal accountability to voters. If, in contrast, the national sovereign “dragoons” the state sovereign, voters may discipline state officials but spare faraway national officials who, in effect, designed and directed programs. Thus, the Medicaid provision threatened republican self-governance at the state level.

Roberts further argued that U. S. Federalisms do not brook holding state decision-makers accountable for offers they cannot fiscally refuse. Federalism permitted Congress to over­see states’ spending of U. S. moneys if states might refuse the moneys, but states’ autonomy—and administra­tive and statutory practices and processes that states had long developed to suit their poli­tical cul­tures and sovereign wills—could not endure Congress’s fiscal compulsion. Con­gress could not pur­port to spend for the “general Welfare” in ways that eroded federalism. On page 51 of his opinion Roberts went so far as to pronounce the Medicaid provisions of the ACA “… a gun to the head.” Conceding that states had consented to Medicaid under the Social Security Act, which expli­citly reserved Congress’s prerogative to change or to end conditions on receipt of U. S. funds, he stated that the ACA’s expansion did not merely transform but transmogrified the re­lations of na­tional and state governments to conform states’ administration[[39]](#footnote-39) of Medicaid to the ACA’s national design.

Chief Justice Roberts’ Marbled Understanding of Federalism

The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in par­ti­cular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.

Reserving police powers to states and denying general, national powers of police to Con­gress, I have argued above, appear to have been one of Chief Justice Roberts’ major objectives in his opinion “of the Court.”[[40]](#footnote-40) Roberts reduced multiple dimensions of U. S. Federalisms to a single ma­jor delineation of federal sovereignty from state sovereignty based on police power’s being re­served to states alone. This simplification of federalism yielded complexities of argumentation, which accounts for the wavering, swirling, “marble cake federalism” in Roberts’ opinion.

ASSOCIATE JUSTICE GINSBURG’S BLENDED RENDERING OF FEDERALISM

Justice Ruth Bader Ginsburg offered before the first major section of her opinion only her spare syllabus of her opinion. Unlike Chief Justice Roberts and The Four, Justice Ginsburg did not put her understanding of U. S. federalism up front. Immediately thereafter, however, she began to disparage the understandings in the other two opinions as retrogressive.[[41]](#footnote-41) Unlike my treatment of the two opinions above, then, I must trace Ginsburg’s model through or derive Ginsburg’s rendering from her long opinion. Like those two foregoing opinions, Justice Ginsburg’s opinion will cringe at a conjured “horrible” and celebrate an alternative affirmative. Spoiler alert: the conjured horrible will be “the twilight zone of dual federalism;” the affirmed alternative will be cooperative federalism amid the welfare state inaugurated in the 1930s.

Justice Ginsburg began her first substantive section [Roman numeral I] by invoking Social Security’s old-age and survivors’ benefits as a welfare-state program upheld by the Court that Con­gress might have emulated without fear of Chief Justice Roberts’ rigid reading of the Commerce Clause and stunningly retrogressive rendering of federalism.[[42]](#footnote-42) That gambit was probably predictable, for case law since 1937 overwhelmingly supported Justices Ginsburg, Breyer, Sotomayor, and Kagan in up­holding the ACA under the Commerce Clause. The less predictable rhetorical tactic was Jus­tice Ginsburg’s claim that Congress instead elected to cut in private insurers and state governments. By this means did Ginsburg laud cooperative federalism.[[43]](#footnote-43)

In the same initial paragraph of Section I, Ginsburg disparaged Roberts’s restrictive reading of the Commerce Clause and tied the Chief Justice [and, *a fortiori* but implicitly, The Four] to an un­derstanding of federalism 75 years in arears: “The Chief Justice’s crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress’ efforts to regulate the national economy in the interest of those who labor to sustain it.”[[44]](#footnote-44) Interesting as Gins­burg’s char­ac­terization of atavistic reading may be to students of judicial rhetoric and fascinating as her defining the Positive State as regulation in the interests of laborers, for my present purpose the more interes­ting feature is Ginsburg’s invocation of the facts of health care in the 21st century as a major prob­lem addressable by cooperative federalism but beyond relief if outdated dual federalism rules the economy and polity. In my reading, Ginsburg begins to call up the spectre of “The Twi­light Zone of Dual Federalism,”[[45]](#footnote-45) a period in which the U. S. Supreme Court and lower courts en­larged the Due Process Clause of the Fourteenth Amendment to prevent states from regulating cor­porations or overruling markets even as they shrank interstate commerce to prevent Congress from regulating increasingly national commerce that, justices and judges claimed, was transacted within a state.[[46]](#footnote-46)

Ginsburg’s prefatory defamation of the Chief Justice out of the way, she broadens the con­text of the ACA and the case in a tactical manner: she notes the immensity of the national market for health care, the inevitability that individuals will be drawn into that immense market, the unpre­dictability of participation in that market, the unavailability and insufficiency of insurance, and the millions of Americans without insurance. Ginsburg thereby redirected attention from Roberts’ sov-ereign states and inactive individuals and toward the commercial, structural, and practical context in which Congress legislated and concerning which states could not legislate effectively.

Justice Ruth Bader Ginsburg’s summoning of “The Twilight Zone of Dual Federalism” from its crypt does not seem to me debatable once I reach page 37 of her slip opinion:

In the early 20th century, this Court regularly struck down economic regulation enacted by the peoples’ representatives in both the States and the Federal Government. See, *e.g., Carter Coal Co.*, 298 U. S., at 303–304, 309–310; *Dagenhart*, 247 U. S., at 276–277; *Lochner* v. *New York*, 198 U. S. 45, 64 (1905). The Chief Justice’s Commerce Clause opinion, and even more so the joint dissenters’ reasoning, see *post,* at 4–16, bear a disquieting resemblance to those long-overruled decisions.

Please note that here the justice manifestly confronts the Chief Justice’s opinion along with the opinion of The Four [but still not Justice Thomas’s brief supplement]. In most parts of her opinion, she contradicts Roberts patently but The Four latently [at most].

In Justice Ginsburg’s telling “the ACA serves the general welfare of the people of the United States while retaining a prominent role for the States.” Even if reasonable readers could reject her opinion regarding state-friendly features of the ACA, Justice Ginsburg was establishing an important part of her “Twilight Zone of Dual Federal­ism:” the incapacity of states. If states cannot solve an important public policy problem, then finding constitutional barriers to national solutions creates or widens the zone in which no government may remedy problems of health care. Long ago that twi­light zone had spared corpora­tions considerable regulation, for the Supreme Court treated corpora­tions as persons protected from states by the Due Process of the Fourteenth Amendment and im­mune from the national govern­ment by a narrow reading of the Commerce Clause.[[47]](#footnote-47)

