

Zetetic Logic in Obamacare Opinions

NFIB versus Sebelius (2012)

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Abstract

This note explores the contribution that zetetic reasoning, Professor Ilmar Tammelo's formulation of logic that results in conclusions not foreclosed by premises rather than conclusions entailed by premises, might make as an analytic tool and as an attitude for reading, analyzing, and teaching appellate opinions. I focus on Chief Justice John Roberts' argument in *NFIB v Sebelius* (2012) that the "Obamacare" individual mandate could not be squared with the authority of Congress under the Commerce Clause. I show that Chief Justice Roberts exploited zetetic reasoning more than Justices Scalia, Kennedy, Thomas, and Alito, whose opinion reached the same holding, and far more than Justice Thomas's separate opinion. From this review of selected passages of the "Obamacare" opinions I conclude that scholars and students alike should adopt zetetic sensibilities to enhance their understanding of judicial reasoning and rhetoric. I even venture that the polity would benefit if more students and scholars were willing to "fisk" opinions, perhaps in the manner in which I do throughout the note.

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Recanting an Old Whine

In this note I use a dated conception to illuminate the classic observation that common law jurists refashion precedents to suit results that they would justify. The dated conception is zetetic reasoning, Professor Ilmar Tammelo's formulation of logic that results in conclusions not foreclosed by premises rather than conclusions entailed by premises. I contend that, both as an analytic tool and as an attitude, attention to zetetic reasoning would enhance research and teaching.

I rehearse Tammelo's formulation of zetetic reasoning, then apply that formulation to arguments in *NFIB v Sebelius* (2012) regarding the consistency of the mandate in "Obamacare" with the Commerce Clause. In the main I show how Chief Justice Roberts' argument about the mandate's exceeding the reach of the Commerce Clause exploits zetetic reasoning far more than argument of Justices Scalia, Kennedy, Thomas, and Alito [hereinafter, "the TASK Four"²] that reaches the same claim. I then briefly note that Associate Justice Thomas's two-page separate opinion lays bare some of the chicanery involved in the Commerce Clause warnings of the Chief Justice and the TASK Four, thus revealing just how "informal" zetetic reasoning sometimes will be. My point in reviewing these parts of the vast output in *NFIB v Sebelius* is **not** that justices justified their holdings in a manner other than deductive, apodictic, formally valid reasoning. Rather, I contend that α) we all know just how inductive, informal, and uncertain appellate reasoning in the United States and especially at the Supreme Court of the United States can be, yet we instruct students by means of briefs, horn-books, and other aids to study that impose relatively formal structures on decidedly informal reasoning; β) vagaries and varieties of jural reasoning magnify the permissiveness of zetetic reasoning both absolutely and relative to syllogistic reasoning; γ) Chief Justice Roberts in particular offered readers a delightful performance of zetetic arts; and, therefore, δ) understanding zetetic reasoning in practice enhances scholarly analysis and improves students' attitudes toward judicial opinions.³

Because I recommend at note's end that students and professors "fisk" appellate court opinions to take advantage of electronic media to demystify constitutional politics and unmask judicial discretion, I practice throughout the note what I shall preach at its end. I fisk the discussion of the mandate and the Commerce Clause in Chief Justice Roberts's opinion. More, I fisk the Chief Justice in a frisky manner. I intend due respect but contend that most commentators regard judicial rhetoric with too much respect of the wrong sort. When we critique appellate opinions by suiting them to prescriptions seldom if ever realized and make it seem as if deep jurisprudential ratiocinations were or are the fulcrum of appellate decision-making, we assist the Bench and Bar in hiding from the citizenry the discretion that adjudicators possess. Judicial rhetors suit their opinions to be relayed via soporifics that deaden sensibilities and thereby insulate appellate personnel from protests. When, by contrast, we appreciate the creativity and casuistry⁴ of appellate justifications and delight in the brilliant buncombe with which judges and justices bamboozle naïfs, we enliven our analyses and awaken the citizenry. The latter is the spirit in which I construct this note.

² Chronological order of appointment to the Supreme Court would dictate Scalia, Kennedy, Thomas, and Alito. I go with "TASK" as a more memorable acronym for an opinion that is reported to be the creation of all four. "The TASK Four" plays on "task force," a drollery that amuses me.

³ I concede that many readers will find my attitude insufficiently respectful. Such readers nonetheless might want to teach their students how to detect zetetic reasoning decorously.

⁴ In using "casuistry" I mean to be wry but not sly. I use the term in this note for reasoning that is too deceitful and too subtle to be specious.

Readers, therefore, must judge the potential of greater attention to zetetic reasoning or rhetoric, the advisability and practicality of fisking justices, and the civility of my tone to determine whether I am singing an old plaint in a new manner or merely recanting old wine.

One Gist of Tammelo's Zetetic Reasoning = Grist for My Mill in This Paper

Logician Ilmar Tammelo contrasted deductive logic with a residual category of techniques that issue possible or permissible conclusions that do not contradict any established premises.⁵ Deductive logic was, Tammelo presumed, familiar [especially to readers of a book entitled *Modern Logic in Service of Law* and especially to Continental devotees of formal-logical legal rationality]. In deduction formally valid syllogisms yielded logically incontestable conclusions that followed via strict inference from established premises. Such formal deductions belied or masked judicial discretion. Tammelo contrasted such deductive logic to zetetic reasoning, techniques that issued possible or permissible conclusions that must not contradict any established premises. Such zetetic reasoning involved at least two double negatives—not totally implausible conclusions that did not contradict premises sufficed—in contrast to the positive, almost unqualified force of deduction, in which premises absolutely or nearly absolutely entailed conclusions. Tammelo explicitly considered analogic reasoning and value judgments as zetetic reasoning that led to verisimilar [in the case of analogies] or plausible [for value judgments] conclusions, so reasoning in the non-deductive range reached conclusions less certain than reasoning in the deductive range [using Tammelo's categories to define a line]. Other habits of judicial justification in the United States would range across zetetic reasoning as Tammelo defined it.⁶

From Tammelo's sketch of zetetic reasoning⁷ I derive three defining features. First, zetetic conclusions are possible, permissible, and perhaps plausible but never certain, indisputable, or apodictic. Second, zetetic techniques succeed if the possible, permissible, plausible claims contradict no premises recognized to be authoritative and applicable. Third, the range of zetetic techniques equips jurists to deal with a central reality of appellate adjudication, especially in the United States: "... *rules of law, alone, do not, because they cannot, decide any appealed case which has been worth both an appeal*

⁵ Ilmar Tammelo, *Modern Logic in Service of Law* (New York: Springer-Verlag 1978) pp. 3-4, reproduced in Appendix A.

⁶ Please see such classic treatments as Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press 1925); Edward H. Levi, *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press 1948); Karl N. Llewellyn, *The Common Law Tradition – Deciding Appeals* (Boston: Little, Brown 1960); and Martin Shapiro, "Toward a Theory of Stare Decisis," *The Journal of Legal Studies* Volume 1, Number 1 (January 1972) pp. 125-134 to test my claim. More modern authorities seem to me zetetic as well. Please see for instance Lief H. Carter and Thomas F. Burke, *Reason in Law* (New York: Pearson/Longman 2009) (8th edition). Tammelo's fellow logician [and epistemologist] Stephen Toulmin provides "The Layout of Arguments" in Chapter III of *The Uses of Argument* (Cambridge, U.K.: Cambridge University Press 1958) and more generally in Stephen Toulmin, Richard Rieke, and Allan Janik, *An Introduction to Reasoning* (New York: Macmillan 1984) (2nd edition).

⁷ I contrast zetetic **reasoning** to deductive **logic** to follow Tammelo's usage. Juristic deployment of zetetic arts would seem to me to fit under reasoning, understanding, rhetoric, logic, techniques, and other terms. Tammelo's zetetic range accommodates various arts. I mean neither to privilege nor to demean use of zetetic arts by assigning some uses "reasoning" and others "rhetoric."

and a response.”⁸ Each of those three defining features contrasts with the certainty and cogency that formal inference would impart if deduction suited appellate adjudication, especially in the United States. Taken together, however, those three defining features generate plausible deniability of judges’ individual caprice and appeals courts’ institutional politicking.

If I am correct [and we certainly have little precedent for that] those three features of zetetic techniques promise to enhance analysis by improving analysts’ attitude toward appellate opinions, especially opinions from justices of the United States Supreme Court and other jurists who enjoy many options. That appellate holdings are far from deductive, indisputable inferences from acknowledged, uncontested rules and precedents has long been evident, but hornbooks, student-briefs, or other aids or summaries often neglect the beauty of that obvious truth. Appeals courts satisfice more often than they demonstrate. If jurists reach holdings via arguments that are not utterly implausible, a presumption of good faith will see the jurists through.⁹ Hence, the first feature of zetetic rhetoric: claims that are not utterly implausible will insulate jurists and, more important, their institutions from attacks.¹⁰ The second feature of zetetic rhetoric reinforces the first. Not utterly implausible holdings are justified if they can be argued not to violate any authoritative dictates of “the law” [including in the Obamacare case the Supreme Law of the Land]. Appellate opinions sometimes simply follow pre-existing rules, but appellate arguments are often about dodging pre-existing rules, as any survey of advocates’ briefs and oral arguments makes plain. The third defining characteristic of zetetic reasoning incorporates the first two. The more momentous the litigation and the more contentious the issues [inherent or ginned up] the greater the degree to which appellate judges are [re]making rules and precedents as they go along. Appellate institutions covet the cover story that they are only abiding by pre-existing jural directives. These three features of a zetetic “model,” taken together, dictate that adequate appellate performance demands non-contradiction so that attentive audiences will not be able to demonstrate negation of a well-established precedent or premise. The performance of zetetic reasoning may consist merely in non-contradiction, so that any conclusions that are not foreclosed will suffice. That in turn means that appellate judges’ claims may be less plausible than alternatives so long as the claims are not doomed by well-established precedents that the appellate judges are not prepared to overturn. In short, appellate judges’ discretion and bluff will prevail if the three zetetic criteria I have highlighted are met.