Justice Ginsburg posited positives—cooperative federalism and states’ autonomy—in con­trast to national control and oppression of states and citizenry Chief Justice Roberts and especially The Four attributed to the ACA. She explicitly characterized concretes that, she argued, contra­dicted abstractions and principles that the Chief Justice raised regarding Medicaid and The Four raised regarding the Individual Mandate and Medicaid. Even expansion of Medicaid, the toughest issue Ginsburg confronted and one on which seven justices disagreed with her and Justice Sonia Sotomayor, led Ginsburg to emphasize the range of autonomy ACA left states. Roberts invoked na­tional Police Power and distant national bureaucracy swallowing up states as well as individuals; The Four augured bound­less national conscription of states and regimentation of individuals; Ginsburg divined adjustments in and adaptation of cooperative federalism to meet challenges to bringing health care and coverage in the United States up to the standards of 20th century, let alone 21st cen­tury societies and polities.[[48]](#footnote-48) Medicaid had all along authorized, Ginsburg contended, states to exper­iment with varying financing, subsidies, coverage, and modes of delivery with the predicted and pre­dictable tailoring of Medicaid programs to states’ socioeconomic and political settings. Con­trary to dismal characterizations of the ACA in the present and to dire descriptions of tyrannical na­tional governance in the future, she predicted on page 44 of her slip opinion that “States, as first-line administrators, will continue to guide the distribution of substantial resources among their needy populations.” On the same page Ginsburg even maintained that states would be marginalized ab­sent national funding with strings attached. [What The Four might call chains Justice Ginsburg may describe as strings!]Thus she fitted the changes in Medicaid worked by the ACA into features of Medicaid all along to make the case that the ACA continued the coopera­tive federalism of the Great Society and that in the absence of Medicaid states would be weakened, a nifty inversion of the argu­ments of The Four if not of Chief Justice Roberts.[[49]](#footnote-49) She summarized her perspective on page 36:

Far from trampling on States’ sovereignty, the ACA attempts a federal solution for the very reason that the States, acting separately, cannot meet the need. Notably, the ACA serves the general welfare of the people of the United States while retaining a prominent role for the States. See *id.,* at 31– 36 (explaining and illustrating how the ACA affords States wide latitude in implementing key elements of the Act’s reforms).

Modernizing Health Care Demands National Authority and Cooperative Federalism

In sum, Justice Ginsburg found a need and filled it with the ACA lest a modern system of health care continue, as it had for decades, to tantalize the United States of America. The Four had played down problems of providing, distributing, and affording health care and hinted at alternative means by which Congress might fund health care without conscripting states to serve the will of Congress and without importuning individuals to purchase insurance that they did not want; Justice Ginsburg had invoked how Congress had at long last addressed serious problems that states could not address without cooperating with the national government and that individuals could not afford and would not afford without serious inducement from the national government. The Chief Justice had laid down markers on the commerce power and national police power but grudgingly fitted the ACA under the Tax and Spend Clause; Ginsburg attacked Roberts’ problems with national police pow­er and expansions of congressional regulatory powers as problems of justices’ own making: first antediluvian justices who stymied the New Deal in the 1930s and now five justices who would stop cooperative federalism in the 2010s. Modernizing health care, Ginsburg argued, might or must be done nationally or not at all. If a modern system of health care could not be constructed because the national legislature and executive could not push it through, the United States would do without modern health care as it had for decades. If, however, a modern system of health care could not be constructed because retrogressive jurisprudes erected anew barriers to federalist—by which I mean national and state—self-governance, Ginsburg was willing to call out the atavists who, she argued, were themselves a problem for health care and for U. S. Federalisms.

FEDERALISMS AND FIG LEAFS

My scamper through justices’ invocations of federalism hardly does justice to the convolu­tions of issues, ideas, votes, or opinions in *Sebelius*, but it does afford a look at how three opinions rendered U. S. Federalisms. U. S. Federalisms involve tensions; interpreters of U. S. Federalisms sel­ect for emphasis more cooperative balances, more competitive checks, and a host of arrange­ments that creatively intertwine national, regional, state, and local authority and responsibility. Those tensions yield federalism**s**. If we habitually discussed intergovernmental relations precisely and accurately, we should pluralize “federalism” to cover evolution, fashions, and inventions across U. S. history. The further back in that history a judicial rhetor ranges to cherrypick concepts or un­derstandings, the more the rhetor renders U. S. Federalisms into this or that argument or appeal to rationalize a result reached in specific cases and in judicial hearings and conferences.

*Sebelius* displays the “bricolage” by which statements and misstatements of facts specific to the cases or generalized to societies, notions principled and fanciful, metaphors helpful in some respects but misleading in other respects, conceptions and misconceptions, precedents massaged and mangled, and other constructions are blended with hyperbole, fallacies, fabrications, and other rhetorical arts to yield determinations that purport to apply pre-existing rules to immediate conflicts. Advocates find and invent elements of arguments that they assemble into ready-made resolutions of conflicts. Adjudicators then vote for results and select more plausible elements and reject less plaus­ible elements to invent justifications more or less credible.

As a result, *Sebelius* exemplifies Fig Leaf Federalism—a barely adequate concealment of the fact that lawyers and judges make federalism**s** up as they adjudicate along. The Four and the Chief Justice fashioned bricolage far more similar to another than their opinions were to the brico­lage of Justice Ginsburg. If I am correct, each bricolage combines evils from which those who ren­der the Constitution and those who live with those renderings might be expected to recoil with goods [hardly ideals!] that might be expected to attract [or at least to distract] adherence and ad­herents to visions of this or that scheme for interrelations among a singular nation and a multiplicity of states and states’ creations. I have identified some horribles from which justices rhetorically and ritualistic­cally recoiled in *Sebelius* and some goods toward which they directed obedience and worship.

Justice Ginsburg rhetorically recoiled from a reprise of a twilight zone, recasting the efforts of The Four and of the Chief Justice to brake national domination of health care as renewed efforts to break the positive state. I argue that Ginsburg resurrected accounts[[50]](#footnote-50) of New Deal nightmares in which proponents of negative, night-watchman, laissez-faire states exploited neoclassical economic theory to explain why positive, welfare-state policies were theoretically and empirically contraindi­cated even as they commandeered constitutional theory to bar democratic-republican initiatives that overcame free-market objections. In contrast to this reborn jural-political horrible, Ginsburg prof­fered modern, cooperative federalism that solves some of the problems of guaranteeing “domicili­aries” health care and invokes the sufficiency of the national government to do what states cannot or will not do, an important consideration since the Articles of Confederation were superceded by the second constitution of the United States.

Against Justice Ginsburg’s rendering, the four dissenters elaborated aspects of the constitu­tional structure envisaged in that second constitution. They drew heavy lines around national policy­making with incantations of national authority delimited even hamstrung by powers conceded to that national government in the Constitution. They adduced as their horrible to be avoided at all costs a national government [President as well as Congress] that reduces sovereign states to thralls and apparatchiks and citizens to subjects and pawns. Their “All-Plenary National Government Hor­rible” would demolish the federalism and freedoms that Framers conceived and crafted. Thus The Four transmogrified halting, groping efforts to grapple with health care into a “teachable moment” in which the Court as republican schoolmaster must extol the virtues of local self-governance, states’ historical priority and declining autonomy, and individual liberty, self-determination, and right to be let alone. The Four eulogized Isaiah Berlin’s negative liberty in particular as imperiled by the Posi­tive State that Justice Ginsburg admired in her rendering of federalism.