I contend that students and other analysts should be reminded that appellate justifications make [up] the law as they go along. The zetetic understanding is one means of reminding students and analysts of what they already should know.

⁸ Llewellyn, *The Common Law Tradition*, p. 189; italics and British usage of “which” in original.

⁹ Indeed, even utterly implausible justifications will suffice on occasion. Remember *Bush versus Gore* (2000)?

¹⁰ I consider the institutional more important than the individual because so few judges have been removed from appeals courts—none from the U. S. Supreme Court. In contrast, threats and moves against institutions have been far more frequent and, in the case of FDR’s court-packing plan, ominous. On the part that institutional defense may have played in Chief Justice Roberts’ machinations, please see Jeffrey Toobin, *The Oath: The Obama White House and the Supreme Court* (New York: Doubleday 2012).

Rendering the Obamacare Case

Study aids and legal instruction do not automatically remind students and analysts that appellate holdings are far from logically entailed inferences, that appellate opinions are as much about burnishing and banishing precedents and rules as about following pre-existing imperatives, and that the prevailing majority on an appeals court will often find it difficult enough to invent quasi-syllogisms that draw the assent of sufficient judges to pass for authoritative. Indeed, student-briefs and other synopses of cases often render jurists' reasoning with more emphasis on formality and deduction and entailment than the opinion being rendered can or should resemble. I do not contend that every synopsis of every Obamacare¹¹ opinion is chockablock with such shifting of zetetic reasoning toward more deductive reasoning. Rather in this section I aim to illustrate how various styles of summarizing or distilling appellate opinions will tend to underemphasize zetetic elements.

Consider first a public summary of *NFIB versus Sebelius* (2012). The syllabus provided by the Court [reproduced in its entirety in Appendix B] mutes the zetetic features and even more formal deductive logic in favor of a scorecard and synopsis of reasoning, as one should expect. The scorecard itself is a hodgepodge from which little deductive logic or zetetic reasoning could be derived:

Roberts, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–C, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined; an opinion with respect to Part IV, in which Breyer and Kagan, JJ., joined; and an opinion with respect to Parts III–A, III–B, and III–D. Ginsburg, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which Sotomayor, J., joined, and in which Breyer and Kagan, JJ., joined as to Parts I, II, III, and IV. Scalia, Kennedy, Thomas, and Alito, JJ., filed a dissenting opinion. Thomas, J., filed a dissenting opinion.

Translation: Chief Justice Roberts wrote an opinion that serves as the opinion of a majority of the justices [Ginsburg, Breyer, Sotomayor, and Kagan joined Roberts] with regard to a statement of the background and posture of the cases [Part I of the Roberts opinion], the inapplicability of the Anti-Injunction Act [Part II], and the authority of Congress to mandate insurance under Congress's power to tax and spend [Part III-C]. Roberts' opinion as to why the mandate exceeded Congress's commerce power [Part III-A], implied powers [Part III-B], and the necessity of discussing the Commerce Clause when the Tax and Spend Clause saves the mandate was the Chief Justice's alone. Justices Breyer and Kagan agreed with the Chief Justice that threatening states' Medicare funds went too far. Otherwise, however, Breyer and Kagan agreed with Ginsburg and Sotomayor in an opinion that upheld Obamacare both on the Tax and Spend Clause and on the Commerce Clause. The TASK Four agreed on a separate opinion [although they agreed that Obamacare went far beyond the authority of the Commerce Clause, the scorecard in the Court's syllabus does not say so]. Justice Thomas issued a separate opinion on his own.

¹¹ I intend no pejorative connotations in calling the Patient Protection and Affordable Care Act of 2010 "Obamacare" throughout this paper.

The syllabus's synopsis of the reasoning of some justices in some opinions illuminates matters further¹² but does not much illuminate the zetetics of Chief Justice Roberts' opinion on the mandate versus the Commerce Clause.

2. Chief Justice Roberts concluded in Part III–A that the individual mandate is not a valid exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause. Pp. 16–30.

(a) The Constitution grants Congress the power to “regulate Commerce.” Art. I, §8, cl. 3 (emphasis added). The power to regulate commerce presupposes the existence of commercial activity to be regulated. This Court's precedent reflects this understanding: As expansive as this Court's cases construing the scope of the commerce power have been, they uniformly describe the power as reaching “activity.” E.g., *United States v. Lopez*, 514 U. S. 549. The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce.

Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority. Congress already possesses expansive power to regulate what people do. Upholding the Affordable Care Act under the Commerce Clause would give Congress the same license to regulate what people do not do. The Framers knew the difference between doing something and doing nothing. They gave Congress the power to regulate commerce, not to compel it. Ignoring that distinction would undermine the principle that the Federal Government is a government of limited and enumerated powers. The individual mandate thus cannot be sustained under Congress's power to “regulate Commerce.” Pp. 16–27.

Of course the Court's syllabus emphasizes the reasoning of the Court and scants or ignores other reasoning. How do summaries by lawyers for the continuing legal education of the Bar and the edification of citizens do? A peek at Appendix C suggests that Professor David Schultz created a brief that formulated questions or issues and provided the majority's answers and dollops of Chief Justice Roberts' reasoning.¹³

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 versus*

¹² Given the imbroglia inset above, wouldn't any synopsis improve on the scorecard?

¹³ I thank Professor Schultz for making his brief available via the “Law and Courts Listserv.” I reproduce that brief to illustrate what competent briefs do.

What briefs set out to do is barely and seldom to cover styles of reasoning. See John Delaney, *Learning Legal Reasoning: Briefing, Analysis and Theory* (Catskill NY: John Delaney Publications 2011).

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.

Schultz appended a “coda” on what has become known as the broccoli argument:

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.” ... 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.”

Because this note concerns almost exclusively Chief Justice Roberts' zetetic reasoning on the mandate and the Commerce Clause, I do not herein elaborate on various opinions and asides of the justices. If that vexes the reader, I apologize but suggest the reader see that vexation as a symptom of a condition that I emphasize in this paper: Inattention to the actual styles and patterns of reasoning of judges and justices grants judges and justices leeways in which to reach conclusions that is far from certain or cogent [zetetic feature #1]; amid which to flourish precedents, rules, and other alleged authority that is far from binding or even extant before the holding and opinion [zetetic feature #2]; and behind which to hide jural caprice and politicking [zetetic feature #3].

I now turn to Chief Justice Roberts' Commerce Clause argument to show how zetetic awareness and attitude might reveal [and revel in] the Chief Justice's zetetic reasoning as to why Congress erred in presuming that the Commerce Clause authorized Congress to pass Obamacare. I contend that a zetetic “stance” enables analysts—undergraduates, graduates, and their professors—to appreciate the Chief Justice's artistry. Hence, I take in this note no position on what judges or justices ought to have done with or about Obamacare.¹⁴ My sole interest is in reviewing and re-viewing a part of Chief Justice Roberts' opinion that, technically, Roberts transformed into personal obiter dicta.¹⁵

¹⁴ I grant readers some skepticism about my attitudes regarding the case, so let me disclose here that, if some lunatic appointed me to a U. S. court and the Senate consented, I should never have reached the issues about which I write in this paper. I hold that either The Tax Anti-Injunction Act of 1867 or an outworn concern for judicial self-restraint or—too much for which to hope—both should have precluded decisions on the merits in a national court. That is, I am so attuned to the U. S. Supreme Court that nine out of nine justices disagreed with me!

¹⁵ Of course, beyond that legal technicality Roberts' opinion amounts to a *Carolene*-like admonition that the Roberts Court will be much more vigilant about Congress's (ab)use of the commerce power.

Man Date with John Roberts

Chief Justice John Roberts' zetetic reasoning regarding the mandate and the Commerce Clause cleared away premises that would contradict his holding the mandate to be beyond the effects to which the Commerce Clause has been extended. This clearing away is diminished or lost if we apply common-law cookie-cutters. It took full-fledged zetetic chicanery to render longstanding conceptions of Congress's commerce power beside the point so that the Chief Justice might expound regarding "new conceptions of federal power." To highlight that zetetic reasoning I now "fisk" Chief Justice Roberts' section on the Obamacare mandate paragraph by paragraph. John Roberts combined Solomonic dicta with zetetic derring-do to clear away Commerce Clause precedents that would obstruct his holding the mandate to be beyond the effects to which the Commerce Clause has been extended. This clearing away through forensic flourishes may easily be lost on scholars and students when common-law molds are applied.

After declarations of reticence and of permissive attitudes toward Congress,¹⁶ the Chief Justice acknowledged that the brief for the United States claims that the Commerce Clause authorized the individual mandate and that multiple Commerce Clause precedents support that authority.¹⁷ The Government¹⁸ contended that the individual mandate is within Congress's power because the failure to purchase insurance "has a substantial and deleterious effect on interstate commerce" by creating the cost-shifting problem.¹⁹ Well might Roberts acknowledge those precedents, for any reference work likely would note that *United States versus Darby Lumber* (1941) and *Wickard versus Filburn* (1942) greatly expanded the scope of the commerce power and extended congressional authority to direct and even indirect effects of intrastate business. Roberts began his efforts to evade this "Effects Doctrine"²⁰ by defining the mandate issue very specifically: "But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product."²¹ Thus did Roberts pivot from precedents that, in the separate opinion of Justice Ginsburg, support Congress's confidence in its authority under the Commerce Clause to pass even Obamacare. This beginning is standard appellate prose and not particularly zetetic even though Roberts was

¹⁶ When a young man tells a throng how much of a ladies' man he is, members of the throng know that, if he were what he claims to be, there would be no need for him to proclaim such. In the same manner, when a justice of the U. S. Supreme Court gushes about respect for Congress and for judicial self-restraint, the reader is entitled to expect activism.

¹⁷ Opinion of Chief Justice Roberts at <http://www.law.cornell.edu/supremecourt/text/11-393>; last accessed 20 March 2013. Hereinafter, I refer to this .pdf file as Roberts Slip Opinion and document citations to section [III], sub-section [A], sub-sub-section number, and paragraph in that .pdf file.

¹⁸ To refer to defenders of Obamacare as "the Government" is not unusual. I do not know how such usage affects students reading the opinion. Does it summon a mental image of some monolithic entity?

¹⁹ RSO IIIA1¶1.

²⁰ This "Effects Doctrine" is apparent in Justice Thomas's separate opinion, which I reproduce verbatim *infra*.

²¹ RSO IIIA1¶2. Please note the Chief Justice's sly use of "unwanted product." Health insurance is a service that almost every sane American wants. Many cannot afford it. Consumers may not want the service at prices they cannot pay, but calling the service "unwanted" injects, deliberately or inadvertently, ideological or political rhetoric at an early part of section IIIA of the opinion. This labeling has no significance for zetetic reasoning that I can see, but it does point out that Mr. Roberts is given to clever phrasing.

beginning to diminish the chance that precedents that supported the Congress, the Government, and the four justices who averred that the Commerce Clause authorized the individual mandate would contradict his opinion.

Roberts immediately followed his evasion of the Effects Doctrine with a dualism: “Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes ‘the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent’ for Congress’s action. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U. S. ____, ____ (2010) (slip op., at 25) (internal quotation marks omitted).”²² Roberts’ circumspection and signaling of caution, craft, and fairness may seem standard juristic fare. It was. Roberts was narrowing or distinguishing precedent.²³ I do not hold that to be the brilliance of Chief Justice Roberts’s zetetic reasoning. Had Roberts at this point in his opinion surveyed all of the precedents on which Congress and the Government might rely, he would have been compelled to concede that “the Effects Doctrine” was multi-dimensional.²⁴ Instead, Roberts at this point in his opinion narrowed the issue by means of wordplay, a very zetetic move as well as a forensic flourish.²⁵

What was the wordplay? By reframing the Obamacare and the Government’s defense thereof as an assertion that Congress might under the Commerce Clause **compel** purchases of **unwanted products**, Roberts at once shrank and magnified the Government’s and the Congress’s claims. The Chief Justice telescoped the many dimensions of commerce to which the Congress’s plenary power might apply into a narrow issue unprecedented even as he extended the uses to which Congress might put such a power into a parade of socialistic horrors.²⁶ No mere distinguishing away of precedents piled on the Government’s and Congress’s side for decades, this passage was full-fledged zetetic chicanery to render longstanding conceptions of Congress’s commerce power beside the point so that the Chief Justice might propound regarding “new conceptions of federal power” that the Chief Justice [and the TASK Four] had conjured in oral arguments over, among other issues, Congress’s mandating the purchase of broccoli [wanted or unwanted].

²² *Ibid.* Please notice that Chief Justice Roberts thereby took advantage of a trope or commonplace that he himself inserted into a prior opinion for a 5-4 decision. In that instance the five justices who would deny Congress the power to mandate health insurance composed the majority, and three justices who would grant Congress the power were in the minority. [Justice Stevens, also in the minority in *Free Enterprise Fund*, was replaced by Justice Kagan.] This rhetorical commonplace or *τοπος* [rhetorical convention] strikes me as far more zetetic than deductive or formal. But I digress.

²³ This feature of common law reasoning would nonetheless be zetetic under Tammelo’s definition, but I am interested in a different zetetic subterfuge.

²⁴ We shall soon see that Chief Justice Roberts reintroduced the general issue—geographic and directness/indirectness scope of the landmarks and black-letter constitutional law—later in his opinion when it was perhaps safer to do so.

²⁵ The reader may note that I strive to acknowledge forensic moves in my review of the Chief Justice’s opinion regarding the individual mandate and the commerce power. I do so for two reasons. First, the accumulation of sly or sophomoric rhetorical devices in Roberts’ justification decreases the likelihood that any device is inadvertent. As “slips” proliferate, they cease to be excusable as slips. Second, the rhetorical devices remind readers and me that much more is going on in the Chief Justice’s opinion than zetetic reasoning alone.

²⁶ Justice Ginsburg scored the opinions of the Chief Justice and the TASK Four for parading improbable horrors.

Chief Justice Roberts's cunning wordplay continued with a discourse on the denotations of "to regulate Commerce."²⁷ If the verb "to regulate" could only apply to commerce already undertaken, then Roberts might blunt or ignore *Gibbons versus Ogden* (1824) and its succeeding precedents. If "compelling" participation in markets for "unwanted" health insurance exceeded denotations of "to regulate" as rendered by Chief Justice Roberts, then that pesky "plenary power" about which Chief Justice Marshall had expounded in *Gibbons* would not thwart Chief Justice Roberts's two-step.

"If the power to 'regulate' something included the power to create it, many of the provisions in the Constitution would be superfluous."²⁸ Chief Justice Roberts here used a trope to exclude one meaning of "to regulate." That trope must be largely if not entirely inconsequential if readers acknowledge shifts in the commerce powers amid the Industrial Revolution in the 19th century and nationalization of commerce in the 20th century, but invocation of a canon against redundancy or superfluity probably distracted readers from such historical issues. Most readers may not realize that many if not most extensions of denotations or connotations of constitutional language decades or centuries after its ratification would likewise render words and phrases in the Constitution superfluous or redundant.²⁹ I am certain that most readers will not reflect that at least some framers had learned

²⁷ RSO IIIA1¶3.

²⁸ *Ibid.*

²⁹ Chief Justice Roberts's bandying of 18th century dictionaries itself is sly. Many if not most of the founders were schooled in Latin and likely would have known that "to regulate" evolved from the Latin "regere" [to rule], which itself incorporated the Latin "rex" [king]. Attention to this denotation or connotation that the founders might have attributed to "regulate" would advantage Ginsburg more than Roberts, so his turn to hurling dictionaries about was, deliberately or inadvertently, advantageous among those unschooled in Latin [99% of his reading audience? > 99%?].

Roberts' gambit becomes even less plausible, of course, if a reader recalls competing denotations or supposes that connotations of "to regulate" in 18th century American English might extend beyond Roberts' rendering. Roberts drops a footnote to fend off Justice Ginsburg's renderings of "to regulate" that would likewise meet the "not implausible" threshold for zetetic reasoning: "JUSTICE GINSBURG suggests that 'at the time the Constitution was framed, to 'regulate' meant, among other things, to require action.' *Post*, at 23 (citing *Seven-Sky v. Holder*, 661 F. 3d 1, 16 (CADC 2011); brackets and some internal quotation marks omitted). But to reach this conclusion, the case cited by JUSTICE GINSBURG relied on a dictionary in which '[t]o order; to command' was the fifth-alternative definition of 'to direct,' which was itself the second-alternative definition of 'to regulate.' See *Seven-Sky*, *supra*, at 16 (citing S. Johnson, *Dictionary of the English Language* (4th ed. 1773) (reprinted 1978)). It is unlikely that the Framers had such an obscure meaning in mind when they used the word 'regulate.' Far more commonly, '[t]o regulate' meant '[t]o adjust by rule or method,' which presupposes something to adjust. 2 Johnson, *supra*, at 1619; see also *Gibbons*, 9 Wheat., at 196 (defining the commerce power as the power 'to prescribe the rule by which commerce is to be governed')."

Roberts' lexical one-upmanship parodies originalism. Roberts admits in his opinion that the constitutional convention devoted little time to debating the commerce power—"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." Quoted *supra*—which makes purporting to guess at denotations, connotations, and circumscriptions in the Commerce Clause risible casuistry. Please recall footnote four *supra* regarding my usage of casuistry.

Moreover, I do not know whether the Chief Justice and his clerks scrutinized their parenthesized definition of the commerce power according to Chief Justice Marshall in *Gibbons versus Ogden* (1824). I should guess not, for that definition—"... commerce power ... [is] the power 'to prescribe the rule by which commerce is to be governed'—does not exclude the health care mandate or any inactivity. Maybe Roberts and his clerks relied on narrowing commerce to preclude commercial choices not to purchase services. Commerce succeeds to consumer choice and is not part of it?

Of course, all of the above observations matter little when all that Roberts need attain is plausibility.

about pleonasm [use of more words than strictly necessary to achieve some rhetorical effect] and might have deployed it. Other readers might recall from the Chief Justice's own opinion that the commerce clause was discussed neither at length nor in depth at the Constitutional Convention. Please recall, however, that zetetic logic does not demand that Roberts' narrowing of "to regulate" to a denotation³⁰ of his own choosing be convincing. Zetetic logic requires one to attain only plausibility or possibility. Roberts' trope and the denotation he singled out are not utterly implausible.

Beyond playing on a denotation of "to regulate," Chief Justice Roberts reintroduced precedents, including some he himself had largely sidestepped, to show that the Court had routinely applied the Commerce Clause to activities that predated the regulation. This, like the trope already discussed, is wordplay—but dazzling wordplay. Chief Justice Roberts relied on the routine use of "activities" as a defining characteristic of precedents.³¹

Indeed, Chief Justice Roberts was so deft and nimble that he could admit that he had sidestepped the gravamen of the many Commerce Clause precedents: "As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching 'activity.'" ³² That is, precedents mostly concerned the scope of congressional commerce power across dimensions of effects. These precedents concerned activities rather than non-activities because cases raised activities.³³ Those precedents have much to say that might contradict Chief Justice Roberts' claim about the Commerce Clause, and they have by his own admission nothing to say about the mandate once Chief Justice Roberts has sharply circumscribed the immediate issue. Chief Justice Roberts's sheer brilliance is on display in his opinion, yet summaries do not note that brilliance and instead force his brilliance into a common-law mold.