Chief Justice Roberts’ bold lines against national Police Power and an overweening expan­sion of Medicaid did not disguise his marble-caked understanding of U. S. Federalisms and his blurred lines elsewhere. Roberts joined The Four in denying that Congress’s authority to regulate interstate commerce extended to individuals’ inactions or consumers’ decisions not to invest in pro­ducts or services. He agreed with six other justices that Congress could not blackmail state sover­eignties into conforming to the commands of Congress. Roberts reserved his horror, however, for the spectre of “National Police Power.” That horrible, Roberts admonished Congress, imperiled individual liberties and states’ sovereignty, the goods that Roberts blessed. He committed his Court to vigilant policing of National Police Power even when Congress exercised authority expressly as­signed it—in the mythopoetic telling, assigned Congress by thirteen confederated states.

To read me tell the tale, in sum, the Court in *Sebelius* tailored U. S. Federalisms to suit three decisions and three concomitant combinations of horribles and goods. “Federalism” serves as a Fig Leaf, it follows, when difficult choices and exigent politics induce—the justices might say “force”—adjudicators to recombine components of federalism as formulated historically and tradi­tionally, commonly and academically, politically and jurally, and, most important, liturgically and ceremonially into a rendering of sacred texts and charismatic enunciators. Such rendering of the Constitution and other objects sacred to the civil religion temporarily if tendentiously redirects audiences from Karl Llewellyn’s epigram displayed at the beginning and at the ending of this draft.

Behold the creative destruction of constitutional adjudication! As justices cast about for shib­boleths and syllogisms to justify decisions that the justices reached before they concocted their opinions, they rendered the Constitution in the manner Theodore J. Lowi described in addressing questionable legitimacy throughout the history of the polity.[[51]](#footnote-51) Professor Lowi in his James Madison Lecture saw Justice Ginsburg’s “Switch in Time” and raised it with at least two other episodes re­lated to U. S. Federalisms. Lowi noted the bait and switch by which 18th century Federalists conned states into “amending” the Articles of Confederation and thereby exchanging local self-government for national other-government. This original sin does not usually figure in originalist accounts of federalism but bears recalling. Securing for national lawmaking authority to do what under the first constitution the states had not done well in the view of the Federalists was a major object of the second constitution. A second episode of Fig Leaf Federalism that Dr. Lowi recounts is the demoli­tion of the "privileges or immunities” that the 14th Amendment purported to protect against state depredations.[[52]](#footnote-52) Lowi noted how Court’s formulations of “dual citizenship” and dual federalism pre­served much of the federalism of old against Congress’s Reconstruction of the Constitution—the Bill of Rights for corporations excepted, of course—and the changes in U. S. Federalisms that the Civil War Amendments might have and after *Carolene Products* did work.

Dr. Lowi’s history of federalism**s** fresh in our minds, we ignore metaphorical baked goods and attend instead to partially baked understandings and ad hoc renderings of U. S. Federalisms in *Sebelius* to see where the Roberts Court may be taking us.

“… *rules of law*, *alone*, do not, because they cannot, decide any

appealed case *which has been worth both an appeal and a response*.”[[53]](#footnote-53)

Appendix One

Professor David A. Schultz’s Brief of *NFIB versus Sebelius*

***National Federation of Independent Business v. Sebelius,***

**U.S. , 132 S.Ct. 2566 (2012)**

**Parties:**

Plaintiffs: National Federation of Independent Business, non-profit organization (501 c 6) representing small businesses, State of Florida and 25 other states.

Respondent: Kathleen Sebelius, Secretary of Health and Human Services, United States Government

**Facts:** In 2010 Congress passed and the president signed into law the Patent Protection and Affordable Care Act (PPACA). Among the major provisions were a requirement that: 1) Individuals not presently covered by medical insurance would be required to purchase and maintain it or pay a prorated fine based on their income to the government (referred to as the “individual mandate”); 2) Individual states would be required to expand participation in their Medicaid program and if they failed to do so the federal government would be allowed to penalize them by withholding all of the Medicaid funding. The National Federation of Independent Businesses, the State of Florida, and 25 other state attorneys generals challenged the constitutionality of PPACA, contending that the individual mandate violated the Commerce Clause and that the Medicaid expansion/penalty violated the Spending Clause. Additionally, plaintiffs asserted that because the PPACA did not contain a severability clause, the entire Act was unconstitutional.

**Procedural Posture:** Case was brought in district court which invalidated the mandate as unconstitutional under the Commerce Clause and also invalidated the entire PPACA because it could not be severed from the mandate. On appeal the Eleventh Circuit Court of Appeals ruled that the individual mandate violated the Commerce Clause but upheld the rest of the act. Supreme Court grants *cert.* on three questions and requests briefly on whether the Anti-Injunction Act bars review of the PPACA until such time as the law takes effect.

**Issues:** (1) Does the Anti-Injunction Act bar the courts from reviewing the constitutionality of the PPACA because the penalty assessed on individuals who do not purchase and maintain health insurance is a tax that cannot be examined until such time as it goes into effect?

(2) May Congress under the Commerce or Necessary and Proper Clause mandate that individuals not presently covered by health insurance purchase and maintain it or pay a prorated fine based on their income to the government?

(3) May Congress under the Spending Clause mandate individual states to expand participation in the Medicaid program and penalize them if they do not by withholding all of their Medicaid funding?

(4) Did the enactment of the entire PPACA exceed Congress’s authority because the individual mandate is unconstitutional and the rest of Act could not be severed from it?

**Holding:** (1) No, the penalty according to the PPACA is not a tax because Congress chose to call it a penalty and the courts must assume that Congress chose its words carefully and dispositively.

(2) No, the individual mandate exceeds Congress’ authority under the Commerce and Necessary and Proper Clauses but is upheld as a tax under the Tax Clause.

(3) No, Congress may not withhold all of a state’s Medicaid funding if it refuses to participate in the expansion of this program. Congress may only withhold that portion of Medicaid funding connected to the PPACA.

(4) Since the individual mandate was upheld under the Tax and Spending Clause a majority of the court did not reach this issue.

**Vote:** Five Justices struck down the individual mandate under the Commerce Clause (Roberts, Scalia, Thomas, Alito, and Kennedy) while five Justices upheld it as a valid exercise of Congress’s Tax and Spending authority (Roberts, Ginsburg, Breyer, Sotomayer, Kagan). Five Justices (Roberts, Scalia, Thomas, Alito, and Kennedy) struck down the Medicaid expansion. Four Justices in dissent (Scalia, Thomas, Alito, and Kennedy) would have invalidated the entire PPACA because the unconstitutional provisions could not be severed from the rest of the Act.