Next Chief Justice Roberts posited that the individual mandate did not regulate existing activity but compelled individuals to become active in the market for health insurance.³⁴ The average reader may not note that the Obamacare does not "compel" anyone to do anything. It alters individuals' incentives. Chief Justice Roberts not only inserted compulsion where, by his own earlier account, no compulsion existed but also played on "compulsion" or "coercion" later in the Medicaid part of his opinion. It may seem ironic that, having given "regulate" so Talmudic a reading, Chief

³⁰ Chief Justice Roberts here once again over-specified. Roberts seems to me adept at generalizing or specifying authority to suit his purposes. That may be standard judicial rhetoric and not particularly zetetic.

³¹ RSO IIIA1¶4. The reader sensitive to zetetic reasoning should neither over-read nor under-read Chief Justice Roberts: "Our precedent also reflects this understanding." Such "reflection" need not be in the eye of the beholder alone but is far from an apodictic or rigorous derivation from precedent. Indeed, mere reflection of precedent is so relaxed an invocation of *stare decisis* [to stand by issues that courts have authoritatively resolved] that it would seem in and of itself to exemplify the low standard of not contradicting [zetetic feature #2?].

³² *Ibid.*

³³ I pause to note another gem in Chief Justice Roberts's opinion: "It is nearly impossible to avoid the word when quoting them." *Ibid.* Roberts is safe in this bit of hyperbole because what jurist is going to deploy his or her clerks to find alternatives or synonyms that might undermine Roberts' claim here?

³⁴ RSO IIIA1¶5.

Justice Roberts would play so fast and loose with “compel,” but that’s part of zetetic reasoning as well as of cunning forensics.³⁵

But Chief Justice Roberts was just getting started: now he introduced a parade of horrors Congress might someday inflict if the mandate were upheld under the Commerce Clause.³⁶ Chief Justice Roberts then applied the hyper-extended logic that he himself created but had since attributed to the government’s lawyers retrospectively to *Wickard versus Filburn* (1942) to show how much more capacious *Wickard* might have been if the Court would have endorsed the Government’s 21st century argument in 1942.³⁷ The sheer jural brio of this gambit amazes and amuses me. In the first place, such a ruling by the Roosevelt Court would have been *dicta ultra obiter*.³⁸ Second, Roberts in this passage belatedly acknowledged that *Wickard* sank a boundary-post for the extent to which Congress might regulate **intrastate** commerce under the Commerce Clause. Since the Chief Justice had admitted that medical insurance and the health system were national markets, commerce within a state—Farmer Filburn’s wheat waving in his field,³⁹ for example—was not at issue.⁴⁰

Were a reader to dwell on how inapposite *Wickard versus Filburn* (1942) would be for *NFIB versus Sebelius* (2012), of course, the reader might ask why Chief Justice Roberts and the TASK Four

³⁵ Although I do not think the following matters much for zetetic reasoning, my purpose in this note, I want to call attention [in a footnote?] to one more feature of Roberts’ expression. Stating that Congress compelled anyone to do anything **might** betray a marked market sensibility. For all of Roberts’ dismissal of economists’ ways of seeing later in his opinion, Roberts seems to regard penalties or taxes as compulsions. Who but an economist [or a Tea Party demagogue] regards altering the calculus to be compelling? Moreover, what Roberts has called an “unwanted product” turns out to be a wanted service if Congress alters the pricing? Altered pricing compels? In sum, Roberts authored an implicit if peculiar criticism of markets if he believed that reshaping incentives amounted to compulsion. I do not know if that was how the framers saw matters. Unlike the Chief Justice, I do not pretend to know. Nor do I know why it should matter how founders in 18th century America viewed markets in health insurance.

³⁶ RSO IIIA1¶¶6-9. If Chief Justice Roberts’s extrapolations were not so improbable it might be sensible to ask him which of the dastardly depredations on individuals and states we might anticipate under Congress’s power to tax and spend. Roberts – spoiler alert! – validates the Obamacare under Taxing and Spending. Armed with this validation and fortified by whatever the Necessary and Proper Clause might add to that first clause of Article I, Section 8, a rampaging Congress might have authority to perpetrate each of the outrages summoned by the Chief Justice of the United States. Congress barely passed Obamacare and cannot seem to do much these days, so I forgive any reader for being unable to foresee how the roid-raging, wide-ranging Congress about which Roberts wrote would act on the basis on which Roberts [and Ginsburg, Breyer, Sotomayor, and Kagan] upheld Obamacare’s mandate.

³⁷ RSO IIIA1¶¶6-7.

³⁸ My own schoolboy Latin for “beyond beside the point.” *Obiter dicta* is legal Latin for verbiage beside the point(s) most crucial to the holding. A precedent may be narrowed or broadened depending on what one includes in the *ratio decidendi* [the interpretation of authority most directly linked to justification of the holding] and what one discards as mere words to the side [*obiter dicta*].

³⁹ Please see <http://www.thefilburnfoundation.com/filburnsfarm.html>; last accessed 25 February 2013.

⁴⁰ Please consult Steven L. Emanuel, *Emanuel Law Outlines—Constitutional Law* (New York: Wolters Kluwer 2012) (30th edition) pp. C9-C10, 44-51, 53-54, which notes *NFIB versus Sebelius* as an exception to the “substantially affecting” rule.

raised *Wickard* at all.⁴¹ My answer is that the Chief Justice and the TASK Four knew or should have known that zetetic reasoning need only rely on arguable premises and not implausible conclusions.

Roberts' vision of *Wickard* on performance-enhancing drugs pushed by government lawyers partakes more of "The Twilight Zone" than of common law. Such is the beauty and advantage of zetetic logic. In a perverse manner Roberts heeds the guidance of Sherlock Holmes in "The Sign of the Four" (1890): "How often have I said to you that when you have eliminated the impossible, whatever remains, *however improbable*, must be the truth?"⁴²

In asserting that the Aggregative Principle in *Wickard*, a boundary of the scope of congressional authority to regulate commerce within Ohio, at least concerned Farmer Filburn's activities, Chief Justice Roberts demonstrated his mastery of zetetic artistry even if he slightly misused language. Sometimes Chief Justice Roberts chose "decisions" instead of "activities," imperiling his zetetic weaving because young people's decisions not to get insurance might bring them under the Commerce Clause. The Commerce Clause applies to decisions and especially individuals' decisions that affect interstate commerce. If decisions not to acquire insurance are decisions instead of inactions, then Roberts' use of decisions made a little too obvious how much his rickety reasoning relied on "activities" rather than synonyms or rough synonyms. Still, we must imagine that, having established his political talking point and zetetic turning point by means of "activities" versus "inactivities," Chief Justice Roberts was largely free to intersperse "decisions" or other synonyms.⁴³

Roberts then inflated his construction of the Government's logic. Congress could regulate anything! "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."⁴⁴ Advocates for Obamacare and the Obama Administration might rejoin that the Chief Justice's interpretation of Congress's authority to Tax and Spend would enable Congress to "compel" citizens to act as "the Government" would have them act, so Chief Justice Roberts' point is academic—hypothetical, theoretical, or fanciful—in at least a second degree.⁴⁵

⁴¹ My answer would implicate the politico-legal blogosphere, in which *Wickard* serves as potent shibboleth. See, among other sites or pages, http://www.conservapedia.com/Wickard_v._Filburn; last accessed 25 February 2013; <http://www.forbes.com/sites/danielfisher/2011/09/14/obamacares-fate-rests-with-poor-farmer-filburn/>; last accessed 25 February 2013; and <http://www.heritage.org/initiatives/rule-of-law/judicial-activism/cases/wickard-v-filburn>; last accessed 25 February 2013.

⁴² http://en.wikiquote.org/wiki/Sherlock_Holmes; last accessed 25 February 2013.

⁴³ Indeed, the difference that "decisions" or "choices" or alternatives might make in and to Chief Justice Roberts's zetetic logic might have been lost both on Roberts and on his clerks in proofreading.

⁴⁴ RSO IIIA1¶9. I have already noted the Chief Justice's penchant for sneaking pejorative characterizations into his prose, so I do not want to spend too much time chortling at Congress's using "... its commerce power to compel citizens to act as the Government would have them act." *Ibid.* As this note shows, I enjoy overkill, so I can scarcely fault the Chief Justice for treating provision of health care as if it were merely a matter of an omnipotent nanny state enforcing orthopraxy on citizen-thralls.

⁴⁵ The Chief Justice's discussion of the mandate and the Commerce Clause was academic in the first degree once the Chief Justice saved Obamacare by means of Congress's authority to Tax and Spend, for then his discussion of limits of

Having invoked a slippery slope,⁴⁶ the Chief Justice appended sheer badinage: “That is not the country the Framers of our Constitution envisioned.”⁴⁷ To quarrel with the Chief Justice over which features of present-day United States the Framers would have envisioned in the 18th century or would recognize in the 21st century is beside my point in this note. My concern is that students and analysts recognize and appreciate the zetetic vaudeville.