**Reasoning:** Article I, section 8, clause 3 gives Congress broad authority to regulate interstate Commerce. Yet this power is not unlimited and it presupposes that some type of commercial activity exists to regulate. In the case of the individual mandate, it does not regulate activity but it requires individuals to become part of interstate commerce by purchasing and maintaining health insurance and then fines individuals for their failure to participate in this activity. In distinguishing this case from *Wickard v. Filburn* where the Court upheld a penalty on an individual who exceeded production quotas when produced wheat for personal consumption but withheld it from sale, the Court ruled that in that case the individual at least did something or engaged in some type of activity. Similarly, the Court ruled that the individual mandate was not constitutional under the Necessary and Proper Clause (Article I, section 8, clause 18) because it was not connected to an enumerated power already textually committed to Congress. However, the Court upheld the individual mandate under the Tax Clause (Article I, section 8, clause 1. In arguing that the Court should undertake every conceivable construction of a law to uphold its constitutionality, it conceived the penalty, under a functional test as articulated in *Bailey v. Drexel Furniture,* as a tax and Congress has broad authority to tax for the general welfare. Individuals who do not wish to purchase health insurance may opt to pay the tax instead, with the tax not being so unreasonable that it constitutes a criminal fine. Proof that the penalty was a tax could be seen in the fact that the amount of the penalty was prorated to one’s income. While there is no doubt that the tax was aimed to affect individual behavior, the country has a long history of uses taxes to influence how people act. Moreover, while the penalty was not construed as a tax for the purposes of the Anti-Injunction Act, that reading of the PPACA is not dispositive for determining its constitutionality.

The Spending Clause (Article I, section 8, clause 1) gives Congress broad authority to expend money for the general welfare. But this clause does not give Congress the authority to mandate that states engage in certain types of regulatory activity. Instead, under the concept of cooperative-federal-state spending programs, states must volunteer to regulate. Here, the threat to withhold all of a state’s Medicaid funding (approximately 10% of a state’s budget) is so significant that it has effectively no choice but to acquiesce and expand this program. Because of the coercive nature of this federal penalty the Court rules that states that refuse to participate in the Medicaid expansion may only lose the money tied to it.

Finally, because the Court upheld the individual mandate as constitutional it ruled that it did not need to address the severability issue.

**Important Dicta:** The “Broccoli argument” prevails!

The failure of that group to have a healthy diet increases health care costs, to a greater extent than the failure of the uninsured to purchase insurance. Those increased costs are borne in part by other Americans who must pay more, just as the uninsured shift costs to the insured. Congress addressed the insurance problem by ordering everyone to buy insurance. Under the Government's theory, Congress could address the diet problem by ordering everyone to buy vegetables.

People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.

That is not the country the Framers of our Constitution envisioned. James Madison explained that the Commerce Clause was “an addition which few oppose and from which no apprehensions are entertained.” The Federalist No. 45, at 293. While Congress's authority under the Commerce Clause has of course expanded with the growth of the national economy, our cases have “always recognized that the power to regulate commerce, though broad indeed, has limits.” The Government's theory would erode those limits, permitting Congress to reach beyond the natural extent of its authority, “everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.”

**Analysis:** The Court established an outer boundary for the Commerce Clause that extends no further that the precedent established in *Wickard*. In fact the Court claries that precedent to require some commercial activity to exist prior to regulation and individuals cannot be forced into doing some commercial activity (such as buying broccoli) that they do not wish to do. Technically the Court did rule the individual mandate unconstitutional and said we cannot be compelled to buy health insurance. Yet if we do not do that we can be taxed.

**Appendix Two**

**The Federalist Papers : No. 45**

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| **The Alleged Danger From the Powers of the Union to the State Governments Considered  For the Independent Journal.** |

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| **MADISON** |

To the People of the State of New York:

HAVING shown that no one of the powers transferred to the federal government is unnecessary or improper, the next question to be considered is, whether the whole mass of them will be dangerous to the portion of authority left in the several States. The adversaries to the plan of the convention, instead of considering in the first place what degree of power was absolutely necessary for the purposes of the federal government, have exhausted themselves in a secondary inquiry into the possible consequences of the proposed degree of power to the governments of the particular States. But if the Union, as has been shown, be essential to the security of the people of America against foreign danger; if it be essential to their security against contentions and wars among the different States; if it be essential to guard them against those violent and oppressive factions which embitter the blessings of liberty, and against those military establishments which must gradually poison its very fountain; if, in a word, the Union be essential to the happiness of the people of America, is it not preposterous, to urge as an objection to a government, without which the objects of the Union cannot be attained, that such a government may derogate from the importance of the governments of the individual States? Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States, that particular municipal establishments, might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty? We have heard of the impious doctrine in the Old World, that the people were made for kings, not kings for the people. Is the same doctrine to be revived in the New, in another shape that the solid happiness of the people is to be sacrificed to the views of political institutions of a different form?

It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object. Were the plan of the convention adverse to the public happiness, my voice would be, Reject the plan. Were the Union itself inconsistent with the public happiness, it would be, Abolish the Union. In like manner, as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter. How far the sacrifice is necessary, has been shown. How far the unsacrificed residue will be endangered, is the question before us. Several important considerations have been touched in the course of these papers, which discountenance the supposition that the operation of the federal government will by degrees prove fatal to the State governments. The more I revolve the subject, the more fully I am persuaded that the balance is much more likely to be disturbed by the preponderancy of the last than of the first scale.

We have seen, in all the examples of ancient and modern confederacies, the strongest tendency continually betraying itself in the members, to despoil the general government of its authorities, with a very ineffectual capacity in the latter to defend itself against the encroachments. Although, in most of these examples, the system has been so dissimilar from that under consideration as greatly to weaken any inference concerning the latter from the fate of the former, yet, as the States will retain, under the proposed Constitution, a very extensive portion of active sovereignty, the inference ought not to be wholly disregarded. In the Achaean league it is probable that the federal head had a degree and species of power, which gave it a considerable likeness to the government framed by the convention. The Lycian Confederacy, as far as its principles and form are transmitted, must have borne a still greater analogy to it. Yet history does not inform us that either of them ever degenerated, or tended to degenerate, into one consolidated government. On the contrary, we know that the ruin of one of them proceeded from the incapacity of the federal authority to prevent the dissensions, and finally the disunion, of the subordinate authorities. These cases are the more worthy of our attention, as the external causes by which the component parts were pressed together were much more numerous and powerful than in our case; and consequently less powerful ligaments within would be sufficient to bind the members to the head, and to each other.

In the feudal system, we have seen a similar propensity exemplified. Notwithstanding the want of proper sympathy in every instance between the local sovereigns and the people, and the sympathy in some instances between the general sovereign and the latter, it usually happened that the local sovereigns prevailed in the rivalship for encroachments. Had no external dangers enforced internal harmony and subordination, and particularly, had the local sovereigns possessed the affections of the people, the great kingdoms in Europe would at this time consist of as many independent princes as there were formerly feudatory barons. The State government will have the advantage of the Federal government, whether we compare them in respect to the immediate dependence of the one on the other; to the weight of personal influence which each side will possess; to the powers respect­tively vested in them; to the predilection and probable support of the people; to the disposition and faculty of resisting and frustrating the measures of each other. The State governments may be re­garded as constituent and essential parts of the federal government; whilst the latter is nowise essen­tial to the operation or organization of the former. Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will, perhaps, in most cases, of themselves determine it. The Senate will be elected absolutely and exclusively by the State legislatures. Even the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the State legislatures. Thus, each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them.