Next Chief Justice Roberts joined the TASK Four in articulating anathema: tyrannical Congress’s overruling individual choices in instance after instance because the Commerce Clause confers a boundless authority that the Supreme Court is powerless to arrest after Obamacare is upheld. This Tea Party dystopia recurs toward the end of the Chief Justice’s discussion of the mandate as unauthorized extension of powers over interstate commerce and throughout the opinion of the TASK Four. That alarm—risible amid the polarized paralysis that has afflicted Congress since Obamacare barely passed—reveals the mindset that Chief Justice Roberts and the TASK Four brought to Obamacare. Much as it has to do with politics, symbolics, and dramatics, it is not zetetic reasoning as I recognize it, so I pass it by.⁴⁸

Chief Justice Roberts then ventured a concession disastrous in formal legal argumentation but unthreatening by zetetic standards. “To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers, who were

the regulation of interstate commerce was an admonition that five justices are prepared to circumscribe expansive readings of Article I, section 8, clause 3. When the Chief Justice imagined slippery slopes down which the Congress might careen if the Congress’s interpretation of the Commerce Clause were accepted by a majority of the Supreme Court, his dire imaginings become academic in the second degree unless one bounds Congress’s power to “compel” purchases of broccoli or other unwanted products [memoirs of members of Congress?] under Article I, section 8, clause 1.

⁴⁶ The Slippery Slope is a fallacy even under the “leeways” of zetetic reasoning. However, when Roberts and the TASK Four invoke slippery slopes and dystopias to which the instant arguments of the Government might lead, they have forsaken even informal logic for fallacious forensics, so I view “the broccoli argument” and other extensions of a principle for which, to my knowledge, no defender of Obamacare actually argued as quite apart from zetetic reasoning.

I cannot refrain, however, from noting an irony in the opinions of the TASK Four and the Chief Justice. Two opinions presume that, because the Government did not or could not volunteer stopping points to fend off Congress’s prescribing broccoli for all Americans, the Government has articulated no barriers in principle to the tyranny imagined by five justices. However, the five justices in two opinions presume what their own opinions demonstrate did not happen with regard to the mandate! If upholding Obamacare would create a principle that would inescapably foreclose future courts from sidetracking a runaway Congress from losing dietary or other ukases on the nation, then why didn’t multiple precedents on the plenary nature of the commerce power inescapably bind the five in the Obamacare cases?

⁴⁷ RSO IIIA1¶10. After one chuckles at Roberts’s being “Shocked! Shocked!” that 20th century regulation of commerce and welfare state since the New Deal and Great Society would seem otherworldly to the Framers, one should reflect that this may be the single juncture of the Chief Justice’s opinion to which Associate Justice Thomas’s separate opinion [inset *infra*] is most apposite. I do not dawdle with Roberts’ invoking the visions of the forefathers but eagerly anticipate an originalism premised on what this or that founder might have foreseen.

⁴⁸ However, Justice Antonin Scalia’s disdain for Congress has become even more apparent since *Sebelius*. Please see <http://www.economist.com/blogs/democracyinamerica/2013/02/voting-rights-act> [last accessed 20 March 2013] for an account of Scalia’s unwillingness to trust Congress to resist such “racial entitlements” as the Voting Rights Act. That the justice would substitute the Court’s judgment on such matters for Congress’s judgment is a novel version of judicial self-restraint.

‘practical statesmen,’ not metaphysical philosophers.”⁴⁹ Roberts’s admission would be logically disastrous if readers noted what Roberts later in his opinion quoted from *Hooper versus California* (1895): “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” Economics would seem to provide a reasonable construction of the mandate as prescription of a rule by which health-care commerce was to be ordered. Maybe the Chief Justice could dismiss such metaphysical philosophers as, say, law professors or political scientists who intoned that canons of judicial self-restraint and ordinary scrutiny bound the justices to defer to Congress if Congress relied on economics to argue that consumers’ decisions not to purchase health insurance were choices or decisions or activities in the marketplace. One of the most practical arts or sciences of modern statecraft or policymaking supports the view of the lawmaking majority, but Roberts contradicted economics by conjuring the views of “practical statesmen” still emerging from mercantilism? That is truly a neat trick.

But that neat trick takes advantage of reasoning zetetically. Many academics, especially those still uneasy with expansions of congressional authority since 1937, will cruise right over any problems of judicial self-restraint or deference to Congress under relaxed scrutiny and perhaps not even notice them. Roberts’ transmogrification of economic analysis into woolly-headed metaphysics and his channeling the views of long-dead statespersons regarding modern markets of exchange is, it seems to me, zetetic genius [albeit sheer nonsense]. Pity the jurist who tries via formal reasoning to deduce what even one framer would have made of the position of the Obama administration.

Then Chief Justice Roberts dismissed the Government’s wordplay: “The Government ... argues that because sickness and injury are unpredictable but unavoidable, ‘the uninsured as a class are active in the market for health care, which they regularly seek and obtain.’ The individual mandate ‘merely regulates how individuals finance and pay for that active participation—requiring that they do so through insurance, rather than through attempted self-insurance with the back-stop of shifting costs to others.’”⁵⁰ Again one might be tempted to say that economists or other realistic observers of modern economic and social realities—along with pesky metaphysicians and academics—have the stronger argument. That substantive claim, however, overlooks advantages of zetetic reasoning, especially at the national Court of last resort,⁵¹ that I have stressed. Chief Justice Roberts need only craft an argument that is not implausible. His intermediate, instrumental premise is that, however true of markets in health insurance the arguments of Congress, “the Government,” four Supreme Court justices, and others may be, such arguments may be twisted into absurdities. From this premise the Chief Justice concludes [but does not, because no one could, logically infer] that those arguments must be unsound. Roberts’ conclusion is at least plausible [zetetic feature #1], his premises not only do not contradict his conclusion but were fashioned to lead up to that conclusion [zetetic feature #2], and, it weakly follows, that the Chief Justice’s arguments on the immediate point do not with any degree of certainty point to bad faith [zetetic feature #3].

⁴⁹ RSO IIIA1¶11. This political scientist finds amusing Chief Justice Roberts’s apparent labeling of economists as metaphysical philosophers. Robert L. Heilbroner called economic theorists “worldly philosophers” for good reasons. Is economics the only metaphysical pursuit in which a Nobel Prize is available, or would literature count?

⁵⁰ RSO IIIA1¶12.

⁵¹ “We are not final because we are infallible, but we are infallible only because we are final.” Associate Justice Robert Jackson concurring in *Brown versus Allen* 344 U.S. 443 at 537.

Chief Justice Roberts returned, then, to a resounding affirmation of his distinction between Congress's regulating activity and Congress's regulating inactivity. His earlier invocation insisted:⁵²

The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and—under the Government's theory—empower Congress to make those decisions for him.

Roberts had espied a spectre that might someday haunt America—the spectre of congressional socialism.⁵³ Toward the end of his opinion on the mandate and the Commerce Clause he rehearsed the ways in which the mandate might be defended only by treating non-participation as behavior on the verge of participation, thereby entitling Congress to regulate all individuals all the time.⁵⁴

Chief Justice Roberts then rebutted the Government's claim the individual mandate regulated the uninsured as a class by asserting that the uninsured are “particularly divorced from any link to existing commercial activity.”⁵⁵ Again students, lawyers, and we political scientists must stand in awe of rhetoric at once bracing, brazen, breezy, and blowsy. I find Roberts' ploy bracing in that Roberts asserted that “in fact” the uninsured are unconnected to any activity in the market for health care in an opinion in which he had already recounted why majorities in Congress had found direct links. I find Roberts' ploy brazen in that neither the Chief Justice nor any of his readers sincerely

⁵² RSO IIIA1¶5 [italics in original].

⁵³ I intentionally misspell “specter” to allude to the opening line of *The Manifesto of the Communist Party*: “A spectre is haunting Europe — the spectre of communism” <<http://www.marxists.org/archive/marx/works/1848/communist-manifesto/ch01.htm>; last accessed 25 February 2013>.

Gratuitous as it should be to note the hyperbole in Chief Justice Roberts' runaway precedent—an unstoppable principle that Justices Scalia, Kennedy, Thomas, and Alito muster in their separate opinion as well—I pause to note that α) the constitutional system of the United States affords individuals tied to the tracks of the locomotive that the Chief Justice and the Associate Justice envision electoral means by which to sidetrack a Congress hell-bent on force-feeding broccoli to Americans; and β) the Congress able to impose its all-consuming will on individuals is at best occasional.

⁵⁴ RSO IIIA1¶¶13-15.

⁵⁵ RSO IIIA1¶14. I scant the Chief Justice's wordplay in RSO IIIA1¶13 [emphasis added]: “The Government repeats the phrase ‘active in the market for health care’ throughout its brief, see *id.*, at 7, 18, 34, 50, but **that concept has no constitutional significance**. An individual who bought a car two years ago and may buy another in the future is not ‘active in the car market’ in any pertinent sense. The phrase ‘active in the market’ cannot obscure the fact that most of those regulated by the individual mandate are not currently engaged in any commercial activity involving health care, and that fact is fatal to the Government's effort to ‘regulate the uninsured as a class.’ *Id.*, at 42. Our precedents recognize Congress's power to regulate ‘class[es] of activities,’ *Gonzales v. Raich*, 545 U. S. 1, 17 (2005) (emphasis added), not classes of *individuals*, apart from any activity in which they are engaged, see, *e.g.*, *Perez*, 402 U. S., at 153 (‘Petitioner is clearly a member of the class which engages in ‘extortionate credit transactions’ . . .’ (emphasis deleted)).”

believes that the uninsured are “divorced” from “any link” to existing health care. I find Roberts’ ploy breezy in that he asserts that the Government’s [and Justice Ginsburg’s] assertion of a link “particularly” lacking. I find Roberts’ ploy blowsy in that Chief Justice Roberts does not begin to respond to Justice Ginsburg’s recitation of long-precedented links.

How can Chief Justice Roberts hope to get away with such cheeky, cheesy argumentation? Holding Roberts to the standards of informal reasoning will not validate his folderol. Informal reasoning would demand that Roberts reach the most probable or most persuasive conclusions of which his premises would admit. Roberts does not meet that demand. He does meet the laxer demands that I have identified with zetetic reasoning. His intermediate, instrumental claim is plausible [not the most plausible, but not utterly implausible—zetetic feature #1]; the premises he adduces to justify that intermediate, instrumental claim do not contradict that claim [zetetic feature #2]; and, “therefore,” his argumentation need not evince bad faith [zetetic feature #3].⁵⁶

The Chief Justice then compounded his bracing, brazen, breezy, and blowsy bombast with a pronouncement not utterly implausible: “If the individual mandate is targeted at a class, it is a class whose commercial inactivity rather than activity is its defining feature.” Justice Ginsburg detailed other defining features, such as the existing propensity of the uninsured to burden the insured and the health care system. However, that need not task Chief Justice Roberts, for he has the authority to declare a distinction to be **the** defining characteristic. Inactivity thereby becomes the defining characteristic of the uninsured because Chief Justice Roberts so asserted. Much as social scientists deride tautology, we must admit that tautologies are true. They are true by definition. Master zetectician John Roberts “discovers” the defining characteristic of the uninsured by declaring that characteristic to define the class. Q. E. D.—sorta.⁵⁷ If inactivity defines the uninsured, Chief Justice Roberts reasons, then the effects on commerce that Congress may regulate do not extend to effects that the choices of the uninsured work. “The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent.”⁵⁸ Behold again and anew the sweeping away of precedent so that contradiction is impossible.⁵⁹

⁵⁶ Moreover, we must keep in mind the tactical situation that the Chief Justice set up. His discussion of the Commerce Clause became gratuitous once Roberts provided the fifth vote for Obamacare. Like Chief Justice Marshall in *Marbury versus Madison* (1803), Chief Justice Roberts in *NFIB versus Sebelius* (2012) may thunder all he wants in a section that he about to render irrelevant as anything more than a warning that there are five votes to restrain Congress’s authority under the Commerce Clause.

⁵⁷ Pedants, please sheath your red pens in your pocket protectors. *Random House Webster’s Unabridged Dictionary on CD-ROM* permits “sorta” without even a hint of censure. I must accept the unwelcome with the welcome, however. The same dictionary demands the periods in the acronym for *quod erat demonstrandum*.

⁵⁸ RSO IIIA1¶16. Justice Ginsburg is far more persuasive, if not convincing, in showing the multitude of precedents that Chief Justice Roberts and the TASK Four want to ignore or wish away and that Justice Thomas wants to overrule.

⁵⁹ Of course, neither the Congress nor the Government nor Justice Ginsburg “prophesied” anything, but that forensic flourish is not part of Roberts’ zetetic reasoning. It is ironic that Chief Justice Roberts scores others for prophesying when he and the TASK Four soothsaid future congresses marauding the polity to compel individuals to buy unwanted products and services—especially broccoli!—while Justice Ginsburg restricts her opinion to actuarial information. Such forensic ironies burlesque “juridical logic.”

I am disinclined to ascribe Roberts's next flourish to any formal logic or informal reasoning. Rather, the Chief Justice resorted to grandiloquence: "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."⁶⁰ I should wager that the Democrats, the Government, and Justices Ginsburg, Breyer, Sotomayor, and Kagan were glad that no one had argued what Chief Justice Roberts refuted.

If we put aside the rhetoric and bloviation, we may spot some underlying zetetic reasoning. The Chief Justice reasons his way to a conclusion that is not impossible or implausible. He gets there by means of reconstitution [pun intended] of longstanding precedents and doctrines so that his conclusion cannot contradict precedent. The upshot of his effort is that the Chief Justice fended off at least some attributions of bad faith if not of sophistry.

In sum, Chief Justice Roberts' opinion displayed frequent deployment of arguments nearer zetetic reasoning than deductive logic or any other formal or informal styles or modes. Roberts' conclusions were at best plausible or possible. Those conclusions need not strike many or most readers as superior to alternative conclusions, and they most certainly should not have. Rather the shaky but not completely implausible conclusions [zetetic feature #1] likely generated in the few who read the Chief Justice's opinion [or excerpts] an impression that the Chief Justice might have argued in acceptably good faith [zetetic feature #3]. I believe that I have shown above that the Chief Justice met the very low standards of zetetic characteristics one and three.

As for zetetic standard two—noncontradiction of authoritative premises—I believe that I have shown above that the Chief Justice finessed the passel of precedents that stood in his way and that informed Congress, the Government, and Justices Ginsburg, Breyer, Sotomayor, and Kagan. I am bolstered in my belief by the contribution of Colin P. Starger [Please see Appendix D].⁶¹

Between Deductive Logic and Zetetic Reasoning

Along a continuum⁶² from deductive logic to zetetic reasoning that I have imagined *supra*, the opinion of the TASK Four would probably lie in the zetetic range but between the opinion of Chief Justice Roberts and a more formal exercise. The TASK Four opinion strikes me as much more direct and much less artful than the Chief Justice's on that ground. I concede that reasonable students and scholars might find the TASK Four opinion far from deductive. Indeed, I think it fair to say that the TASK Four rely on many of the same rhetorical ploys that Chief Justice Roberts exploited, especially the parade of horrors to which acceptance of the mandate under the commerce power would subject the polity. My purpose in this section is **not** to establish which

⁶⁰ RSO IIIA1¶17.

⁶¹ Please see <http://solum.typepad.com/legaltheory/2012/07/starger-on-nlr-b-v-sebelius.html>; last accessed 16 March 2013.

⁶² Please recall that Professor Tammelo articulated contrasting categories. I have treated those categories as segments along one dimension. This spectrum, then, is my invention, not Tammelo's.

opinion is more zetetic or more deductive. Both are far more zetetic than deductive. Rather I intend as above to show advantages of a zetetic sensibility in approaching judicial opinions.

The TASK Four began their opinion in what might be regarded as an almost deductive manner.⁶³ [I here quote only the prefatory language bearing on the individual mandate.]

This case is in one respect difficult: it presents two questions of first impression. The first of those is whether failure to engage in economic activity (the purchase of health insurance) is subject to regulation under the Commerce Clause. Failure to act does result in an effect on commerce, and hence might be said to come under this Court's "affecting commerce" criterion of Commerce Clause jurisprudence. But in none of its decisions has this Court extended the Clause that far. ... Those questions are difficult.

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

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

The TASK Four identified a structural principle of which the individual mandate must run afoul. I admit that this might be deemed a zetetic gambit because the four's conclusions could never contradict precedents if the four posit that no apposite precedents. I persist in labeling this approach deductive relative to the Chief Justice's reasoning because the opinion formulated a large-scale, overarching principle of the Constitution and the constitutional polity, then showed that the individual mandate must violate that general constitutional precept. Chief Justice Roberts tried to reinterpret various precedents to "find" implicit in those precedents a restriction of the Commerce Clause to activities. He then "found" that Congress [and by implication advocates for Obamacare

⁶³ I quote from the second, third, and fourth paragraphs of the opinion that Justices Scalia, Kennedy, Thomas, and Alito authored. I used the .pdf file from <http://www.law.cornell.edu/supremecourt/text/11-393>; accessed 15 March 2013.

and Justices Ginsburg, Breyer, Sotomayor, and Kagan] had overlooked the limits embedded in precedents. Although I grant that differences between the two opinions are not great, I “find” the Chief Justice’s opinion much more zetetic and the TASK Four’s opinion somewhat less zetetic.

In the context of this note, however, judgments about the relative use of zetetic reasoning matter less than the focus on differences in argumentation. My claim in this note is that attention to zetetic reasoning has great potential for making scholars and students more mindful of what jurists are habitually arguing and how they are arguing it. Declaring precedents unavailable and structural principles at hand the TASK Four, like the Chief Justice, anticipated a dystopia of Congress’ meddling in every aspect of individuals’ lives. Chief Justice Roberts conjured the same socialistic squalor after he had far more artfully argued the unconstitutionality of the mandate under the Commerce Clause. Roberts revealed far more of the potential of zetetics in a sophisticated manner, while the TASK Four were blunt and perhaps dogmatic [and probably angry that the Chief Justice had abandoned their side].⁶⁴

The structural argument of the TASK Four seems to me far less specious and slippery than the Chief Justice’s semantic shenanigans, although the TASK Four indulged in many of the ersatz originalist exercises in which the Chief Justice frolicked. That underscores an important feature of the zetetic model as I have defined it in this note. Roberts’ machinations regarding the mandate create an opinion far less credible than that of the TASK Four, but that barely matters for many summaries to which we might send our students. Roberts needed conclusions not entirely implausible. He reached some. His argument was far less logical than that of the TASK Four, but because Roberts fended off flat contradiction he achieved credibility enough to propound what student briefs and jurat aids take for a deductive or informally logical argument. This, I am arguing in this note, fosters mystification and misunderstanding.

Clarence Thomas’s Less Zetetic Dissent Might Foster Future Deductivist Rhetoric

The separate opinion of Associate Justice Thomas may lie at greater remove from the Chief Justice’s opinion than the opinion of the TASK Four lies and so may place Roberts’ zetetic gambits in even sharper relief. If so, that favors my thesis in this note. Roberts deftly and The TASK Four brusquely defined away Supreme Court precedents that justified the Congress’s authority under the Commerce Clause to pass the Obamacare mandate. Thomas recommended the Court overrule New Deal and Great Society precedents. Justice Thomas was not content to reconstitute precedent as the Chief Justice was nor even to state that there was no controlling precedent for the instant issue [although Thomas joined the opinion of the TASK Four to that effect]. Rather, Thomas would prefer that the Court acknowledge that since at least 1937 and perhaps since 1824 the Supreme Court had imagined the authority of Congress to regulate commerce to be far more plenary than some framer might have thought.