On the other side, the component parts of the State governments will in no instance be indebted for their appointment to the direct agency of the federal government, and very little, if at all, to the local influence of its members. The number of individuals employed under the Constitution of the United States will be much smaller than the number employed under the particular States. There will consequently be less of personal influence on the side of the former than of the latter. The members of the legislative, executive, and judiciary departments of thirteen and more States, the justices of peace, officers of militia, ministerial officers of justice, with all the county, corporation, and town officers, for three millions and more of people, intermixed, and having particular acquaintance with every class and circle of people, must exceed, beyond all proportion, both in number and influence, those of every description who will be employed in the administration of the federal system. Compare the members of the three great departments of the thirteen States, excluding from the judiciary department the justices of peace, with the members of the corresponding departments of the single government of the Union; compare the militia officers of three millions of people with the military and marine officers of any establishment which is within the compass of probability, or, I may add, of possibility, and in this view alone, we may pronounce the advantage of the States to be decisive. If the federal government is to have collectors of revenue, the State governments will have theirs also. And as those of the former will be principally on the seacoast, and not very numerous, whilst those of the latter will be spread over the face of the country, and will be very numerous, the advantage in this view also lies on the same side.

It is true, that the Confederacy is to possess, and may exercise, the power of collecting internal as well as external taxes throughout the States; but it is probable that this power will not be resorted to, except for supplemental purposes of revenue; that an option will then be given to the States to supply their quotas by previous collections of their own; and that the eventual collection, under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States. Indeed it is extremely probable, that in other instances, particularly in the organization of the judicial power, the officers of the States will be clothed with the correspondent authority of the Union. Should it happen, however, that separate collectors of internal revenue should be appointed under the federal government, the influence of the whole number would not bear a comparison with that of the multitude of State officers in the opposite scale. Within every district to which a federal collector would be allotted, there would not be less than thirty or forty, or even more, officers of different descriptions, and many of them persons of character and weight, whose influence would lie on the side of the State. The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected.

The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State. The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State governments will here enjoy another advantage over the federal government. The more adequate, indeed, the federal powers may be rendered to the national defense, the less frequent will be those scenes of danger which might favor their ascendancy over the governments of the particular States. If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union, than in the invigoration of its ORIGINAL POWERS. The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained. The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing Congress by the articles of Confederation. The proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them.

The change relating to taxation may be regarded as the most important; and yet the present Congress have as complete authority to REQUIRE of the States indefinite supplies of money for the common defense and general welfare, as the future Congress will have to require them of individual citizens; and the latter will be no more bound than the States themselves have been, to pay the quotas respectively taxed on them. Had the States complied punctually with the articles of Confederation, or could their compliance have been enforced by as peaceable means as may be used with success towards single persons, our past experience is very far from countenancing an opinion, that the State governments would have lost their constitutional powers, and have gradually undergone an entire consolidation. To maintain that such an event would have ensued, would be to say at once, that the existence of the State governments is incompatible with any system whatever that accomplishes the essential purposes of the Union.

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**<avalon.law.yale.edu/18th\_century/fed45.asp>**

1. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown 1960) p. 189; italics and British usage of “which” as in original. [↑](#footnote-ref-1)
2. I deploy “U. S. Federalisms” to remind readers and myself of the range of variation in schemes called federalism in the United States, let alone around the globe. Please see S. E. Finer, *The History of Government from the Earliest Times* (Oxford U. K.: Oxford University Press 1997) Volume 3 “Empires, Monarchies, and the Modern State” pp. 1501-1516; George Anderson, *Federalism: An Introduction* (Oxford U.K.: Oxford University Press 2008); David Brian Robertson, *Federalism and the Making of America* (Oxford U. K.: Routledge 2011). [↑](#footnote-ref-2)
3. Morton Grodzins, *The American System: A New View of Government in the United States* (Chicago: Rand McNally & Company, 1966) pp. 7-8. [↑](#footnote-ref-3)
4. # Lest the reader doubt that anyone takes one- or two-dimensional line-drawing at all seriously as a mode of analysis or a rhetoric of justification, may I suggest a glimpse at *Constitutional Analysis in a Nutshell* (St. Paul, MN: West Publishing Co., 1979)*?* Therein the late Jerre S. Williams, a former Judge on the 5th Circuit Court of Appeals and former professor of law at the University of Texas School of Law, on pp. 36-74 used national-state line-drawing to illustrate constitutional foundations. If that edition seems dated, try Thomas E. Baker and Jerre S. Williams, *Baker and Williams' Consti­tutional Analysis in a Nutshell* (St. Paul, MN: West Academic Publishing, 2003; 2nd edition) pp. 92-132.

   An ordinary distinction between dimensions in the study of intergovernmental relations differen­tiates “vertical federalism”—relations between the national government and state(s)—from “hori­zontal federalism”—relations between or among sovereign states. [↑](#footnote-ref-4)
5. I use “dual federalism” in this essay to mean sovereignty divided between or among a single national government and various state governments with, at an extreme, minimal interference from the national government in governments of states. Dual federalism may be a dialectical but not diametric opposite of cooperative federalism, which involves sustained, substantial cooperation between or among federal government and regional, state, or local governments. Except in some theoretical or some jural discourse, dual federalism and cooperative federalism are analytically distinct but mutually reinforcing; in practice all U. S. federalism is at least somewhat dualistic and at least somewhat cooperative. I suppose that the metaphor of the “layer cake” applies more to dual federalism and the metaphor of the “marble cake” more to cooperative federalism. Still, the more than dual federalism and cooperative federalism correspond, converge, or coincide, the less useful either metaphor likely will prove. [↑](#footnote-ref-5)
6. By bricolage I mean tactical and usually ad hoc assembly of a perspective from various readings, interpretations, semantics, characterizations, and concepts to construct logics of discovery or of justification. Although I learned much from Gerald Garvey’s *Constitutional Bricolage* (Princeton NJ: Princeton University Press 2015) and from [Claude Lévi-Strauss](http://www.amazon.com/s/ref=dp_byline_sr_book_1?ie=UTF8&field-author=Claude+L%C3%A9vi-Strauss&search-alias=books&text=Claude+L%C3%A9vi-Strauss&sort=relevancerank)’s *The Savage Mind* (Chicago IL: University of Chicago Press 1966), I do not trust my theoretic chops to bring insights therefrom to bear on this draft in a profitable manner. The source most useful to a non-theorist like me remains Benjamin R. Twiss, *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* (Princeton, NJ: Princeton University Press, 1942). [↑](#footnote-ref-6)
7. The full style of the 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.* For that reason alone I call it *Sebelius* or the Obamacare case throughout this draft.