I dissent for the reasons stated in our joint opinion, but I write separately to say a word about the Commerce Clause. The joint dissent and THE CHIEF JUSTICE correctly apply our precedents to conclude that the Individual Mandate is beyond the power granted to Congress under the Commerce Clause and the Necessary and

⁶⁴ See Toobin, *The Oath*, PART FIVE for a pithy description of the maneuvering on the Court in this landmark.

Proper Clause. Under those precedents, Congress may regulate “economic activity [that] substantially affects interstate commerce.” *United States v. Lopez*, 514 U. S. 549, 560 (1995). I adhere to my view that “the very notion of a ‘substantial effects’ test under the Commerce Clause is inconsistent with the original understanding of Congress’ powers and with this Court’s early Commerce Clause cases.” *United States v. Morrison*, 529 U. S. 598, 627 (2000) (THOMAS, J., concurring); see also *Lopez*, *supra*, at 584–602 (THOMAS, J., concurring); *Gonzales v. Raich*, 545 U. S. 1, 67–69 (2005) (THOMAS, J., dissenting). As I have explained, the Court’s continued use of that test “has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits.” *Morrison*, *supra*, at 627. The Government’s unprecedented claim in this suit that it may regulate not only economic activity but also *inactivity* that substantially affects interstate commerce is a case in point.⁶⁵

Justice Thomas’s originalist blade cuts in multiple directions. It reinforces the determination of five justices that the Commerce Clause does not extend to inactivity. That might augur other circumscriptions of the authority of Congress. However, it notes as well that longstanding precedents have guided counsel to presume that Congress’s power over commerce is as plenary as Chief Justice Marshall stated in 1824 and the New Deal Court said from 1937 on. If the commerce power is plenary and if Congress’s authority extends to whatever affects interstate commerce, the Chief Justice’s “finessing” of effects contradicts what most students of constitutional law would have regarded as settled law. Chief Justice Roberts left the Effects Doctrine as it was and argued that inactivity was no part of regulation. Justice Thomas noted that, to the extent that Roberts was sounding an alarm, he was stopping short of the systemic alarm that Thomas thought needful. Moreover, Justice Thomas’s dissent seems more sincere than the Chief Justice’s opinion and so exposes Roberts’ legal legerdemain as cunning.

Justice Thomas’s lone dissent reaches the barely plausible and thoroughly questionable conclusion that courts, judges, and justices have been in error for 75 or more years. To that degree, Thomas may be called somewhat zetetic [feature #1]. Thomas’s revolutionary, systemic conclusions, however, would not only clash with dozens of premises and precedents [contrary to zetetic feature #2] but also serve an originalist reading too erratic, too ideological, and too devious to provide the Court or agreeing justices much political cover. Those conclusions would, however, supply “covering law” for future jurists, who could deduce from those conclusions novel bounds on the authority of Congress.

Hence, my limited contention with respect to Thomas’s separate opinion is that it advocates the Court do candidly and boldly what the Chief Justice made his Court do disingenuously and cunningly. If I am correct in that contention, alerting scholars and students to zetetic reasoning might contextualize critically the opinion most likely to dominate synopses and other study aids.

⁶⁵ I secured a .pdf of Justice Thomas’s separate opinion from <http://www.law.cornell.edu/supremecourt/text/11-393>; last accessed 19 March 2013 as I had for Chief Justice Roberts’s and the TASK Four’s opinions.

Go Fisking

If I have shown already that attention to zetetic reasoning would profit scholars and teachers, readers might ask Lenin's question "What is to be done?" I recommend that scholars, students, journalists, and especially those who labor in the blogosphere go fisking. Fisking is a 21st century term for piece-by-piece argument with documents.⁶⁶ Fisking often has been ferocious. I think my fisking above has been frisky and frolicsome but not fierce. Whatever the tone or style of fisking, the gist of the technique is to alert those who attend to judicial opinions to the devices, tropes, and other informal logic or reasoning at work or at play in judicial justifications. Throughout this paper I have highlighted conclusions that are barely plausible and thoroughly questionable [zetetic feature #1], that are positioned after premises so crafted that conclusions do not clash with the premises [zetetic feature #2], and opinions that combine premises and conclusions to fend off charges that appellate judges have been capricious, political, or misleading.

I issue in this note no call for fisking that is formalistic or legalistic. Piecemeal attention to abstruse subtleties or jural argot would clutter cyberspace with barratry and thereby shield judges even more from critical scrutiny. Line by line, paragraph by paragraph, or argument by argument, jurisprudential disputation or logic-parsing will add more glaze to more eyes. Let's leave that to law reviews.

Instead, I look for cyber-critics to treat judicial opinions as performances that may be more or less esthetic, more or less respectful of interests, institutions, and individuals, and more or less credible and edifying. I intended my waggery *supra* to show the potential of critiques of informal, far-from-deductive reasoning. I fervently hope for lively criticism and debunking from those who know more than I do [a surmountable standard, what?] and who see through ingenuity and disingenuity better than I do.

Conclusion

I have argued above that application of Tammelo's conception of zetetic reasoning would enhance research and teaching of constitutional reasoning by directing attention to how jurists and advocates avoid contradictions more than achieve cogency or reach demonstrable conclusions. I am not committed to the proposition that adoption or development of a zetetic understanding is the only means by which to improve research or teaching. Indeed, as always, I hope that other teachers and scholars have ideas better than mine. It follows that I am not and could not be adamant that mastering zetetics—even if I knew what that entailed, which I do not—is necessary or sufficient to inducing colleagues and charges to read more critically.

The claim about which I am adamant is that scholars and teachers should stop doing jurists' mystification for them. Whatever the reasons for teaching law students to create student briefs that shift zetetic reasoning toward more deductive logic, I know of no good reasons for teaching undergraduates to do so.

⁶⁶ Please see definitions at en.wikipedia.org/wiki/Fisking and andrewsullivan.thedailybeast.com/2012/12/the-neoconsrally-against-hagel.html; each last accessed 21 March 2013.

Appendix A

Ilmar Tammelo

Modern Logic in Service of Law pp. 3-4

Logical reasoning is deductive in the sense that the application of appropriate principles of inference leads to conclusions that necessarily follow from the given premises. This reasoning does not itself guarantee the material soundness of the claimed conclusions, but it contributes to the achievement of it. In a logically valid inference, the conclusion must be also materially sound if its premisses are free from contradictions and materially sound. From the formal point of view, which is relevant to logic, the results of logical reasoning can be regarded as completely certain. This means that the principles and methods of logic applied in formal reasoning are “fixed” for the purposes of this reasoning and can therefore be resorted to without questioning in the course of execution of logical procedures. Nevertheless, on the level of the foundations of logic some of its ideas may be called into question. Challenges to the existing systems of logic are not excluded and may be successful, which may lead to improvements or refinements of ideas or techniques of logic. Where in the course of application of logic results are obtained which [*sic*] appear unsound, the source of unsoundness can lie in a faulty application of the formal instruments employed, or in an improper choice of the premises used, or in the defects in the material on which this reasoning operates in the given instances. Only the first source is a direct concern of logicians.

In contrast to logical reasoning, zetetic reasoning is non-deductive. It never leads to formally necessary conclusions. Formally, the conclusions here are only possible, [*sic*] that is, without following from their premises, they do not contradict them. Thus, for the generalizations achieved by inductive methods only a degree of probability can be claimed. In reasoning by analogy, in which conclusions drawn are based on the similarity of relevant factors, only verisimilitude can be claimed for the conclusions. For the conclusions that are reached by those methods by which value judgments are justified, merely plausibility can be claimed. From the formal point of view, the conclusions reached by zetetic reasoning are not cogent, unless a general principle is superadded to instances of such reasoning – one capable of converting them into instances of deductive reasoning.

Appendix B

SUPREME COURT OF THE UNITED STATES

Syllabus

NATIONAL FEDERATION OF INDEPENDENT BUSINESS et al. v. SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES, et al.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 11–393. Argued March 26, 27, 28, 2012—Decided June 28, 2012 1

In 2010, Congress enacted the Patient Protection and Affordable Care Act in order to increase the number of Americans covered by health insurance and decrease the cost of health care. One key provision is the individual mandate, which requires most Americans to maintain “minimum essential” health insurance coverage. [26 U. S. C. §5000A](#). For individuals who are not exempt, and who do not receive health insurance through an employer or government program, the means of satisfying the requirement is to purchase insurance from a private company. Beginning in 2014, those who do not comply with the mandate must make a “[s]hared responsibility payment” to the Federal Government. §5000A(b)(1). The Act provides that this “penalty” will be paid to the Internal Revenue Service with an individual’s taxes, and “shall be assessed and collected in the same manner” as tax penalties. §§5000A(c), (g)(1).

Another key provision of the Act is the Medicaid expansion. The current Medicaid program offers federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care. [42 U. S. C. §1396d\(a\)](#). The Affordable Care Act expands the scope of the Medicaid program and increases the number of individuals the States must cover. For example, the Act requires state programs to provide Medicaid coverage by 2014 to adults with incomes up to 133 percent of the federal poverty level, whereas many States now cover adults with children only if their income is considerably lower, and do not cover childless adults at all. §1396a(a)(10)(A)(i)(VIII). The Act increases federal funding to cover the States’ costs in expanding Medicaid coverage. §1396d(y)(1). But if a State does not comply with the Act’s new coverage requirements, it may lose not only the federal funding for those requirements, but all of its federal Medicaid funds. §1396c.