   The gist of the decisions and opinions for the Obamacare case are summarized in Appendix One. [↑](#footnote-ref-7)
8. I selected “The Four” to wryly compare Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito to “The Four Horseman” who opposed and for a time stalled the New Deal: [Justices](http://en.wikipedia.org/wiki/Associate_Justice_of_the_Supreme_Court_of_the_United_States) [Pierce Butler](http://en.wikipedia.org/wiki/Pierce_Butler_(justice)), [James Clark McReynolds](http://en.wikipedia.org/wiki/James_Clark_McReynolds), [George Sutherland](http://en.wikipedia.org/wiki/George_Sutherland), and [Willis Van Devanter](http://en.wikipedia.org/wiki/Willis_Van_Devanter). Please see en.wikipedia.org/wiki/Four\_Horsemen\_(Supreme\_Court); last accessed 18 March 2015. The nickname plays off Justice Ginsburg’s recalling the constitutional old guard. I intend no of­fense; I am just horsing around. [↑](#footnote-ref-8)
9. I use the British spelling of “specter” to stay consistent with my allusion to the beginning of the *Communist Manifesto* later in this draft. [↑](#footnote-ref-9)
10. Scalia, Kennedy, Thomas, and Alito, slip opinion in *Sebelius*, pp. 1-4. As I do with Chief Justice Roberts’ opinion in the next section of this draft but do not do with Justice Ginsburg’s opinion, I attend most closely to The Four’s prefatory summary of their own argument to make myself less likely to over-read this or that sentence or passage from their 65-page opinion. [↑](#footnote-ref-10)
11. The first words of the slip opinion of The Four are

    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 … go beyond those powers. We conclude that they do.

    Although my purpose in this romp is not to insert myself or my views of the issues, I note a forensic flourish that seems gratuitous. Those who voted for the ACA would likely characterize the problem less that many Americans cannot afford the best health care and more that millions of Americans can­not secure any health care aside from emergency rooms and health insurance. Perhaps the opinion was written in a hurry: “beyond the reach of many Americans who cannot afford it” seems to lack the concision of a polished opinion. Thus, I admire the early, clear statement of thesis; the sloppy [I hope] or sly [I fear] understatement of the problems I find less admirable, perhaps mean.

    I do not know whether to read the assurance of The Four that Congress possesses valid authority to remedy health care problems as lawyerly arguing in the alternative or as judicious tem­porizing or as both. The Affordable Care Act is the only health care law at issue, so conceding that Congress does have the constitutional authority if Congress used it correctly is hypothetical, especially when offered after the Republicans have retaken the House of Representatives and are ritually and re­pea­ted­ly repealing Obamacare. When The Four later sketch how Congress might have funded health care constitu­tionally, they might be sincere but might as well be running a shell game. [↑](#footnote-ref-11)
12. Please permit me a perhaps noteworthy rhetorical aside: The Four in this summary opening pronounced unprecedented or barely precedented substantive issues and questions concerning which Chief Justice Roberts packed his opinion with citations and allusions to precedents. [↑](#footnote-ref-12)
13. The first question of first impression was whether failure to purchase of health insurance might be regulated under the Com­merce Clause. The Court had extended the Commerce Clause to many actions that affect commerce however indirectly but not to inaction. [↑](#footnote-ref-13)
14. The second question of first impression was whether Congress’s authority to tax and spend was so capacious as to allow Congress to threaten substantial reduction of Medicaid funds if states resisted the ACA’s enormous expansion of Medicaid. While the Court had indicated that the Spending Clause did not extend to coercing states, the Court had not yet found a congressional act coercive. [↑](#footnote-ref-14)
15. Phrasing of the two foregoing sentences yielded a “now I see it; now I don’t” paragraph. First, The Four asserted that the authority of the national government has limits af­firmed [not articulated] by [not in] the text of the Constitution, the Tenth Amendment, and many cases since. Those limits implied from structure but not quite explicit are so clear that no one could doubt that Congress can­not intrude on some individual acts and cannot impose some obligations on states. This phrasing makes a thesis that few could doubt—to wit, the extent of Congress’ law-making power is finite—murky. The phrasing of the second sentence makes matters worse. Why should the bounds of or on the Congress’ authority to regulate international and interstate com­merce empower Congress to control all private conduct or coerce states to carry out national programs? [↑](#footnote-ref-15)
16. ### This draft examines rhetoric, so I suppose I should let pass jurisprudential mysteries in the inset quotation. I should not ask why, if *Wickard versus Filburn* (1942) always been regarded as the outer limit of the Commerce Clause, The Four cited no authority who explicitly so regarded or so regards or says she or he so regards *Wickard*. Nor should I ask whether The Four decided that their stark assertion that *Wickard* was the utmost extension of the Commerce Clause to activities intrinsically intrastate might be taken for granted owing to the starkness of the assertion. Nor should I inquire why Colin Starger’s “A Visual Guide to NFIB v. Sebelius” displayed *Wickard versus Filburn* alongside *United States* *versus Darby Lumber Co.* (1941) and *Heart of Atlanta Motel, Inc. v. United States* (1964) <www.cardozolawreview.com/content/denovo/starger\_2012\_316.pdf; last accessed 17 March 2015>. Dare I ask along what dimension(s) might *Darby Lumber*, *Heart of Atlanta*, or *Katzenbach versus McClung* (1964) be adjudged “inside” or “short of” the *Wickard* pole? Restricting myself to intrastate commerce, I had better not ask why *Daniel v. Paul* 395 U.S. 298 (1969) did not constitute commerce even more intrastate than *Wickard* yet unanimously reckoned valid under the commerce power.

    ### The Four might insist that they invoked *Wickard* as an intrastate activity caught within the net of the New Deal to dramatize what a radical expansion of Congress’s power the ACA was. That would explain the wisecrack about breathing in and breathing out, I suppose. Nonetheless, The Four do collapse the Commerce Clause and adjudication of the commerce power into a single dimension.

    [↑](#footnote-ref-16)
17. I call The Four’s invocation of *Wickard* unidimensional in that Farmer Filburn’s case turned on a determination that his **intra**state wheat could be said to affect interstate commerce. I cannot imagine itslegal pertinence for *Sebelius*. I see only a rhetorical use. Unlike The Four, I admit that I could be wrong. [↑](#footnote-ref-17)
18. It is perhaps not without rhetorical implication that The Four cited two pages from *United States* v. *Butler* 297 U. S. 1 (1936) on which Mr. Justice Owen Roberts and his majority sided with Alexander Hamilton and Joseph Story against Mr. Madison’s views. The Four were thus at best selective and at worst deceptive in invoking Madison. The decision to invoke *Butler* is peculiar rhetoric in two other respects that I can summon. First, *Butler* is a last gasp of the anti-New Deal Court. Given Justice Ginsburg’s casting The Four [and Chief Justice Roberts] as regressive if not reactionary or revanch­ist, The Four were brave but perhaps stepping on their own contentions by using *Butler*. Second, the author of the *Butler* opinion, who would switch sides to uphold the New Deal, made himself in­famous or ridiculous for what he wrote two or three pages before:

    When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty -- to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.

    To be sure, The Four were at liberty to cite 1) an infamous case that 2) is seldom, to my knowledge, cited as a precedent for the reading of the Tax and Spend Clause that the Four aver, but 3) more often cited for the expansive view of the Tax and Spend Clause that The Four avoid [and the Chief Justice abhors as tantamount to National Police Power], and 4) is recalled even more often as premised on a risible claim to mechanical jurisprudence, to camouflage 5) an intra-Court logroll between its author and Chief Justice Hughes, both of whom would as part of that logroll vote to expand the Tax and Spend Clause into a General Welfare Clause that upheld New Deal legislation thereafter. The rhetorical utility of such shenanigans eludes me, however. [↑](#footnote-ref-18)
19. The Four based their opposition on structure while Chief Justice Roberts, we see below in this draft, based his argument on consent versus coercion as if U. S.-funded state-administered activities were a contract. [↑](#footnote-ref-19)
20. Please note that the inset quotation described horizontal federalism. The Four did not dissent in a completely unidimensional federalism. They got a second dimension into their opinion, however limited and late the reference. [↑](#footnote-ref-20)
21. Professors who teach constitutional law must strive, when they encounter statements such as Chief Justice Roberts’, to get out of their heads the summation of the late Senator Dale Bumpers at the trial of President Clinton:

    H.L. Mencken said one time, “When you hear somebody say, ‘This is not about money,’ it's about money.”

    (LAUGHTER)

    And when you hear somebody say, “This is not about sex,” it's about sex.

    <www.cnn.com/ALLPOLITICS/stories/1999/01/21/transcripts/bumpers.html; last accessed 17 March 2015>

    Worse, constitutional law professors must dismiss from their minds that Chief Justice John Roberts shares a surname with Associate Justice Owen Roberts whose similar denial of politicking I resurrect later in this draft. [↑](#footnote-ref-21)
22. The Chief Justice rehearsed further statements of judicial modesty. On page 2 of his slip opinion, for example, Roberts wrote “Resolv­ing this controversy requires us to examine both the limits of the Government’s power, and our own limited role in policing those boundaries.” [↑](#footnote-ref-22)
23. Justice Potter Stewart’s condemning laws against contraception as uncommonly silly in *Griswold versus Connecticut* 381 U.S. 479 (1965) springs to my mind instantly. [↑](#footnote-ref-23)
24. This overall logic constitutes what the late Stephen E. Toulmin defined as the main line of an argument in *The Uses of Argument* (Cambridge, U.K.: Cambridge University Press 1958). [↑](#footnote-ref-24)
25. I appreciate Chief Justice Roberts’ calling the government created by the second constitution “the National Government” in his third paragraph. That Chief Justice Roberts lapses into ordinary usage by the next paragraph and calls the National Government “The Federal Government” does not di­minish my enjoyment of someone’s recognizing that “the federal government” ought to include na­tional and state governments under U. S. Federalisms. [↑](#footnote-ref-25)
26. I write “listed” rather than “enumerated” to remind readers that the practice of calling powers ex­plicit in the United States Constitution “enumerated” is itself mythopoetic rather than literal. I con­cede that “enumerate” often means merely to list. Nonetheless, I agree with George Orwell that shor­ter words are usually superior to longer words and that more literal, more concrete terms are usually to be preferred to pretentious usage.See “Politics and the English Language” in *Horizon: A Review of Literature and Art* Volume 13, issue 76 (April 1946) pp. 252-265 or in *The New Republic* (June 17, 1946) pp. 872-874 and (June 24, 1946) pp. 903-904. [Orwell would prefer “list” to “enumerate” as well because “list” derives from German rather than classical Latin or Greek; I generally prefer Latin-rooted words but go along with Orwell when lawyers are misusing Latin.] To use “enumer­ated” as a lawyerly term of art is at least somewhat ritualistic, I maintain, and perhaps a step toward invoking constitutional argot. [↑](#footnote-ref-26)
27. I do not speculate why Chief Justice Roberts attributed “police power” to allusions in cases. “Our cases refer to this general power of govern­ing, possessed by the States but not by the Federal Gov­ernment, as the ‘police power.’ See, *e.g., United States* v. *Morrison*, 529 U. S. 598, 618–619 (2000).” [↑](#footnote-ref-27)
28. Although *The Federalist* # 45 will bear the construction Chief Justice Roberts gives it, # 45 supports Justice Ginsburg’s understanding of federalism as well. Please see Appendix Two. I herein make no further comment on Chief Justice Roberts’s use of the word “bureaucracy” other than to note that it is in the context of the 18th century anachronistic. [↑](#footnote-ref-28)
29. I do not pause in this romp to worry what one might take Roberts to mean by “carefully” in this passage, except to note that a detractor might interpret “carefully” to mean either “tactically” or “as narrowly and grudgingly as possible.” Even if all that Roberts meant by “carefully” was “meticu­lously,” please note, Roberts’ statement that an explicit power could be narrowed by its resemblance to national police power strikes me as extraordinarily adventuresome.