Twenty-six States, several individuals, and the National Federation of Independent Business brought suit in Federal District Court, challenging the constitutionality of the individual mandate and the Medicaid expansion. The Court of Appeals for the Eleventh Circuit upheld the Medicaid expansion as a valid exercise of Congress’s spending power, but concluded that Congress lacked authority to

enact the individual mandate. Finding the mandate severable from the Act's other provisions, the Eleventh Circuit left the rest of the Act intact.

Held: The judgment is affirmed in part and reversed in part.

648 F. 3d 1235, affirmed in part and reversed in part.

1. Chief Justice Roberts delivered the opinion of the Court with respect to Part II, concluding that the Anti-Injunction Act does not bar this suit.

The Anti-Injunction Act provides that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person,” [26 U. S. C. §7421\(a\)](#), so that those subject to a tax must first pay it and then sue for a refund. The present challenge seeks to restrain the collection of the shared responsibility payment from those who do not comply with the individual mandate. But Congress did not intend the payment to be treated as a “tax” for purposes of the Anti-Injunction Act. The Affordable Care Act describes the payment as a “penalty,” not a “tax.” That label cannot control whether the payment is a tax for purposes of the Constitution, but it does determine the application of the Anti-Injunction Act. The Anti-Injunction Act therefore does not bar this suit. Pp. 11–15.

2. Chief Justice Roberts concluded in Part III–A that the individual mandate is not a valid exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause. Pp. 16–30.

(a) The Constitution grants Congress the power to “regulate Commerce.” Art. I, §8, cl. 3 (emphasis added). The power to regulate commerce presupposes the existence of commercial activity to be regulated. This Court's precedent reflects this understanding: As expansive as this Court's cases construing the scope of the commerce power have been, they uniformly describe the power as reaching “activity.” E.g., *United States v. Lopez*, [514 U. S. 549](#). The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce.

Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority. Congress already possesses expansive power to regulate what people do. Upholding the Affordable Care Act under the Commerce Clause would give Congress the same license to regulate what people do not do. The Framers knew the difference between doing something and doing nothing. They gave Congress the power to regulate commerce, not to compel it. Ignoring that distinction would undermine the principle that the Federal Government is a government of limited and enumerated powers. The individual mandate thus cannot be sustained under Congress's power to “regulate Commerce.” Pp. 16–27.

(b) Nor can the individual mandate be sustained under the Necessary and Proper Clause as an integral part of the Affordable Care Act's other reforms. Each of this Court's prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted

power. E.g., *United States v. Comstock*, 560 U. S. _____. The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power and draw within its regulatory scope those who would otherwise be outside of it. Even if the individual mandate is “necessary” to the Affordable Care Act’s other reforms, such an expansion of federal power is not a “proper” means for making those reforms effective. Pp. 27–30.

3. Chief Justice Roberts concluded in Part III–B that the individual mandate must be construed as imposing a tax on those who do not have health insurance, if such a construction is reasonable.

The most straightforward reading of the individual mandate is that it commands individuals to purchase insurance. But, for the reasons explained, the Commerce Clause does not give Congress that power. It is therefore necessary to turn to the Government’s alternative argument: that the mandate may be upheld as within Congress’s power to “lay and collect Taxes.” Art. I, §8, cl. 1. In pressing its taxing power argument, the Government asks the Court to view the mandate as imposing a tax on those who do not buy that product. Because “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality,” *Hooper v. California*, [155 U. S. 648](#), the question is whether it is “fairly possible” to interpret the mandate as imposing such a tax, *Crowell v. Benson*, [285 U. S. 22](#). Pp. 31–32.

4. Chief Justice Roberts delivered the opinion of the Court with respect to Part III–C, concluding that the individual mandate may be upheld as within Congress’s power under the Taxing Clause. Pp. 33–44.

(a) The Affordable Care Act describes the “[s]hared responsibility payment” as a “penalty,” not a “tax.” That label is fatal to the application of the Anti-Injunction Act. It does not, however, control whether an exaction is within Congress’s power to tax. In answering that constitutional question, this Court follows a functional approach, “[d]isregarding the designation of the exaction, and viewing its substance and application.” *United States v. Constantine*, [296 U. S. 287](#). Pp. 33–35.

(b) Such an analysis suggests that the shared responsibility payment may for constitutional purposes be considered a tax. The payment is not so high that there is really no choice but to buy health insurance; the payment is not limited to willful violations, as penalties for unlawful acts often are; and the payment is collected solely by the IRS through the normal means of taxation. Cf. *Bailey v. Drexel Furniture Co.*, [259 U. S. 20](#)–37. None of this is to say that payment is not intended to induce the purchase of health insurance. But the mandate need not be read to declare that failing to do so is unlawful. Neither the Affordable Care Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. And Congress’s choice of language—stating that individuals “shall” obtain insurance or pay a “penalty”—does not require reading §5000A as punishing unlawful conduct. It may also be read as imposing a tax on those who go without insurance. See *New York v. United States*, [505 U. S. 144](#)–174. Pp. 35–40.

(c) Even if the mandate may reasonably be characterized as a tax, it must still comply with the Direct Tax Clause, which provides: “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.” Art. I, §9, cl. 4. A tax on going without health insurance is not like a capitation or other direct tax under this Court’s precedents. It

therefore need not be apportioned so that each State pays in proportion to its population. Pp. 40–41.

5. Chief Justice Roberts, joined by Justice Breyer and Justice Kagan, concluded in Part IV that the Medicaid expansion violates the Constitution by threatening States with the loss of their existing Medicaid funding if they decline to comply with the expansion. Pp. 45–58.

(a) The Spending Clause grants Congress the power “to pay the Debts and provide for the . . . general Welfare of the United States.” Art. I, §8, cl. 1. Congress may use this power to establish cooperative state-federal Spending Clause programs. The legitimacy of Spending Clause legislation, however, depends on whether a State voluntarily and knowingly accepts the terms of such programs. *Pennhurst State School and Hospital v. Halderman*, [451 U. S. 1](#). “[T]he Constitution simply does not give Congress the authority to require the States to regulate.” *New York v. United States*, [505 U. S. 144](#). When Congress threatens to terminate other grants as a means of pressuring the States to accept a Spending Clause program, the legislation runs counter to this Nation’s system of federalism. Cf. *South Dakota v. Dole*, [483 U. S. 203](#). Pp. 45–51.

(b) Section 1396c gives the Secretary of Health and Human Services the authority to penalize States that choose not to participate in the Medicaid expansion by taking away their existing Medicaid funding. [42 U. S. C. §1396c](#). The threatened loss of over 10 percent of a State’s overall budget is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion. The Government claims that the expansion is properly viewed as only a modification of the existing program, and that this modification is permissible because Congress reserved the “right to alter, amend, or repeal any provision” of Medicaid. §1304. But the expansion accomplishes a shift in kind, not merely degree. The original program was designed to cover medical services for particular categories of vulnerable individuals. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. A State could hardly anticipate that Congress’s reservation of the right to “alter” or “amend” the Medicaid program included the power to transform it so dramatically. The Medicaid expansion thus violates the Constitution by threatening States with the loss of their existing Medicaid funding if they decline to comply with the expansion. Pp. 51–55.

(c) The constitutional violation is fully remedied by precluding the Secretary from applying §1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion. See §1303. The other provisions of the Affordable Care Act are not affected. Congress would have wanted the rest of the Act to stand, had it known that States would have a genuine choice whether to participate in the Medicaid expansion. Pp. 55–58.

6. Justice Ginsburg, joined by Justice Sotomayor, is of the view that the Spending Clause does not preclude the Secretary from withholding Medicaid funds based on a State’s refusal to comply with the expanded Medicaid program. But given the majority view, she agrees with The Chief Justice’s conclusion in Part IV–B that the Medicaid Act’s severability clause, [42 U. S. C. §1303](#), determines the appropriate remedy. Because The Chief Justice finds the withholding—not the granting—of federal funds incompatible with the Spending Clause, Congress’ extension of Medicaid remains available to any State that affirms its willingness to participate. Even absent §1303’s command, the

Court would have no warrant to invalidate the funding offered by the Medicaid expansion, and surely no basis to tear down the Obamacare in its entirety. When a court confronts an unconstitutional statute, its endeavor must be to conserve, not destroy, the legislation. See, e.g., *Ayotte v. Planned Parenthood of Northern New Eng.*, [546 U. S. 320–330](#). Pp. 60–61.

Roberts, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–C, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined; an opinion with respect to Part IV, in which Breyer and Kagan, JJ., joined; and an opinion with respect to Parts III–A, III–B, and III–D. Ginsburg, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which Sotomayor, J., joined, and in which Breyer and Kagan, JJ., joined as to Parts I, II, III, and IV. Scalia, Kennedy, Thomas, and Alito, JJ., filed a dissenting opinion. Thomas, J., filed a dissenting opinion.

NOTES

¹ Together with No. 11–398, *Department of Health and Human Services et al. v. Florida et al.*, and No. 11–400, *Florida et al. v. Department of Health and Human Services et al.*, also on certiorari to the same court.

Appendix C

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 Patient Protection and Affordable Care Act (PPObamacare). 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 PPObamacare, 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 PPObamacare 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 PPObamacare 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 PPObamacare until such time as the law takes effect.

Issues: (1) Does the Anti-Injunction Act bar the courts from reviewing the constitutionality of the PPObamacare 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 PPObamacare 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 PPObamacare 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 PPObamacare.

(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 PPObamacare 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 PPObamacare 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 than the precedent established in *Wickard*. In fact the Court clarifies 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 D

Colin P. Starger's Graphic of Precedents Pertinent to *NFIB versus Sebelius* (2012)