    Please note as well that Roberts may have intended “carefully” to contrast with “permissively,” a term he uses to characterize past extensions of Commerce Power by the Court. [↑](#footnote-ref-29)
30. Chief Justice Roberts should have learned the difference in standard U. S. usage between “reti­cence,” which he selected, and “reluctance,” which is what he meant. I draw attention to what was, when Roberts and I went to Catholic schools three years apart, preferred to ask whether Roberts might have been trying a bit too hard to adorn his opinion. [↑](#footnote-ref-30)
31. Article One, section eight, clause three—“To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; …”—will for the rest of this draft be called either the commerce power or the Commerce Clause. See www.archives.gov/exhibits/charters /constitution\_transcript.html; last accessed 17 March 2015. [↑](#footnote-ref-31)
32. Hereafter, I call Article One, section eight, clause one—“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; …”—either the power to tax and spend or the Tax-and-Spend Clause. See <www.archives.gov/exhibits/charters/constitution\_transcript.html; last ac­cessed 17 March 2015>. Roberts’ arguments on commerce and taxing and spending are peri­pheral to my focus in this draft. See <www.nytimes.com/2012/06/29/us/supreme-court-lets-health-law-largely-stand.html?pagewanted=all&\_r=0; last accessed 17 March 2015> for a concise summary. [↑](#footnote-ref-32)
33. I am unpersuaded by the Chief Justice’s *Marbury*-like, *Marbury*-lite defense of reaching the Com­merce Clause in deciding *Sebelius*. Compare Akram Faizer, “Chief Justice John “Marshall” Roberts--How the Chief Justice's Majority Opinion Upholding the Federal Patient Protection and Affordable Care Act of 2010 Evokes Chief Justice Marshall's Decision in Marbury v. Madison,” *University of New* *Hampshire Law Review* (April 2013) 11 U.N.H. L. Rev. 1 and Stephen M. Feldman, “Chief Justice Roberts's Marbury Moment: The Affordable Care Act Case,” *Wyoming Law Review* 13 Wyo. L. Rev. 335. I nonetheless do not weigh in on the necessity or gratuitousness of reaching the commerce-power issue. For my purposes in this romp, it little matters why Chief Justice Roberts ordered his opinion as he did. Rather, I am interested in what Roberts’ rhetoric reveals about his understanding of federalism. “JUSTICE GINSBURG questions the necessity of rejecting the Government’s commerce power argument, given that §5000A can be upheld under the taxing power. *Post,* at 37. But the statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a com­mand if the Constitution allowed it. It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question. And it is only because we have a duty to construe a stat­ute to save it, if fairly possible, that §5000A can be inter­preted as a tax. Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction.” [↑](#footnote-ref-33)
34. I adapt my phrasing of constitutional evils for each justice from Justice Ginsburg’s mocking “the broccoli horrible” on p. 29 of her slip opinion. Appendix One describes the “broccoli argument” favored by Chief Justice Roberts, The Four, and challengers of the Obamacare law. [↑](#footnote-ref-34)
35. Whether Roberts invokes national police power gratuitously in this case to set up “the Police Power Horrible” for use in future cases I cannot know. [↑](#footnote-ref-35)
36. Please see p. 47 of the Chief Justice’s slip opinion. *Bond versus United States* may be found at www.supremecourt.gov/opinions/10pdf/09-1227.pdf. Justice Kennedy there quoted his own opinion in *Alden v. Maine* 527 U. S. 706 (1999) at p. 758. [↑](#footnote-ref-36)
37. Roberts’ slip opinion, pp. 57-58. [↑](#footnote-ref-37)
38. Chief Justice Roberts’ claim that Congress could not regulate indirectly by undue financial influ­ence under the Spending Clause what it could not regulate directly seems to me the better ra­tionali­zation for his considering and rejecting Congress’s authority under the Commerce Clause. My un­derstanding of constitutional law is that under the Commerce Clause Congress would have au­thority to work its will on states. By denying Congress authority to regulate individuals’ decisions to go without health insurance—a decision often as financially coercive as the granting or withholding of funds to states, I admit—Roberts deprived Congress of its plenary authority to regulate interstate commerce in health insurance. Thrown back on its authority under the Tax and Spend Clause, the national government lacked plenary authority to compel states to do the national government’s bid­ding. Or so it seems to me. I think it seemed this way to the Chief Justice as well on page 48 of his slip opinion: “… when the State has no choice, the Federal Government can achieve its objectives with­out accountability, just as in *New York* and *Printz*. Indeed, this danger is heightened when Con­gress acts under the Spending Clause, because Congress can use that power to implement federal policy it could not impose directly under its enumerated powers.” This, I think, effectively explains to Justice Ginsburg why the Chief Justice might defensibly dismiss the Commerce Clause as author­ity for the individual mandate in favor of the more limited authority under the Spending Clause. [↑](#footnote-ref-38)
39. Would it be too sly to observe that Chief Justice Roberts consistently describes what state legisla­tors and bureaucrats do as “administration” or “administrative” control but what national imple­menters and administrators do as “bureaucratic” command from some faraway “bureaucracy?” I guess it would. I shall not do so, therefore. [↑](#footnote-ref-39)
40. Even my focus on U. S. Federalisms has not distracted me, of course, from Roberts’ joining The Four in circumscribing the Commerce Clause. [↑](#footnote-ref-40)
41. Justice Ginsburg does not bother with Justice Thomas’ even more retrogressive two-pager. [↑](#footnote-ref-41)
42. Lest readers conclude I take liberties with Justice Ginsburg’s language, I reproduce it below from page 2 of her slip opinion:

    Beyond question, Congress could have adopted a similar scheme for health care. Congress chose, instead, to preserve a central role for private insurers and state governments. According to The Chief Justice, the Commerce Clause does not permit that preservation. This rigid reading of the Clause makes scant sense and is stunningly retrogressive.

    Ginsburg passes by the opinion of The Four and the two-page opinion offered by Jus­tice Thomas, but I guess she would find those opinions even more retrogressive than the Chief Justice’s opinion of the Court. [In the passage inset immediately above, I altered the case of “The Chief Justice.”] [↑](#footnote-ref-42)
43. Justice Ginsburg also directs her opinion at Chief Justice Roberts and usually “refutes” The Four only by citing post-1937 precedents. [↑](#footnote-ref-43)
44. I adapt a capitalization in Ginsburg’s slip opinion. [↑](#footnote-ref-44)
45. Twiss, *Lawyers and the Constitution* featured Ch. XI, “The Twilight Zone of Dual Federalism.” [↑](#footnote-ref-45)
46. For this draft I pass by a rhetorical note that I may pursue in a future effort: Justice Ginsburg im­plicitly answers the structural argument of The Four by emphasizing how markets or other socio-economic settings, contexts, or structures constrain sovereign states and free “domiciliaries” even when she does not, as on page 37 of her slip opinion, do so explicitly. I could pack this claim into “The Twilight Zone of Dual Federalism” but should ground the claim further before adding to a draft that already overmatches me. [↑](#footnote-ref-46)
47. Aside from in this note, I do not digress to whether, like laissez faire courts, the Roberts Court regards corporations as persons. Granting that some have read this into *Citizens United versus the Federal Election Commission* 558 U.S. 310 (2010), I note the association then stick with federalism. [↑](#footnote-ref-47)
48. Indeed, Ginsburg riposted that a study that challengers had cited found that the majority of states would spend modestly more to obtain national matching payments from the national govern­ment and would reduce costs of uncompensated care states bore absent reform of health care and insur­ance. Far from some unfunded mandate [Roberts] or national crushing of states’ sov­ereignties [Roberts on Medicaid and The Four overall], Ginsburg claimed, ACA benefited states, individuals, and intergovernmental cooperation. [↑](#footnote-ref-48)
49. Ginsburg may have gone too far, of course, in arguing that Medicaid was a gift (p. 45 of the slip opinion). She knew that, however much it helped her argument to say Medicaid grants are generous and flexible, to The Four at least and perhaps to Chief Justice Roberts the ACA’s Medicaid gift seemed a Pandora’s jar. [↑](#footnote-ref-49)
50. I embellish slightly the throwback jurisprudence to which Justice Ginsburg alludes by incorpora­ting perspectives in Twiss, *Lawyers and the Constitution*; Thurman W. Arnold, *The* *Symbols of Government* (New Haven CN: Yale University Press 1935); and Thurman W. Arnold, *The Folklore of Capitalism* (New Brunswick NJ: Transaction Publishers 2009). [↑](#footnote-ref-50)
51. Theodore J. Lowi, “Bend Sinister: How the Constitution Saved the Republic and Lost Itself,” *PS: Political Science and Politics* Vol. 42, No. 1 (Jan., 2009), pp. 3-9. [↑](#footnote-ref-51)
52. Some originalists long for the Roberts Court to revive the Privileges or Immunities Clause. See <www.ij.org/restoring-the-privileges-or-immunities-clause-may-have-to-wait-for-another-day-2; last accessed 21 March 2015>. [↑](#footnote-ref-52)
53. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown 1960) p. 189; italics and British usage of “which” as in original. [↑](#footnote-ref-53)